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THE INTERACTION OF LAW AND RELIGION

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II.

The Influence of Christianity on the Development of Western Law

Thus far we have considered religion and law in their universal aspects. In all societies, even the most sophisticated, there are shared beliefs in transcendent values, shared commitments to an ultimate purpose, a shared sense of the holy; and in all societies, even the most rudimentary, there are structures and processes of social ordering, established methods of allocating rights and duties, a shared sense of the just. These two dimensions of social life are in tension: the prophetic and mystical sides of religion challenge, and are challenged by, the structural and rational sides of law. Yet each is also a dimension of the other. Every legal system shares with religion certain elements—ritual, tradition, authority, and universality—which are needed to symbolize and educate men's legal emotions. Otherwise law degenerates into legalism. Similarly, every religion has within it legal elements, without which it degenerates into private religiosity.

This, admittedly, is a very long-range view of our common humanity. When we look more closely, we see that mankind has many different religions and many different kinds of law, each religion bearing the stamp of a particular community of faith and each kind of law bearing the stamp of a particular social order. It is the religious and legal beliefs and practices of a particular society, and not some ideal religion and some ideal law, that give the members of that society their faith in the future, on the one hand, and their social cohesion, on the other. And the religious and legal beliefs and practices of a particular community are always intimately related to the unique experience of that community, its unique history.

And so when we turn from universal aspects of the interrelations of religion and law to the interrelations of particular religions and particular legal systems, we turn inevitably from the study of human nature to the study of history—that is, to the study of the realization of human nature in social experience. The philosopher asks timeless questions: What is religion? What is law? But these questions are unanswerable until we have made them timely and specific. Not "What is the nature of man?" but "What am I, my God? What is my nature?" asked St. Augustine.[1] Similarly, the social scientist must ask: Who are we? How have we come into being? What experiences have formed our character? In what direction are we heading? What alternatives confront us? For the "nature" of "man" in "society" is

only to be found in the living deposits of remembered social experience, such as religion and law, and these exist everywhere not in abstraction but in the history of the communities in which we live. It is in this sense that Ortega was right in saying that man has no nature, he has only a history.[2]

In the perspective of our own Western history, the religious dimensions of law appear first as a succession of challenges made by the Christian church in the various stages of its development—and increasingly, in the last two centuries, by secular religions derived from Christianity—to adapt legal institutions to human needs. The basic theme of the story is Jesus' ringing cry, "The sabbath was made for man, not man for the sabbath!" But the opposite theme cannot be suppressed: human needs become identified with the institutions of the religion itself, and the new legal institutions created to serve man acquire an authority independent of their purposes. And so the struggle must be repeated. Yet the memory of past victories gives a basis for hope that we may come closer to our goals; and behind the memory and the hope is a faith that the historical enterprise itself—including both religious history and legal history—is part of some great plan of salvation for man. This, in any event, is Christian historiography carried over from Judaism, and in recent centuries carried over to many of the secular religions that have come to dominate us, including both the religion of democracy and the religion of socialism.[3]

Historical Jurisprudence in a Christian Perspective

For Judaism, the center of gravity of human history is the history of the Jewish people and of the Judaic law that binds it to God and its members to each other; whereas for Christianity, the church from the time of St. Paul, though conceived to be a historical continuation of the Jewish people, was intended to embrace all other peoples as well, each with its own law. Therefore a new law was required within the church itself, as a religious community, to govern its relationships with God as well as the relationships of its members with each other; also new attitudes and policies were required with respect to the secular law by which individual Christians were governed in their nonreligious activities and by which the church as a whole was governed in its relationships with "the world."

