BL
65
L33
B4

THE INTERACTION OF LAW AND RELIGION

HAROLD J. BERMAN

Abingdon Press
Nashville New York

Theology Library
SCHOOL OF THEOLOGY
AT CLAREMONT
California

THE INTERACTION OF LAW AND RELIGION

Copyright © 1974 by Abingdon Press

All rights in this book are reserved. No part of the book may be reproduced in any manner whatsoever without written permission of the publishers except brief quotations embodied in critical articles or reviews. For information address Abingdon Press, Nashville, Tennessee.

Library of Congress Cataloging in Publication Data

BERMAN, HAROLD JOSEPH, 1918-
The interaction of law and religion.
Includes bibliographical references.
1. Religion and law. I. Title.
Law 340 73-16050

ISBN 0-687-19127-0

Scripture quotations are from *The New English Bible*. © the Delegates of the Oxford University Press and the Syndics of the Cambridge University Press 1961, 1970. Reprinted by permission.

MANUFACTURED BY THE PARTHENON PRESS AT
NASHVILLE, TENNESSEE, UNITED STATES OF AMERICA

I.

Religious Dimensions of Law

Western man is undergoing an integrity crisis—the kind of crisis that many individual men and women experience in their early fifties when they ask themselves with utmost seriousness, and often in panic, what their lives have stood for and where they are headed. Now we are asking that question not only as individuals but as nations and as groups within the nations. Our whole culture seems to be facing the possibility of a kind of nervous breakdown.[1]

One major symptom of this threatened breakdown is the massive loss of confidence in law—not only on the part of law-consumers but also on the part of law-makers and law-distributors. A second major symptom is the massive loss of confidence in religion—again, not only on the part of those who (at least at funerals and weddings) sit in the pews of our churches and synagogues, but also on the part of those who occupy the pulpits.

Historians will tell us that in every generation the complaint is made that people are losing their religious faith and their respect for law. And it may also be true that there are more churchgoing, law-abiding Europeans and Americans today than there were in previous periods of our history. Yet the symptoms of an integrity crisis are unmistakable. Among the earliest signs were those given after the first World War by artists and poets and novelists—men like Picasso and Joyce—whose work revealed that traditional conceptions of space and time and even of language itself were disintegrating, cracking up. Then came the intellectual upheavals of the 1930s when social scientists told us that the traditional social, political, and economic structures had lost their validity. Europe was torn by new revolutionary mythologies, while America withdrew into herself. Ironically, the Second World War gave the nations of the West a temporary lift; we found that we were, after all, capable of collective action and of personal sacrifice for traditional common goals. This spirit was artificially maintained for a time after the war, especially by the campaign against communism. But since the late 1950s we have increasingly experienced a sense of futility and a premonition of doom, the most visible signs of which are the progressive demoralization of the cities, the deep frustration of a significant portion of the youth, and the incapacity of the nations to act decisively in the interests of peace either at home or abroad.

What makes this an integrity crisis rather than some

other kind of crisis is precisely its relation to the loss of confidence in religion and in law. In the centuries prior to World War I religion and law—especially in America—were the patrimony of our collective life. They embodied our sense of common purpose and our sense of social order and social justice—"the style of integrity" (in Erikson's words) "developed by [our] . . . civilization."[2] Our disillusionment with formal religion and with formal law is thus symptomatic of a deeper loss of confidence in fundamental religious and legal values, a decline of belief in and commitment to any kind of transcendent reality that gives life meaning, and a decline of belief in and commitment to any structures and processes that provide social order and social justice. Torn by doubt concerning the reality of those values that sustained us in the past, we come face to face with the prospect of death itself.

How are we to explain our disillusionment with law and with religion? There are, of course, many causes. One of them, I believe, is the too radical separation of one from the other. That in turn is partly the result of our failure to make the right connections between formal legal and religious systems, on the one hand, and the underlying legal and religious values to which I have referred, on the other. Both the law schools and the schools of theology bear their share of responsibility for the narrowness and the rigidity of our thought on these matters.

