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THE "PATH OF THE LAW" AND THE VIA SALUTIS: A NATURALISTIC PERSPECTIVE

Douglas Sturm*

I. PROLOGUE

The topic of this section of the meeting of the Association of American Law Schools—the interaction of law and religion in America—is an assignment of broad significance and many facets. One facet is constructive theory, and one approach to that facet is to investigate possible relationships between theories of religion and theories of law in the development of American thought as they bear explicitly or implicitly on particular jurisprudential problems.

In this paper, selected writings from two American philosophers of law, Oliver Wendell Holmes, Jr., and Thomas I. Emerson, and two American philosophers of religion, Josiah Royce and Alfred North Whitehead, have been placed in conjunction in order to explore a central jurisprudential question: Whether and in what sense some reference to religion enters into an adequate understanding of law. First, a series of quotations is presented from religious scriptures to provide a backdrop for the more theoretical discussion. Second, a set of questions about the interaction between law and religion is outlined, the final question constituting the basis for the remainder of the paper. The subsequent four sections of the paper are devoted to interpretations of Holmes’ understanding of law, Royce’s notion of religion, Whitehead’s concepts of rational religion and civilization, and Emerson’s theory of the first amendment, in that order. Overall, the paper is exploratory and tendentious, intended to provoke serious reflection about how the realities of religion and law relate to our common experience and our common life.

II. LAW AS DHARMA, TORAH, AND AGAPE

The holy writings of religious traditions constitute a primary source of data for explorations into the interaction between law and religion. Indeed, lest discussions about how law and religion are related become too abstract, such

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writings should be kept clearly in focus. For this reason, brief selections from four religious traditions are included in this section of the paper. These selections address directly, if obscurely, the relevance of law to religious concern.

There is a hermeneutical problem, of course, in the presentation of these selections, for whether such terms as “Dharma” and “Torah” are appropriately translated and understood as “law” is a difficult question. However, for the issue at hand, it is instructive to understand that “law,” in some important meaning of that term, is indeed central in each of these scriptural passages, and plays a vital role in the religious comprehension of reality conveyed by the passage.

The first quotation is from Buddhist scripture:

The blessed Buddhas, of virtues endless and limitless, are born of the Law of Righteousness [Dharma]; they dwell in the Law, are fashioned by the Law; they have the Law as their master, the Law as their light, the Law as their field of action, the Law as their refuge. They are produced by the Law . . . and all the joys in this world and the next are born of the Law and produced by the Law . . . .

The second quotation is taken from Hindu writings:

Dharma is the foundation of the whole universe. In this world people go unto a person who is best versed in dharma for guidance. By means of dharma one drives away evil. Upon dharma everything is founded. Therefore, dharma is called the highest good.

The third quotation is from the Hebraic Book of Psalms:

Happy are they whose life is blameless, who conform to the law of the Lord . . . .
Thou, Lord, hast laid down thy precepts for men to keep them faithfully.
If only I might hold a steady course, keeping thy statutes!
I shall never be put to shame if I fix my eyes on thy commandments.
I will praise thee in sincerity of heart as I learn thy just decrees.
Thy statutes will I keep faithfully; O do not leave me forsaken.

1. Dharmasangiti Sutra.
2. Taittiriya Aranyaka.
The fourth and final quotation is from the Gospel according to St. Matthew:

"Master, which is the greatest commandment in the Law?" He answered, "Love the Lord your God with all your heart, with all your soul, with all your mind." That is the greatest commandment. It comes first. The second is like it: 'Love your neighbor as yourself.' Everything in the Law and the prophets hangs on these two commandments."

In each quotation, law, understood variously as "Dharma," "Torah," and "Agape," is intimately related to a way of salvation. As the discussion proceeds, the basic spirit of these passages should be kept in mind as a backdrop for the more theoretical construct that unfolds. In building my case, I am concerned to honor the intentionality of these passages.