In the first age of the church, the most striking fact about the secular law—the law of the Roman Empire—was that it altogether prohibited Christian worship. The church was illegal: to survive, it had to go underground—literally—into the catacombs. Thus the first principle of Christian jurisprudence, established by historical experience, was the principle of civil disobedience: laws that conflict with Christian faith are not binding in conscience. This had had its counterpart in Jewish history as well—for example, in the resistance to the worship of Baal, the story of Daniel's disobedience to King Darius, and refusals to place statues of the Roman emperors in the synagogues. There was, however, a dif-

ference: as Roman citizens, disobedient Christians were defying the laws of their own people. This fact had a considerable significance for the future, when the Christian church became part of the political establishment and individual Christians were confronted with unconscionable laws enacted by their own, not pagan but Christian, rulers—laws that were often imposed in the name of the church itself. People could not forget that the Christian era began with the assertion of a moral right—indeed, a duty—to violate a law that conflicts with God's will. This right and duty, reasserted in our own time by such men as Martin Luther King and the Berrigan brothers, is one of the foundations of our constitutional law of freedom of speech.[4]

With the conversion of the Roman emperors to Christianity in the fourth century, the church came to operate within the power structure. Now it faced a quite different aspect of the question of the relationship between law and religion—namely, whether the emperor's acceptance of the Christian faith had anything positive to contribute to his role as a legislator. The answer given by history was that the Christian emperors of Byzantium considered it their Christian responsibility to revise the laws, as they put it, "in the direction of greater humanity."[5] Under the influence of Christianity, the Roman law of the postclassical period reformed family law, giving the wife a position of greater equality before the law, requiring mutual consent of both spouses for the validity of a marriage, making divorce more difficult

(which at that time was a step toward women's liberation!), and abolishing the father's power of life or death over his children; reformed the law of slavery, giving a slave the right to appeal to a magistrate if his master abused his powers and even, in some cases, the right to freedom if the master exercised cruelty, multiplying modes of manumission of slaves, and permitting slaves to acquire rights by kinship with freemen; and introduced a concept of equity into legal rights and duties generally, thereby tempering the strictness of general prescriptions. Also the great collections of laws compiled by Justinian and his successors in the sixth, seventh, and eighth centuries were inspired in part by the belief that Christianity required that the law be systematized as a necessary step in its humanization. These various reforms were, of course, attributable not only to Christianity, but Christianity gave an important impetus to them as well as providing the main ideological justification. Like civil disobedience, law reform "in the direction of greater humanity" remains a basic principle of Christian jurisprudence derived from the early experience of the church.

In contrast to the Byzantine emperors, who inherited the great legal tradition of pagan Rome, the rulers of the Germanic, Slavic, and other peoples of Europe during roughly the same era (from the fifth to the tenth centuries) presided over a legal regime consisting chiefly of primitive tribal customs and rules of the blood feud. It is more than coincidence that the rulers of many of

the major tribal peoples, from Anglo-Saxon England to Kievan Russia, after their conversation to Christianity promulgated written collections of tribal laws and introduced various reforms, particularly in connection with family law, slavery, and protection of the poor and oppressed, as well as in connection with church property and the rights of clergy.[6] The Laws of Alfred (about A.D. 890) start with a recitation of the Ten Commandments and excerpts from the Mosaic law; and in restating and revising the native Anglo-Saxon laws Alfred includes such great principles as: "Doom [i.e., judge] very evenly; doom not one doom to the rich, another to the poor; nor doom one to your friend, another to your foe."

The church in those centuries, subordinate as it was to emperors, kings, and barons, sought to limit violence by establishing rules to control blood feuds; and in the tenth and eleventh centuries the great Abbey of Cluny, with its branches all over Europe, even had some success in establishing the so-called Peace of God, which exempted from warfare not only the clergy but also the peasantry, and the so-called Truce of God, which prohibited warfare on the weekends.[7] Here, too, are influences of religion on law that have bearing for our time.