If we see law in dictionary terms merely as a structure

or "body" of rules laid down by political authorities, and similarly see religion merely as a system of beliefs and practices relating to the supernatural, the two seem connected with each other only very distantly or in only a few rather narrow and specific respects. But in reality both are much more than that. *Law is not only a body of rules; it is people legislating, adjudicating, administering, negotiating—it is a living process of allocating rights and duties and thereby resolving conflicts and creating channels of cooperation. Religion is not only a set of doctrines and exercises; it is people manifesting a collective concern for the ultimate meaning and purpose of life—it is a shared intuition of and commitment to transcendent values.* Law helps to give society the structure, the gestalt, it needs to maintain inner cohesion; law fights against anarchy. Religion helps to give society the faith it needs to face the future; religion fights against decadence.[3]

These are two dimensions of social relations—as well as of human nature—which are in tension with each other: law through its stability limits the future; religion through its sense of the holy challenges all existing social structures. Yet each is also a dimension of the other. A society's beliefs in an ultimate transcendent purpose will certainly be manifested in its processes of social ordering, and its processes of social ordering will likewise be manifested in its sense of an ultimate purpose. Indeed, in some societies (ancient Israel, for example) the law, the Torah, *is* the religion. But even in those societies which make

a sharp distinction between law and religion, the two need each other—law to give religion its social dimension and religion to give law its spirit and direction as well as the sanctity it needs to command respect. Where they are divorced from each other, law tends to degenerate into legalism and religion into religiosity.

In this first chapter I shall speak chiefly about the dependence of law upon religion.

Anthropological studies confirm that in all cultures law shares with religion four elements: ritual, tradition, authority, and universality.[4] In every society these four elements, as I shall try to show, symbolize man's effort to reach out to a truth beyond himself. They thus connect the legal order of any given society to that society's beliefs in an ultimate, transcendent reality. At the same time, these four elements give sanctity to legal values and thereby reinforce people's legal emotions: the sense of rights and duties, the claim to an impartial hearing, the aversion to inconsistency in the application of rules, the desire for equality of treatment, the very feeling of fidelity to law and its correlative, the abhorrence of illegality. Such emotions, which are an indispensable foundation of every legal order, cannot obtain sufficient nourishment from a purely utilitarian ethic. They require the sustenance of a belief in their inherent and ultimate rightness. The prevailing concept in contemporary Western societies that law is primarily an instrument for effectuating the policies of those who are in control is, in the long run, self-defeating. By thinking of law solely

in terms of its efficiency, we rob it of that very efficiency. By failing to give enough attention to its religious dimensions, we deprive it of its capacity to do justice and possibly even its capacity to survive.

The Secular-Rational Model

A heavy burden of proof rests on one who asserts that not only in past eras of our own history and not only in nonwestern cultures but also in modern, technologically advanced countries of the West, including the United States today, religious elements play an indispensable part in the effective working of the law.

The conventional wisdom is the opposite: that although law in most cultures may have originally been derived from religion and although during certain eras such as the Catholic Middle Ages or the age of Puritanism our own law may have contained religious elements, these have been gradually purged away during the past two centuries so that today there is almost nothing left of them; and further, that modern law is to be explained solely in instrumental terms, that is, as a consciously elaborated means of accomplishing specific political, economic, and social policies.

Contemporary social science characterizes modern law by the words "secular" and "rational."[5] The alleged secularism of law is linked with the decline of the belief in either a divine law or a divinely inspired natural law. The law of the modern state, it is said, is not a reflection of any sense of ultimate meaning and purpose in life;

instead, its tasks are finite, material, impersonal—to get things done, to make people act in certain ways.

