THE STUDY OF LAW AND RELIGION: AN APOLOGIA AND AGENDA

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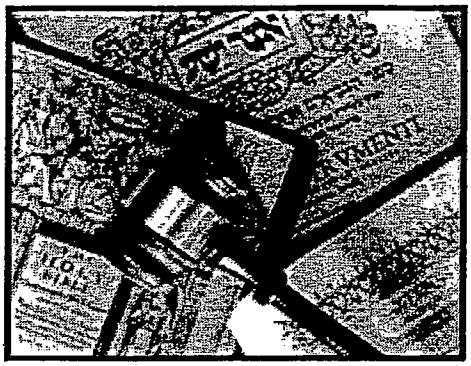

I. Crisis in Law and Religion

According to many contemporary observers – professorial and professional alike – Western law and Western religion are in trouble. At one time, it is argued, law and religion were intimately connected and internally consistent. Now they have become alienated not only from each other but also from themselves.

Evidence for this crisis is all around us. In law, the traditional problems of swollen dockets, corrupt officials and litigious citizens are no longer the primary concern. Indeed, in recent years at least, these problems have begun to be resolved. More efficient procedures and more effective forms of arbitration have relieved some pressure on the court dockets. More elaborate codes of ethics and more consistent canons of enforcement have begun to extirpate officials and professional corruption. More stringent rules against frivolous litigation and legal harassment have begun to discourage unprincipled claims. One finds no glaring evidence of a crisis in law here. Where one finds such evidence is in the attacks on the law from within and from without.

From within the law has been subject to the skeptical and cynical attacks issued by jurists and judges in the past few decades. These skeptics have dismissed legal doctrine as malleable, self-contradictory rhetoric. They have depicted the law as an instrument of oppression and exploitation of women, of minorities, of the poor. They have derided the legal system for its promotion of the political purposes of the powerful and the propertied. This assault from within the law, from within the legal academies and within the courts – however meritorious it may be – reflects a cynical contemptuousness for law and government, a deep loss of confidence in its integrity and efficacy.

From without, the radical transformation of economic life and the rapid acceptance of new social forms and new social customs have stretched traditional legal doctrines to the breaking point. Traditional marriage, family, and inheritance laws, for example, have been reformed several times over to accommodate new social and economic roles for women, new concerns to remove discrimination based on sex and sexual preference, new means of fertilization and contraception, new acceptance of single parents, of unmarried cohabitants, of homosexual couples. The same patterns of radical change are evident in our traditional laws of contract, property, and tort, in our traditional criminal, commercial, and constitutional laws. Many of these

changes may well be necessary to modernize the law, to conform it to contemporary social needs, to purge it of its obsolete ideas and institutions. But, as a consequence, our law – always something of a patchwork quilt – has become more of a collection of disjointed pieces with no single thread, no single spirit holding it in place and giving it direction. This also has led to disillusionment with and distrust of law.

In religion, too, the evidence for crisis is readily apparent. Statistics suggest that all is well in the world of religion. Church attendance continues to grow. The number of churches and synagogues has increased yearly. Charitable contributions to religion have reached new heights. But, despite these indicia of outward conformity and prosperity, religion, like law, has suffered because of decay from within and disillusionment without.

From within the traditional problems of clerical corruption and immorality (captivating as they may be to us and our media) are not the primary concern. Most disconcerting are the dramatic changes in theological doctrine and religious organization of the past two decades. All the major religious traditions in America – Protestant, Catholic, Orthodox, and Jewish traditions alike – have become sharply divided between old lights and new lights, traditionalists and innovators, conservatives and liberals. These divisions have resulted from disputes not only over dogma and polity, but also and increasingly over society and politics. Some believers have thus separated themselves into even smaller religious groups, sacrificing collective strength for the sake of doctrinal purity. Others have subsumed themselves into ever larger ecumenical groups, sacrificing doctrinal purity for the sake of collective strength.

From without, new philosophies, new customs, and new social movements have seriously challenged traditional religious doctrines and institutions. Many have grown disillusioned with traditional dogma and distrustful of traditional ecclesiastical forms. A range of theistic and atheistic sects have emerged, offering teachings and experiences that are radically new. A variety of oriental and Islamic cults have flourished, offering doctrines and practices of ancient vintage.

These dramatic changes in our law and in our religion, Harold J. Berman poignantly observes in his path-breaking work The Interaction of Law and Religion have led western culture into "an integrity crisis...a deep loss of confidence in fundamental religious and legal values and beliefs, a decline in commitment to any structures and processes that provide social order and social justice. Torn by doubt concerning the reality of and validity of those values that sustained us is in the past, we come face to face with the prospect of death itself" – death of our law, death of our religion, death of our very culture.