Nevertheless, despite the reforms and innovations of Christian kings and emperors, the prevailing law of the West remained—prior to the twelfth century—the law of the blood feud, and of trial by battle, and by ordeals of fire and water, and by ritual oaths. There were no

professional judges, no professional lawyers, no law books, either royal or ecclesiastical. Custom reigned—tribal custom, local custom, feudal custom. In the households of kings and in the monasteries there was civilization to a degree; but without a system of law it was extremely difficult to transmit civilization from the centers to the localities. To take one example: the church preached that marriage is a sacrament which cannot be performed without the consent of the spouses, but there was no effective system of law by which the church could overcome the widespread practice of arranging marriages between infants. And not only were civilized values crushed by a hostile environment, but the church itself was under the domination of the same environment: lucrative and influential clerical offices were bought and sold by feudal lords, who appointed brothers and cousins to be bishops and priests.

In the latter part of the eleventh and first part of the twelfth century, there took place in the West a great revolution which resulted in the formation of a visible, corporate, hierarchical church, a legal entity independent of emperors, kings, and feudal lords, and subordinate to the absolute monarchical authority of the bishop of Rome. This was the Papal Revolution, of whose enormous significance medieval historians both inside and outside the Catholic Church are becoming increasingly aware.[8] It led to the creation of a new kind of law for the church as well as new kinds of law for the various secular kingdoms.

Previously the relationship between the spiritual and secular realms had been one of overlapping authorities, with emperors and kings (Charlemagne and William the Conqueror, for example) calling church councils and promulgating new theological doctrine and ecclesiastical law, and with popes, archbishops, bishops, and priests being invested in their offices by emperors, kings, and lords. In 1075, however, Pope Gregory VII proclaimed the complete political and legal independence of the church and at the same time proclaimed his own supreme political and legal authority over the entire clergy of Western Christendom.[9] It took forty-five years of warfare between the papal and the imperial parties—the Wars of Investiture—and in England it took the martyrdom of Thomas Becket before the papal claims were established (albeit with some substantial compromises).

The now visible, hierarchical, corporate Roman Catholic Church needed a systematic body of law, and in the twelfth and thirteenth centuries this was produced—first in a great treatise written about 1140 by the Italian monk Gratian and eighty years later, after a succession of jurist-popes had promulgated hundreds of new laws, by Pope Gregory IX in his Decretals of 1234. The Decretals remained the basic law of the Roman Church until 1917.

Of course there had been ecclesiastical canons long before Gratian, but they consisted of miscellaneous scattered decisions, decrees, teachings, etc., mostly of a theological nature, pronounced by various church coun-

cils and individual bishops, and occasionally gathered in chronologically arranged collections. There were also traditional procedures in ecclesiastical tribunals. However, there was no systematized body of ecclesiastical law, criminal law, family law, inheritance law, property law, or contract law, such as was created by the canonists of the twelfth and thirteenth centuries. The canon law of the later Middle Ages, which only today, eight centuries later, is being called into question by some leading Roman Catholics themselves,[10] was the first modern legal system of the West, and it prevailed in every country of Europe. The canon law governed virtually all aspects of the lives of the church's own army of priests and monks and also a great many aspects of the lives of the laity. The new hierarchy of church courts had exclusive jurisdiction over laymen in matters of family law, inheritance, and various types of spiritual crimes, and in addition it had concurrent jurisdiction with secular courts over contracts (whenever the parties made a "pledge of faith"), property (whenever ecclesiastical property was involved—and the church owned one-fourth to one-third of the land of Europe), and many other matters.

The canon law did not prevail alone, however. Alongside it there emerged various types of secular law, which just at this very time, in the twelfth and thirteenth centuries, began to be rationalized and systematized. In about 1100, the Roman law of Justinian, which had been virtually forgotten in the West for five centuries, was

rediscovered. This rediscovery played an important part in the development of the canon law, but it also was seized upon by secular rulers who resisted the new claims of the papacy. And so in emulation of the canon law, diverse bodies of secular law came to be created by emperors, kings, great feudal lords, and also eventually in the cities and boroughs that emerged in Europe in the twelfth and thirteenth centuries, as well as among merchants trading in the great international fairs. The success of the canon law stimulated secular authorities to create their own professional courts and a professional legal literature, to transform tribal, local, and feudal custom, and to create their own rival legal systems to govern feudal property relations, crimes of violence, mercantile transactions, and many other matters.