This concept of the secular character of law is closely linked with the concept of its rationality, in the special sense in which that word has come to be used by social scientists. The lawmaker, in inducing people to act in certain ways, appeals to their capacity to calculate the consequences of their conduct, to measure their own and others' interests, to value rewards and punishments. Thus legal man, like his brother economic man, is conceived as one who uses his head and suppresses his dreams, his convictions, his passions, his concern with ultimate purposes. At the same time, the legal system as a whole, like the economic system, is seen as a huge, complex machine—a bureaucracy (in Max Weber's definition)—in which individual units perform specific roles according to specific incentives and instructions, independently of the purposes of the whole enterprise.

The contrast between this conception of law and the conception of religion that goes with it has recently been expressed by Professor Thomas Franck of New York University. Law, he writes, in contrast to religion "has . . . become undisguisedly a pragmatic human process. It is made by men, and it lays no claim to divine origin or eternal validity." This leads Professor Franck to the view that a judge, in reaching a decision, is not propounding a truth but is rather experimenting in the solution of a problem, and if his decision is reversed by a higher court or if it is subsequently overruled, that

does not mean it was wrong but only that it was, or became in the course of time, unsatisfactory. Having broken away from religion, Franck states, law is now characterized by "existential relativism." Indeed, it is now generally recognized "that no judicial decision is ever 'final,' that the law both follows the event (is not eternal or certain) and is made by man (is not divine or True)." [6]

On the other hand, Franck recognizes that to proclaim this philosophy too loudly may involve a certain cost in popular respect for legality. The legal system is apt to become "more open to challenge and less likely to inspire unquestioning mass loyalty." We would go one step further and ask what it is that inspires not unquestioning mass loyalty to law but simply a general willingness to obey it at all. If law is merely an experiment, and if judicial decisions are only hunches, why should individuals or groups of people observe those legal rules or commands that do not conform to their interests?

The answer usually given by adherents of the instrumental theory is that people generally observe the law because they fear the coercive sanctions which will otherwise be imposed by the law-enforcing authority. This answer has never been satisfactory. As psychological studies have now demonstrated, far more important than coercion in securing obedience to rules are such factors as trust, fairness, credibility, and affiliation.[7] 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 which 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.

Law itself, in all societies, encourages the belief in its own sanctity. It puts forward its claim to obedience in ways that appeal not only to the material, impersonal, finite, rational interests of the people who are asked to observe it but also to their faith in a truth, a justice, that transcends social utility—in ways, that is, that do not fit the image of secularism and instrumentalism presented by the prevailing theory. Even Joseph Stalin had to reintroduce into Soviet law elements which would make his people believe in its inherent rightness—emotional elements, sacred elements; for otherwise the persuasiveness of Soviet law would have totally vanished, and even Stalin could not rule solely by threat of force. Though he unleashed all his terror against potential enemies, he invoked "socialist legality" as a source of support among the rank and file of the people, and in the name of

"socialist legality" and "stability of laws" he attempted to restore the dignity of the Soviet courts and the sacredness of the duties and rights of Soviet citizens.[8]

Similarly, the idea that law is wholly existential, wholly relative to circumstances of time and place, that it cannot be measured by standards of truth or of rightness but only by standards of workability, that it "lays no claim to divine origin or eternal validity,"[9] is also self-defeating. It is tenable in the classroom but not in the courtroom or in the legislature. Judicial decisions or statutes that purport to be merely hunches or experiments lack the credibility upon which observance of law ultimately depends—observance not only by "the masses" but by all of us, and especially by judges and lawmakers.