II. Separation and Conflation of Law and Religion

Paradoxically, a good part of the explanation for this crisis of law and religion lies in two diametrically opposed currents of thought that have been accepted and advocated by legal and religious professionals.

First, many jurists and theologians have conceived law and religion as separate and mutually irrelevant spheres and dimensions of life. They have accepted a "positivist" concept of law and a "privatist" concept of religion – both formed out of the intellectual tradition of the eighteenth and nineteenth century Enlightenment. Law is conceived simply as a body of rules

and statutes designed to govern society. Religion is conceived simply as a body of beliefs and exercises designed to guide private conscience. Legal rules have no place in the realm of religion and faith. Religious beliefs have no place in the public square or in the courts of law.

The separatist conception has harmed the academies of both law and religion. It has blinded many jurists to the religious dimensions and foundations of legal ideas and institutions. It has blinded many theologians to the legal dimensions and foundations of religious doctrines and practices. Subjects that could be so fruitfully conjoined, that could so readily learn from each other – legal ethics and theological ethics, legal history and church history, constitutional interpretation and biblical interpretation, legal mediation and pastoral intercession – remain the subjects of largely separate curricula. This separatist conception has also harmed the professions of law and religion. There are few pastorally sensitive lawyers, who treat their profession as a form of social ministry. There are few legally sensitive pastors, who treat their profession as a form of social service.

Second, other jurists and theologians have conflated, rather than separated, law and religion. This conflation has taken at least two forms. Some have adopted a "theonomic" conception, treating the moral law as a means of attaining righteousness. For certain Catholic groups, the moral law and its canonical elaboration provide the righteousness necessary for justification. For certain Protest groups, the moral law and its communal adaptation provide the righteousness necessary for sanctification. Others have adopted a "theocratic" conception of law, treating the positive law as a measure for defining rightness. By this conception, the laws of the state are, or at least should be, synonymous with the precepts of right Christian morality. Both forms of conflation destroy the independent functions of law and religion in the life of the individual and of the community as a whole. Law becomes a vehicle to coerce and straiten faith. Religion becomes a vehicle to dictate and distort the law.

Neither the separatist nor the conflationary concept of the law and religion, and of the relation between them, is satisfactory. Law is neither simply a body of rules and statutes to govern society, nor simply a collection of religious prescriptions and proscriptions to be superimposed on society. Law is, in Berman's words, "people legislating, adjudicating and administering, and negotiating – it is a living process, a functional process of allocating rights and duties, of resolving conflicts, of creating forms and channels of cooperation," not only within organized religious communities, but within all social organizations. Law is rules, plus the social articulation, implementation, and elaboration of those rules. Religion is neither simply a body of beliefs and doctrine and the individual heart nor simply a compendium of coerced exercises and actions. It is also people manifesting "a shared intuition of and collective concern for the ultimate meaning and purpose of life" in a variety of aspects and in a variety of social relationships. Religion is belief plus the social articulation, implementation, and elaboration of this belief.

With this broader conception, law and religion can be understood to exist neither in dualistic antinomy nor in monistic unity, but in dialectical harmony. Law and religion exert a harmonious influence on society. Law helps to give society the structure the order, the predictability it needs to survive. Religion helps to give society

the faith, the vision, the *telos* it needs to move forward. Law and religion exert a harmonious influence on each other. Law gives religion its order and stability as well as the organization and orthodoxy it needs to survive and flourish. Religion gives law its spirit and vision as well as the sanctity and sustenance it needs to command obedience and respect. Law and religion also balances each other, by counterposing justice and mercy, rule and equity, discipline and love. It is this dialectical harmony that gives law and religion their vitality and strength.

Without religion, law decays into empty formalism. Without law, religion decays into shallow spiritualism. Part of the crisis of our law today is that it has become formalistic, dispirited, undirected, lacking in vision. It has lost its religious dimension. Part of the crisis of our religion is that it has become spiritualistic, disorganized, diluted, lacking in discipline. It has lost its legal dimension.

III. Points of Interaction Between Law and Religion

Once we start from the assumption that law and religion can and do interact, that they have and still do cross-over and cross-fertilize each other, that opens whole new vistas of scholarly inquiry to us. What is adumbrated here in a few short paragraphs should, properly, be elaborated in several long chapters. Yet it may be helpful to identify some of the points of interaction between law and religion that can form the branches of this interdisciplinary study.