Thus it was the church that first taught Western man what a modern legal system is like. The church first taught that conflicting customs, statutes, cases, and doctrines may be reconciled by analysis and synthesis. This was the method of Abelard's famous *Sic et Non* (*Yes and No*), which lined up contradictory texts of Holy Scriptures—the method reflected in the title of Gratian's *Concordance of Discordant Canons*. By this method the church, in reviving the study of the obsolete Roman law, transformed it by transmuting its complex categories and classifications into abstract legal concepts. These techniques were derived from *the principle of reason* as understood by the theologians and philosophers of the twelfth century as well as by the lawyers.

The church also taught *the principle of conscience*—in the corporate sense of that term, not the modern individualist sense: that the law is to be found not only in scholastic reason but also in the heart of the lawgiver or judge. The principle of conscience in adjudication was first stated in an eleventh-century tract which declared that the judge must judge himself before he may judge the accused, that he must, in other words, identify himself with the accused, since thereby (it was said) he will know more about the crime than the criminal himself knows.[11] A new science of pleading and procedure was created in the church courts, and later in secular courts as well (for example, the English Chancery), "for informing the conscience of the judge." Procedural formalism was attacked. (In 1215 the Fourth Lateran Council effectively abolished trials by ordeal throughout Europe by forbidding clergy to participate in them.) The right to direct legal representation by professional lawyers and the procedure for interrogation by the judge according to carefully worked out rules were among the new institutions created to implement the principle of conscience. Conscience was associated with the idea of the equality of the law, since in conscience all litigants are equal; and from this came equity —the protection of the poor and helpless against the rich and powerful, the enforcement of relations of trust and confidence, and the granting of so-called personal remedies such as injunctions. Equity, as we noted earlier, had been part of the postclassical Roman law as well,

but it was now for the first time made systematic, and special procedures were devised for invoking and applying it.

And so the church sought both to legalize morality and to moralize legality; it took legal jurisdiction over sins, and it influenced the secular law to conform to moral principles. As in ancient Israel, the distinction between law and morality was minimized. On the one hand, standards of right and wrong were reinforced by legal procedures and legal sanctions; on the other hand, a divine righteousness was attributed to legal standards which they by no means always had. Universal celibacy of the priesthood, for example, was made a legal requirement in the eleventh century in order to insulate the clergy from clan and feudal politics, but it acquired an aura of sanctity that made it survive long after it had ceased to be necessary. The law of heresy is another example of the evil of confusing immorality with illegality. Excommunication for disobedience to ecclesiastical authority was a legal remedy which could deprive a person of his entire moral security.

There was, however, an important difference between medieval Christendom and ancient Israel in this regard: in medieval Christendom there was a conflict of jurisdictions between church and state, a coexistence and rivalry of diverse legal systems within each nation and a coexistence and rivalry of diverse nations within the church. The sanctity which a visible, hierarchical, corporate church could give to its law was challenged by the fact

that each person in Christendom lived not only under church law but also under several secular legal systems —royal law, feudal law, local law, merchant law, and others. Each of the secular legal systems also claimed sanctity; and that sanctity, too, was challenged—by the other secular legal systems as well as by ecclesiastical law. This pluralism of legal systems has remained a dominant feature of Western law, despite the inroads of nationalism and of positivism since the Protestant Reformation. In all countries of the West today, including the United States, every person lives under more than one legal system. We live not only under national law but also under international law; and we may invoke international legal custom as well as treaties and conventions and even declarations of the United Nations to challenge the acts of our national authorities. Also, we in America live under both state and federal law, and may run from one to the other for protection; we live under both statute law and constitutional law and may invoke concepts of "due process" and "equal protection" to oppose the will of the legislature; we live under both strict law and equity—under the rule and under the discretion to depart from the rule in exceptional cases. The coexistence of diverse legal systems within the same polity gives a legal foundation to the concept of the supremacy of law; political power is always subject to legal challenge, unless the ruler has seized control of *all* the available legal systems.