Once in 1947 when the late Thurman Arnold, who as a teacher and writer carried the theory called "legal realism" to the point of genuine cynicism, was urging upon a class at Yale Law School his view that judges decide solely according to their prejudices, a student interrupted to ask whether when Arnold himself was on the bench he did the same. Arnold paused before answering; one had the impression that he was transforming himself from Mr. Hyde to Dr. Jekyll as the professor in him yielded to the judge. He replied, "Well, we can sit here in the classroom and dissect the conduct of judges, but when you put on those black robes and you sit on a raised platform, and you are addressed as 'Your Honor,' you *have* to believe that you are acting according to some objective standard."[10]

Common Elements of Law and Religion

The secular-rational model neglects the importance of certain elements of law which transcend rationality, and especially of those elements which law shares with religion. This neglect is connected with the fallacy of viewing law primarily as a body of rules and of underestimating the context in which rules are enunciated. Once law is understood as an active, living human process, then it is seen to involve—just as religion involves—man's whole being, including his dreams, his passions, his ultimate concerns.

The principal ways in which law channels and communicates transrational values are fourfold: first, through *ritual*, that is, ceremonial procedures which symbolize the objectivity of law; second, through *tradition*, that is, language and practices handed down from the past which symbolize the ongoingness of law; third, through *authority*, that is, the reliance upon written or spoken sources of law which are considered to be decisive in themselves and which symbolize the binding power of law; and fourth, through *universality*, that is, the claim to embody universally valid concepts or insights which symbolize the law's connection with an all-embracing truth. These four elements—ritual, tradition, authority, and universality—are present in all legal systems, just as they are present in all religions. They provide the context in which in every society (though in some, of course, to a lesser extent than in others) legal rules are enunciated and from which they derive their legitimacy.

It is striking that Thurman Arnold, in the episode which I have related, stressed the effect upon himself, as a judge, of the symbols of office—the robes, the furniture of the courtroom, the rhetoric of respect. Such symbols are supposed to impress not only the judge, but also all other participants in the proceeding, and indeed the society as a whole, with the fact that one charged with the dread responsibility of adjudication should put aside his personal idiosyncrasies and personal prejudices, his *pre*judgments. Similarly, the jurors, the lawyers, the parties, the witnesses, and all others involved in a trial, are given their respective roles by the ceremonious opening ("Oyez! Oyez!" with all rising), the strict order of appearance, the oaths, the forms of address, and the dozens of other rituals that mark the play. This is no free-for-all in which everyone "is himself." On the contrary, each participant subjects his own personality to the requirements of the legal process. Thus the great ideals of legal justice are dramatized: objectivity, impartiality, consistency, equality, fairness. As the English say, justice must not only be done, it must also be *seen* to be done. This does not mean that unless it is seen it will not be accepted; it means that unless it is seen it is not justice. In Marshall McLuhan's famous phrase, "the medium is the message."

The rituals of law (including those of legislation, administration, and negotiation, as well as of adjudication) like the rituals of religion are a solemn dramatization of deeply felt values. In both law and religion the

dramatization is needed not only to reflect those values, not only to make manifest the intellectual belief that they are values that are useful to society, but also to induce an emotional belief *in* them as a part of the ultimate meaning of life. More than that, the values have no existence, no meaning, outside the process of their dramatization. By virtue of their symbolization in judicial, legislative, and other rituals, the ideals of legal justice come into being not primarily as matters of utility but rather as matters of sanctity, not primarily as ideals but rather as shared emotions: a common sense of rights, a common sense of duties, a demand for a fair hearing, an aversion to inconsistency, a passion for equality of treatment, an abhorrence of illegality, and a commitment to legality.

Moral philosophers attribute beliefs concerning justice to man's capacity to reason, but we are speaking here of something different, namely, man's emotions; and we are speaking not of his moral emotions but more specifically of his legal emotions.[11] Justice Holmes once wrote that even a dog knows the difference between being stumbled over and being kicked. We would add that even a dog becomes upset if his master rewards him one minute and punishes him the next for the same thing. The rituals of law symbolize (bring into being) the fundamental postulate of all legal systems, even the most rudimentary, that like cases should be decided alike: they raise that postulate from a matter of intellectual perception and moral duty to a matter of collective faith.