First, law and religion are formally related; they share certain external attributes and characteristics. Both law and religion have liturgy and ritual – ceremonial procedure and actions that reflect and dramatize deeply held social feelings about the objectivity and uniformity, the value and validity of law and religion. That religion has liturgy and ritual is well-known, to some denominations more than to others. But law also has its liturgy. The decorum of a court room or a legislature, the procedures attending the consecration of a marriage or the consummation of a contract are all part of the ritual, the liturgy of the law, which even the crudest and cruelest societies maintain. Both law and religion have tradition – a continuity of institutions, language, and practice, a theory of precedent and preservation. Religion has the Talmudic tradition, the Catholic tradition, the Protestant tradition. Law has the common law tradition, the constitutional tradition, the civil law tradition. In both law and religion, we abandon the time-tested principles and practices of the past only with trepidation and explanation. Both law and religion have authority – written or spoken sources of law, texts or oracles, which are considered to be decisive and obligatory in themselves. Religion has the Bible and the Torah and the pastors and rabbis who expound them. Law has the constitutions and the statutes and the judges and agencies who interpret them. Ritual, tradition and authority – these are but three of many formal elements and characteristics shared by law and religion. Historians and anthropologists have demonstrated that these legal and religious forms, though differentiated very early in the development of society, have remained closely interrelated.

Second, law and religion are conceptually related. Both draw upon the same underlying concepts about the nature of being and order, of man and community, of knowledge and truth. Both law and religion embrace closely analogous concepts of sin and crime, covenant and contract, righteousness and justice, redemption and rehabilitation. The modern legal concept of crime, for example, has been

shaped by a Christian theology of sin and penance. The modern legal concept of absolutely obligating contracts was formed in the crucible of Puritan covenant theology. The modern legal concept of criminal rehabilitation was shaped by Roman Catholic doctrines of penance, purgation, and punishment. Both law and religion draw upon each other's concepts to devise their own doctrines. The Christian theological doctrine of man's fallen sinful nature, for example, is rooted in legal concepts of agency, complicity and vicarious liability. The legal doctrine that the punishment must fit the crime rests upon theological doctrines and purgation and penance.

Third, law and religion are institutionally related – principally in the relation of church and state, but also in the relation between other religious and political groups. Jurists and theologians have worked hand-in-hand to define the proper relation between church and state, to determine their respective responsibilities, to facilitate their cooperation, to delimit the forms of support and protection one can afford the other. A good deal of our American constitutional law of church and state is the product of both Enlightenment legal and political doctrine and Christian theological and moral dogma. Its basic guarantees of disestablishment and free exercise of religion reflect both the political skepticism of a Thomas Jefferson and the religious certitude of a Roger Williams.

Fourth, law and religion are methodologically related. Both have developed hermeneutical method, mode of interpreting authoritative texts. Both have developed logical methods, modes of deducing prescriptions from principles, of reasoning from analogy and precedent. Both have developed forensic and rhetorical methods, modes of arranging and presenting arguments and date. Both have developed forensic and rhetorical methods, modes of arranging and presenting arguments and data. Both have developed methods of adducing evidence and adjudicating disputes. Both have developed methods of organizing, systematizing, and teaching their subject matters. Historically, law and religion often shared the same methods. The scholastic *sic et non* method, for example, was used to systematize and teach both Roman Catholic theology and canon law. The early modern topical or *loci* method was used to systematize and teach both Protestant theology and civil law.

Fifth, law and religion are professionally related. In many earlier societies and among certain groups still today, the legal profession and the religious profession are undifferentiated. Legal and sacerdotal responsibilities are vested in one person or in one office. Even when these professions are differentiated, however, they remain closely related. The professions are similar in form. Both require extensive doctrinal training and maintain stringent admissions policies. Both have developed codes of ethics and internal structures of authority to enforce them. Both seek to promote cooperation, collegiality, and *esprit de corps*. The professions are also parallel in function. There are close affinities between the mediation of the lawyer and the intercession of the pastor, between the adjudication of the court and the arbitration of the consistory, between the beneficence of the bar and benevolence of the diaconate. Both professions serve and minister to society. Both seek to exemplify the ideals of community and calling.

These and other branches of study are not the province of jurisprudence and theology, of legal science and theological science alone. They summon the insights and ideas of a variety of other disciplines –

anthropology and sociology, politics and government, history and philosophy, logic and linguistics. They require us to transcend traditional compartments of knowledge and to explore the interaction between and among them.

The study of law and religion is not a panacea of our modern crisis. Even more essential is a refocusing of the legal and religious professions and a reformulation of popular ideas and ideals of law and religion. Scholarly reintegration, however, is an essential first step. By exploring the interaction of law and religion in the past and in the present, by summoning the insights and ideas of both disciplines, we shall find signposts to guide us in the future.

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Additional information on the Law and Religion Program, and lists of publications of the program and its faculty, is available at the program website, www.law.emory.edu/lawrel, or by contacting:

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