The medieval church also taught *the principle of the*

growth of the law—that legal doctrines and legal institutions are to be consciously based on past authority and yet are to be consciously adapted to the needs of the present and future. The canon lawyers worked out new rules and doctrines on the basis of Justinian, the Bible, the church fathers, Aristotle, Germanic customs; they revered the authoritative texts, but they glossed them and then glossed the glosses. The concept of organic growth helped to reconcile stability with flexibility. Just as the great Gothic cathedrals were built over centuries and had budgets projected for a thousand years, so the great law texts were constructed and reconstructed with eyes both to the past and to the future. And indeed they have survived: the reforms now taking place in the Roman Catholic Church are in part an effort to build once again on the legal foundations of the twelfth and thirteenth centuries. But more than that, the canon laws —of marriage, of inheritance, of torts, of crime, of contracts, of property, of equity, of procedure—have entered into the secular legal systems of the West, as has the principle of growth itself, with the result that there has in fact been created a common language of Western law, a Western legal tradition capable of organic development.

The Lutheran Reformation broke the medieval dualism of two kinds of official hierarchy, two kinds of official legal systems—that of the church and that of the secular authorities—by delegalizing the church. Where Lutheranism succeeded, the church came to be conceived

as invisible, apolitical, alegal; and the only sovereignty, the only law (in the political sense), was that of the secular kingdom or principality. It was just before this time, in fact, that Machiavelli invented the word "state" to apply to the purely secular political order. The Protestant reformers were in one sense Machiavellians in that they were skeptical of man's power to create a human law which would reflect eternal law, and they explicitly denied that it is the task of the church as such to develop human law. This Protestant skepticism made possible the emergence of a theory of law—legal positivism—which treats the law of the state as morally neutral, a means and not an end, a device for manifesting the policy of the sovereign and for securing obedience to it. But the secularization of law and the emergence of a positivist theory of law are only one side of the story of the contribution of the Protestant Reformation to the Western legal tradition. The other side is equally important: by freeing law from theological doctrine and from direct ecclesiastical influence, the Reformation enabled it to undergo a new and brilliant development. In the words of the great German jurist and historian Rudolf Sohm, "Luther's Reformation was a renewal not only of faith but also of the world: both the world of spiritual life and the world of law." [12]

The key to the renewal of law in the West from the sixteenth century on was the Protestant concept of the power of the individual, by God's grace, to change nature and to create new social relations through the

exercise of his will. The Protestant concept of the individual will became central to the development of the modern law of property and contract. Nature became property. Economic relations became contract. Conscience became will and intent. The last testament, which in the earlier Catholic tradition had been a means of saving souls by charitable gifts, became a means of controlling social and economic relations. By the naked expression of their will, their intent, testators could dispose of their property after death and entrepreneurs could arrange their business relations by contract. The property and contract rights so created were held to be sacred and inviolable, so long as they did not contravene conscience. Conscience gave them their sanctity. And so the secularization of the state, in the restricted sense of the removal of ecclesiastical controls from it, was accompanied by a spiritualization, and even a sanctification, of property and contract.

It is not true, therefore, that Protestantism placed no limits upon the political power of the absolute monarchs that ruled Europe in the sixteenth century. The development of positive law was conceived to rest ultimately upon the prince alone, but it was presupposed that in exercising his will he would respect the individual consciences of his subjects, and that meant respecting also their property and contract rights. This presupposition rested—precariously, to be sure—upon four centuries of history in which the church had succeeded in Christianizing law to a remarkable extent (given the level of

the cultural life of the Germanic peoples to begin with). Thus a Protestant positivism which separates law from morals, denies the lawmaking role of the church, and finds the ultimate sanction of law in political coercion nevertheless assumes the existence of a Christian conscience among the people and a state governed by Christian rulers.