It is no overstatement, therefore, to speak of fidelity or faithfulness to law. This is essentially the same kind of dramatic response to the sacred, to the ultimate purpose of life, that is characteristic of religious faith. Law, like religion, originates in celebration and loses its vitality when it ceases to celebrate.[12]

Law also shares with religion its emphasis on tradition and authority. All legal systems claim that their validity rests in part on continuity with the past, and all preserve such continuity in legal language and legal practices. In Western legal systems, as in Western religions, the historical sense of ongoingness is comparatively very strong, so that even drastic changes are often consciously explained as necessary to preserve and carry forward concepts and principles handed down from the past. But in other cultures as well, the drive for consistency leads to some sense of continuity with the past. The Moslem khadi has a reputation to preserve and will not judge differently each time. Even the Greek oracles were supposed to reflect a hidden consistency. The law need not be eternal, but it also must not be arbitrary, and therefore it must change by reinterpreting what has been done before. The traditional aspect of law, its sense of ongoingness, cannot be explained in purely secular and rational terms, since it embodies man's concept of time, which itself it bound up with the transrational and with religion.[13]

Similarly, the law need not be revealed in the sense of written by God on tablets of stone (indeed, there are

few such reported cases); yet the law is invariably appealed to, when parties are in dispute, as though someone in authority once embodied it in a constitution or statute or precedent or custom or learned book or some other authoritative source. In most political, economic, or social experience of a nonlegal nature (say, an election campaign or an industrial program or a family crisis or a neighborhood feud), people feel free to propose new courses of action based solely on utility; but if a legal question is posed, alternative solutions are almost invariably debated in terms of rules and decisions laid down by those in authority. Of course, the power to interpret the rules and decisions is also the power to remake them. Nevertheless, we say that the court is "bound" by the statute; the legislature is "bound" by the Constitution; even the framers of the Constitution felt themselves to be "bound" by a "higher law." They made it, but they did not make it out of whole cloth.

Except in cultures where law and religion are not differentiated, the specific rituals, traditions, and authorities of the law are not generally the same as the rituals, traditions, and authorities of religion, although they may overlap to some extent. Nor are the emotional responses which they induce the same, although they, too, may overlap. The legal emotions differ from the ecstasy or sense of grace or anxiety or fear of damnation that Søren Kierkegaard and Rudolf Otto attributed to the "idea of the holy."[14] Nevertheless, legal emotions share with religious emotions the same sense of "givenness,"

the same reverence, the same urgency. In secular religions the givenness, the sanctity, may be attached to the state rather than to God, or to the court, or to the party, or to the people.

Also there is the same potentiality for abuse of ritual, tradition, and authority in law as in religion. Here the chief danger is that symbols needed to reflect and induce commitment to higher values may become objects of reverence for their own sake, ends in themselves, rather than "outward and visible signs of an inward invisible grace." In religion this is called magic and idolatry. In law it is called procedural formalism—as in trial by ordeal or by battle or by ritual oaths. The whole history of Western law from the twelfth century on has been marked by efforts, by no means always successful, to break away from the domination of such formalism.[15] The secularists and the rationalists would have us escape from magic and idolatry and formalism by entirely rejecting emotional commitment to legal values, together with the ritual, tradition, and authority which reflect and induce them. They would rely wholly on an intellectual commitment to law as a useful instrument of policy in promoting the finite, material interests of individuals and groups in society and would disparage efforts to ground logic and policy in an emotional commitment to law as an integral part of the ultimate meaning of life, with the "penumbra of mystery" (as Reinhold Niebuhr has put it) which "surrounds every realm of meaning."[16] What I am urging is that law will not survive such a

desiccation, such a draining of its emotional vitality. On the contrary, law and religion stand or fall together; and if we wish law to stand, we shall have to give new life to the essentially religious commitments that give it its ritual, its tradition, and its authority—just as we shall have to give new life to the social, and hence the legal, dimension of religious faith.

The fourth major commitment which law shares with religion is the belief in the universality of the concepts and insights which it embodies. Such a belief should be distinguished from the theory of natural law, which may be wholly independent of religion. Indeed, a secular and rational theory of natural law is not only entirely possible but is the most widespread form which current natural-law theory takes. The morality inherent in law itself, the principles of justice which are implicit in the very concept of adherence to general rules, may be perceived by moral philosophers without reference to religious values or religious insights.[17] Also, anthropologists are able to show by empirical observation that no society tolerates indiscriminate lying, stealing, or violence within the in-group, and indeed, the last six of the Ten Commandments, which require respect for parents and prohibit killing, adultery, stealing, perjury, and fraud, have some counterpart in every known culture. In fact many natural-law theorists consider a religious explanation of law to be superstitious and dangerous. Such theorists are able to demonstrate by reason and observation alone that basic legal values and principles cor-

respond to human nature and to the requirements of a social order. Contracts should be kept; injuries should be compensated; one who represents another should act in good faith; punishment should not be disproportionate to the crime. These and a host of other principles reflect what reason tells us is morally right and what in virtually all societies is proclaimed to be legally binding.

It was the Greeks who taught us this kind of thinking. It was they who first translated religion into philosophy. Since Plato we have not needed the gods to tell us what virtue is; we can discover it by using our minds. So, at least, we have said, although as Christopher Dawson has shown, the Greek secularization of philosophy also involved a deification of reason. Today we are no longer so convinced that thought can be as "pure" as the philosophers have assumed.[18] We have learned that when the mind tries to operate wholly independently, when it pretends to stand wholly outside the reality it observes, it breaks down and becomes skeptical even of itself.

On a more pragmatic level, the trouble with a purely intellectual or philosophical analysis of morality is that the very inquiry, by its exclusive rationality, tends to frustrate the realization of the virtues it proclaims. The intellect is satisfied, but the emotions, without which decisive actions cannot be taken, are deliberately put aside. Therefore all legal systems require not only that we recognize the proclaimed legal virtues with our intellect but also that we become committed to them with our whole being. And so it is by a religious emotion,

a leap of faith, that we attach to the ideals and principles of law the dimension of universality. To say, for example, that it is against human nature to tolerate indiscriminate stealing and that every society condemns and punishes certain kinds of taking of another's property is not the same thing as to say that there is an all-embracing moral reality, a purpose in the universe, which stealing offends. And when a society loses its capacity to say *that*—when it rests its law of property and of crime solely on its rational perception of human nature and of social necessity and not also on its religious commitment to universal values—then it is in grave danger of losing the capacity to protect property and to condemn and punish stealing.

The Revitalization of Law

But is there not a serious danger that an emphasis on the law's commitment to universal truths will serve to deify existing social structures and thus to bring us to idolatry by another route? Must not the prophetic aspect of religion and the tension between law and love, law and faith, law and grace, be preserved for the sake of the integrity of religion, whatever may be the consequences for law? And are not the consequences for law, too, apt to be disastrous if law is not only respected but also sanctified?

These are questions to which I shall return in subsequent chapters. However, there is one aspect of them that has to be dealt with immediately, or everything said thus far will be misunderstood. It is *not* to be

supposed that since law is failing to communicate its values to large numbers of people in the urban ghettos, in the new youth culture, in the peace movement, and elsewhere, therefore we should set about simply to manipulate its rituals, traditions, and concepts of authority and universality, leaving the underlying social, economic, and political structure unchanged. It is *not* suggested that the way to overcome our integrity crisis is to prop up the legitimacy of the old legal system with various religious devices plus a return to the Puritan ethic.

On the contrary, a recognition of the dialectical interdependence of law and religion leads us in the opposite direction—in the direction of fundamental social, economic, and political change and of new legal solutions for the acute problems confronting us: unemployment, racial conflict, crime, pollution, corruption, international conflict, war. But in order to find new *legal* solutions to such problems we must give new vitality to law—for law as it now presents itself, shorn of its mystique and its authority and its role in the grand design of the universe, is too weak a reed to support the demands we place upon it. In many areas of American life law reform will not work because law will not work—until it finds rituals that effectively communicate its objectivity, until it recovers its sense of ongoingness and of binding power, until it rediscovers its relationship to universal truths concerning the purpose of life itself.