We have spoken thus far of Protestantism primarily in its Lutheran form. A later form, Calvinism, has also had profound effects upon the development of Western law, and especially upon American law. The Puritans carried forward the Lutheran concept of the sanctity of the individual conscience and also, in law, the sanctity of the individual will as reflected in property and contract rights. But they added two new elements: first, a belief in the duty of Christians to reform the world—indeed, "reforming the world" was a specifically Puritan slogan;[13] and second, a belief in the local congregation, under its elected minister and elders, as the seat of truth—a "fellowship of active believers" higher than any political authority.[14] The active Puritan, bent on reforming the world, was ready to defy the highest powers of church and of state in asserting his faith, and he did so on grounds of individual conscience, also appealing to divine law, to the Mosaic law of the Old Testament, and to natural-law concepts embodied in the medieval legal tradition. As the early Christian martyrs founded the church by their disobedience to Roman law, so the seventeenth-century Puritans, includuding men like

Hampden, Lilburne, Udall, William Penn, and others, by their open disobedience to English law laid the foundations for the English and American law of civil rights and civil liberties as expressed in our respective Constitutions: freedom of speech and press, free exercise of religion, the privilege against self-incrimination, the independence of the jury from judicial dictation, the right not to be imprisoned without cause, and many other such rights and freedoms.[15] We also owe to Calvinist congregationalism the religious basis of our concepts of social contract and government by consent of the governed.[16]

The Jurisprudence of the Secular Religions

Puritanism in England and America, and Pietism, its counterpart on the European continent, were the last great movements within the institutional church to influence the development of Western law in any fundamental sense. In the eighteenth and nineteenth centuries both the Roman Catholic Church and the various Protestant denominations continued, of course, to exert pressures upon law in various directions. Undoubtedly, prophetic Christianity as such continued to play an extremely important part in effectuating law reform—for example in the abolition of slavery, in the protection of labor, and in the promotion of welfare legislation generally. And undoubtedly, on the other side, "organized religion" continued to support the status quo, whatever it happened to be. But the significant factor in this re-

gard—in the nineteenth century and even more so in the twentieth—has been the very gradual reduction of the traditional religions to the level of a personal, private matter, without public influence on legal development, while other belief systems—new secular religions ("ideologies," "isms")—have been raised to the level of passionate faiths for which people collectively are willing not only to die but also (which is harder) to live new lives.

It was the American and French Revolutions that set the stage for the new secular religions—that is, for pouring into secular political and social movements the religious psychology as well as many of the religious ideas that had previously been expressed in various forms of Catholicism and Protestantism. At first a kind of religious orthodoxy was preserved by means of a deistic philosophy —which, however, had little of that very psychology which is the heart of religious faith. What was religious, in fact, about the great revolutionary minds of the late eighteenth and nineteenth centuries—men like Rousseau or Jefferson—was not their belief in God but their belief in Man, individual Man, his Nature, his Reason, his Rights. The political and social philosophies that sprang from the Enlightenment were religions because they ascribed ultimate meaning and sanctity to the individual mind—and also, it must be added immediately, to the nation. The age of individualism and rationalism was also the age of nationalism: the individual was a citizen, and public opinion turned out to be not the opinion of man-

kind but the opinion of Frenchmen, the opinion of Germans, the opinion of Americans, and so forth.

Individualism, rationalism, nationalism—the Triune Deity of Democracy—found legal expression in the exaltation of the role of the legislature and the consequent reduction (except in the United States) of the law-creating role of the judiciary; in the freeing of individual actions from public controls, especially in the economic sphere; in the demand for codification of criminal and civil law; in the effort to make predictable the legal consequences of individual actions, again especially in the economic sphere. These "jural postulates" (as Roscoe Pound would have called them) [17] were considered to be not only useful but also just, and not only just but also part of the natural order of the universe. Life itself was thought to derive its meaning and purpose from these and related principles of legal rationality, whose sources in theological doctrines of natural law and of human reason are evident.