Let me give a few practical examples. The breakdown in administration of criminal law is perhaps the most

striking. Our press as well as our scholarly literature has been full of accounts of the grotesque and humiliating character of our system of detention prior to trial, our system of disposition of cases by negotiation between the prosecutor and the accused, and our prison system. We seem to be reliving the times of Charles Dickens. There is no easy way out of this morass; nevertheless, an understanding of the religious dimensions of law can show the direction to be taken. We need new forms of investigation, new forms of hearing, and new forms of custody which will dramatize humaneness and sympathy in the treatment of offenders, on the one hand, and, on the other hand, indignation both at their offenses and at the conditions which produce the offenses. It is not enough to remove the usual criminal sanctions of imprisonment or fines for so-called "crimes without victims" (drunkenness, drug abuse, prostitution, gambling, homosexuality), thereby releasing a very large amount of the time and energy of the police, the courts, and the detention agencies. This is advocated by the experts, and to a considerable extent it should be done; but it is only half the solution. The other half is to devise new legal procedures both inside and outside the criminal courts—new liturgies, if you will—for dealing with cases of persons who engage in such conduct (to the extent that it is antisocial), including new ways of enlisting the participation of the community—of psychiatrists, social workers, and clergy, and also of family, friends, neighbors, and fellow workers—before, during,

and after the case is heard. To speak of "decriminalization" of the law, as some do, is misleading. To speak of offenders as "ill persons," as some do, is also misleading. We must find ways of hearing such cases and treating such persons humanely and creatively while at the same time expressing society's condemnation, not of them as persons, but of their conduct and of the conditions underlying their conduct. This, indeed, is in our religious tradition; and it makes sense.[19]

Another example is that of political crimes. We need new forms of proceedings, new rituals, for dealing with cases like those in recent times of the Chicago Seven where the defendants seek to use the courtroom as a platform for proclaiming their political views.[20] One clue to what is possible in such cases was provided in the case of the Catonsville Nine, an anti-war group accused of burning some hundreds of draft cards. The judge permitted the trial to be conducted in a relatively informal way. The defendants, who included the priests Daniel and Philip Berrigan, had ample opportunity to express their motives, with which the judge and the prosecuting attorney were sympathetic. Yet the illegal actions were condemned.[21] Thus the trial served a larger purpose than putting guilty persons in prison. All trials should be educational, not vindictive. It is better to delay the proceedings than to bind or gag or ridicule a defendant. It is better that he go free than that the court —to paraphrase Holmes—should do an ignoble thing. A trial should provide a catharsis, not a new assault upon

our dignity. It should dramatize, not caricature, the values implicit in the legal process.

We also need new forms of procedure in many types of civil cases. New types of family courts are needed to deal with problems of family disorganization. In the area of automobile accidents, nonjudicial agencies should determine the amount of damages, thus avoiding the travesty of leaving it to a jury to determine the extent of the plaintiff's losses, including his pain and suffering; but at the same time new procedures should also be devised in automobile cases to expose and condemn negligent driving as well as defects in our automobile technology. Once again, the law should not settle for convenience only; it should insist on educating the legal emotions of all who are involved—the parties, the spectators, the public.

Apart from the adjudicative process, we need new forms of proceedings in local and state government in order to revitalize branches of law relating to public education, pollution, welfare, low-cost housing, fair employment practices, and other like matters. Here the community itself can begin to create the new quality of life that many of our youth have rightly demanded. But new forms, new rituals, are needed to channel popular participation in creative rather than destructive ways. One important reform that has been undertaken in many places is the establishment of the office of Complaint Commissioner (the so-called Ombudsman), who will effectively investigate and act on citizens' complaints. A

second, more general suggestion is to establish procedures for encouraging the expression of popular sentiment—"town meeting" types of procedures—without permitting domination by too vocal minorities.

Ultimately, broader participation of the public in the processes of the law is an important key to its revitalization. People must feel that it is *their* law, or they will not respect it. But they will only have that feeling when the law, through its rituals and traditions and through its authority and its universality, touches and evokes their sense of the whole of life, their sense of ultimate purpose, their sense of the sacred. At the end of the First World War, Max Weber charged that "the fate of our times is characterized by rationalization and intellectualization and, above all, by the 'disenchantment of the world.'"[22] It is true that many branches of our law have suffered from such a disenchantment, though often without benefit of much rationalization or intellectualization. But despite all our disillusionment, it is wrong to suppose that America is without faith. The faith of America is expressed above all in participation itself, in the sense of people in local communities and groups, all over the country, acting somehow together. This is the heritage of Puritan congregationalism, on the one hand, and of the social and religious experience of ethnic immigrant communities on the other. It would be tragic if America's tradition of participation were allowed to die. Even in the raw, ugly context of the modern city, we have a chance to bring back into public life

"the ultimate and most sublime values" which Weber said had "retreated" either into mystical experience or into intimate personal relations,[23] by enlisting people of all kinds, and in large numbers, in the processes of law enforcement, in new types of parajudicial proceedings, in local and state administration, and in many other areas of public life.

We have considered religion and law in the broadest possible terms—religion as man's sense of the holy, law as man's sense of the just—recognizing that in all societies, though in widely varying ways, law draws on the sense of the holy partly in order to commit people emotionally to the sense of the just. This is true among the Barotse tribesmen of Africa, where witchcraft stands behind legal custom and mediation as a kind of last resort. It was true in another way in traditional China, where law was seen as a necessary evil but was nevertheless dialectically related to Confucian gentility and politeness as well as to neo-Confucian ancestor worship and emperor worship. The interdependence of the sense of the holy and the sense of the just is true also of Soviet Russia, where the law proclaims that socialist property is sacred and where socialist eschatology—the coming of a communist utopia—is an important factor in the development of legal institutions and of legal doctrine. It is true of the United States, where not only traditional Christianity and Judaism but also the secular religion of the American way of life give sanctity to

basic legal norms and procedures; indeed, in few other legal systems does one find such explicit reliance on divine guidance and divine sanctions and so great a reverence for constitutional appeals to universal standards of justice.[24]

By emphasizing the interaction of law and religion we may come to see them not just as two somewhat related social institutions, but as two dialectically interdependent dimensions—perhaps *the* two major dimensions—of the social life of man.

Taken alone, so broad a concept may obscure the tensions that exist between law and religion in given historical situations. That is, of course, the danger of an anthropological approach—that it tends to view culture as an integrated, harmonious whole. Some anthropologists writing on religion treat virtually everything in the culture they are writing about as religion; and similarly, some anthropologists writing on law treat virtually everything in the culture they are writing about as law.

Despite this danger, I believe we must start with an anthropological perspective on law and religion—a perspective which takes into account the fact that in all known cultures there has been an interaction of legal and religious values. In a sense everything *is* religion; and in a sense, everything *is* law—just as everything is time and everything is space. Man is everywhere and always confronting an unknown future, and for that he needs faith in a truth beyond himself, or else the community will decline, will decay, will fall backward.

Similarly, man is everywhere and always confronting social conflict, and for that he needs legal institutions, or else the community will dissolve, will break apart. These two dimensions of life are in tension—yet neither can be fulfilled without the other. Law without faith degenerates into legalism; this indeed is what is happening today in many parts of America and of the Western world. Faith without law, as I shall try to show in a subsequent chapter, degenerates into religiosity. We must begin with these basic cross-cultural truths if we are to succeed in understanding what history requires of us here and now.