Liberal democracy was the first great secular religion in Western history—the first ideology which became divorced from traditional Christianity and at the same time took over from traditional Christianity both its sense of the sacred and some of its major values. But in becoming a secular religion, liberal democracy was very soon confronted with a rival: revolutionary socialism. And when, after a century of revolutionary activity throughout Europe, communism ultimately seized power in Russia in 1917, its doctrines had acquired the sanctity

of authoritative revelation and its leadership the charisma of high priests. Moreover, the Communist Party had the intimacy on the one hand, and the austerity on the other, of a monastic order. It is not accidental that during the purges after World War II loyal Communists in Europe used to say, "There is no salvation outside the Party."

The jural postulates of socialism, though they differ in many respects from those of liberal democracy, show a common ancestry in Christianity. The Soviet "Moral Code of the Builder of Communism," for example, which Soviet schoolchildren must learn by heart and which is taken as a basis for Soviet legal policy, contains such principles as: "conscientious labor for the good of society —he who does not work, neither shall he eat"; "concern on the part of everyone for the preservation and growth of public wealth"; "collectivism and comradely mutual assistance—one for all and all for one"; "honesty and truthfulness, moral purity, modesty, and unpretentiousness in social and personal life"; "an uncompromising attitude toward injustice, parasitism, dishonesty, careerism, and money-grubbing"; "an uncompromising attitude toward the enemies of communism"; "fraternal solidarity with the working people of all countries and with all people." [18] Soviet law is strkingly reminiscent of the Puritan code of the Massachusetts Bay Colony, the "Body of Liberties" of 1641, in its punishment of ideological deviation, idleness, and personal immorality.[19] In addition, the Soviet system places a very strong

emphasis on the educational role of law and on popular participation in legal proceedings and in law enforcement—through Comrades' Courts, People's Patrols, and placing persons in the care of the collective of the factory or the neighborhood. Moreover, this is done in the name of an eschatology which foresees the ultimate disappearance of coercion and of law itself as a communist society is created in which every person will treat every other—again, in the words of the Moral Code of the Builder of Communism—as "comrade, friend, and brother." It is by no means inconsistent with this utopian vision that strong measures of coercion and of formal law may be used to bring it about.

It is, of course, an exaggeration to compare the religious (or quasi-religious) character of political and social movements in the United States with that of communism in the Soviet Union. Yet in America and in all countries of the West the emotions that were once poured into traditional religions are now poured into secular movements: into party politics, welfare legislation, social reform, student revolt, the peace movement, women's liberation, ecology, and a host of others. Moreover, it is not only the emotional side of these movements that is of religious derivation; many of their ideas, as well, originated in Christianity and Judaism; and above all, their historical outlook is often similar—especially their faith in the future.

Meanwhile, Christianity itself is losing its public character, its political and legal dimension, and (in Jürgen

Moltmann's phrase) is becoming "privatized."[20] For the most part, people go to church as individuals, or as individual families, to gain spiritual nourishment to sustain them in activities and relationships that take place elsewhere.

We are thus confronted with a combination of a "religionless Christianity"[21] and what may be called a "Christianity-less religion." The question this raises for law is whether—and if so, how—such a combination can command sufficient authority to carry forward into a new age the great principles of Western jurisprudence established so painfully during the past two thousand years: the principle of civil disobedience, the principle of law reform in the direction of greater humanity, the principle of the coexistence of diverse legal systems, the principle of the conformity of law to a system of morals, the principle of the sanctity of property and contract rights based on intent, the principle of freedom of conscience, the principle of legal limitations on the power of rulers, the principle of the responsibility of the legislature to public opinion, the principle of predictability of the legal consequences of social and economic actions, as well as newer socialist principles of the priority of state interests and of public welfare. These principles may appear to some to be self-evident truths, and to others they may appear to be utilitarian policies, but for Western man as a whole they are, above all, historical achievements created mainly out of the experience of the Christian church in the various ages of its life: the underground

church of the first centuries, the theocratic state-church of Byzantium and of the early Middle Ages in the West, the independent transnational visible corporate church of the later Middle Ages, the invisible Lutheran church within the nation, the congregational church of Calvinism, and increasingly today the church of the private individual. These successive ages of the church have created the psychological basis, and many of the values, upon which the legal systems of democracy and socialism rest.

It is supposed by some—especially intellectuals—that fundamental legal principles, whether of democracy or of socialism, can survive without any religious or quasi-religious foundations on the basis of the proper political and economic controls and a philosophy of humanism. History, however, including current history, testifies otherwise: people will not give their allegiance to a political and economic system, and even less to a philosophy, unless it represents for them a higher, sacred truth. People will desert institutions that do not seem to them to correspond to some transcendent reality in which they believe—believe *in* with their whole beings, and not just believe *about*, with their minds. That is why countries of democracy and socialism that have abandoned traditional religions turn ultimately to religions of race, of country, or of class (or of all three). The intellectuals feel betrayed by this; they continually anticipate that people will develop a new style of consciousness, secular and rational like their own, but they do not realize that

their own belief in political and economic systems and in a humanist philosophy is equally transrational and equally self-interested—it is the religion of the intellectual.

I have attempted in these first two chapters to challenge the conventional view of law as something to be found primarily in lawbooks. Law is *not* primarily a collection of rules and of legal opinions applying rules to cases and of learned treatises and articles analyzing the ways in which rules are applied to cases. These are the residue of law in the minds of the experts, but its basic reality—in every society—consists in the drama of its continual enactment and reenactment; and that drama, with its ritual, its tradition, its authority, and its universality, manifests and effectuates not only legal principles and policies but also legal values, legal emotions. These, in turn, help to constitute the religious dimension of law, its sanctity.

These chapters are intended, secondly, to challenge the conventional view of law as the product solely of politics. Politics does, of course, give rise to legal rules and decisions; but unless people believe in the law, unless they attach a universal and ultimate meaning to it, unless they see it and judge it in terms of a transcendent truth, nothing will happen. The law will not work—it will be dead.

Thirdly, these chapters are meant to challenge the view that legal values are attributable primarily to man's rational faculties, his capacity to "figure out" sensible solu-

tions to his problems. Many of the basic principles of our law were, indeed, figured out and do, indeed, make sense—and we should be very glad of that; but they are real, and they command allegiance, also because they were fought for and won in the struggle of Western man to defend his faith and to adapt himself to new historical situations. If we lose our memory of the struggle which brought those principles into being, we shall not be able to properly evaluate them. We might disagree, for example, about the political wisdom of those of our contemporaries who practice civil disobedience and about the political wisdom of those who would have the government tolerate it; yet we should all agree that a court, in trying persons for violating laws which they sincerely believe to be unconscionable, ought to accept that belief as a mitigating rather than an aggravating circumstance —in deference to a heritage of more than two thousand years. Similarly, we might disagree about the wisdom of the legal principle that contracts should be kept—*pacta sunt servanda;* but we must recognize that to adopt a contrary principle, namely, that an agreement need not be kept if it proves disadvantageous to the weaker side, is to renounce more than four centuries of our religious and legal history. Here we may differ about the importance of that history—whether we should be bound by it in this particular matter—but we must recognize that the great passions which have created our heritage also create a presumption in favor of preserving it. The presumption of historical continuity is, to be sure, re-

buttable, but the burden of proof is on the proponents of change.

Finally, I have attempted to challenge the view that history is only a record of the past and not also a path to the future. Both Western law and Western religion treat history as a living tradition, a symbol of ongoingness. And both our legal and our religious traditions, by linking us with a past that antedates our political and economic ideology—antedates democracy as well as socialism—also link us with a future that transcends present ideological controversies. It is for this reason that the massive loss of confidence in law and in religion threatens our integrity as a people—threatens our whole past and therefore our whole future. One of the ways we must take to overcome that integrity crisis is to recover our sense of how, at various times in the history of Western man, the interaction of religion and law has made it possible to regenerate both.