III. FOUR QUESTIONS

Jurisprudence, like all other areas of philosophical reflection, is burdened with a host of perennial questions. Perennial questions are those that are inescapable, but not susceptible of simple or conclusive resolution either empirically or rationally. Efforts to bracket or to ignore questions about the sources of law, the relation between law and morality, the limits of legal jurisprudence, or the balance between rule and discretion fail in the end, for the very processes of law are infused with these issues. Harold Berman has performed the service of reminding us of one such perennial question, one that has unfortunately but understandably been subdued in modern jurisprudential discourse, namely, the question of the interaction between law and religion. While there has been widespread debate over the vast issue of the relationship between law and morality, little has been said about the interaction between law and religion, except in the interpretation of the religion clauses in the first amendment by the Supreme Court.

As Berman notes, there are many ways of exploring the interaction between law and religion. He probes four perspectives: anthropological, historical, philosophical, and eschatological. One could just as well, however, translate the four questions H. L. A. Hart has formulated about relations between law and morals into this arena. The first question is historical and causal: Have developments of law been influenced by religion and, conversely, have developments in religion been influenced by law? One could construct a plausible case for an affirmative response to both por-

tions of this question. Thus it might be argued that, on the one side, traditions of Christianity have had an impact on laws of property and contract, on judicial procedures, and on legal theories of civil rights and conscientious objection. On the other side, religion has been affected, at least in form if not in substance, by legal policies, for at various times and places, religion has been outlawed, persecuted, subsidized, or established by law. One could also make a case that neither religion nor law is an independent historical force, but that developments in both are highly conditioned, if not determined, by other social and cultural forces.

A second question concerns the possibility and the forms of religious criticism of law: Is law a self-contained system with its own internal rules of validity, interpretation, application, and change such that religious criticism, when and if it is ever appropriate, derives from an external, even alien, source? Or are there points at which law is not sufficient, where for its own formation and completion, it stands before the judgment of the religious spirit? Are the critical principles of religious ethics as they pertain to law any different from critical principles of philosophical ethics? Is the import of justice in a specifically religious sense, for instance, significantly different from justice in a philosophical sense?

A third question concerns the legal enforcement of religion: Is the fact that certain institutions, rituals, and principles of behavior are by common religious belief essential to the salvation of mankind sufficient to justify enforcing them legally? On the negative side, ought irreligious or anti-religious behavior and belief be made punishable by law? Or was Thomas Jefferson correct

that almighty God hath created the mind free, and manifested his supreme will that free it shall remain by making it altogether insusceptible of restraint; that all attempts to influence it by temporal punishments, or burthens, or by civil incapacitations, tend only to beget habits of hypocrisy and meanness, and are a departure from the plans of the holy author of our religion, who being lord both of body and mind, yet chose not to propagate it by coercions on either, as was in his Almighty power to do, but to extend it by its influence on reason alone . . . .

In brief, is it religiously impermissible to enforce religiosity in thought or actions by means of law?

These three questions presuppose a fourth—a question of definition: Must

some reference to religion enter into an adequate understanding of law or a legal system? Are religion and law related in any essential manner, or do they concern totally distinct realms of reality? Does law, in the traditional positive sense, deal with the strictly mundane and temporal, while religion concerns matters supramundane and transcendental? Or do law and religion, at least at certain significant points, coincide in their concern for the character and condition of human existence? How, in other words, are law and religion to be understood so that one can investigate whether and in what sense they interact within various cultural contexts?

This fourth question should constitute a central focus for considerations of the interaction between law and religion, for while the question of definition seems often abstract and remote, it is vital both in the philosophy of law and in the study of religion. The thesis I shall assert is that some reference to religion must indeed enter into an adequate understanding of the workings of law and that the legal profession and the education of jurists are deficient when they neglect explicit attention to the religious dimension of reality.

IV. THE PATH OF THE LAW

Among the more significant and controverted works in the history of American juristic thought is Mr. Justice Oliver Wendell Holmes' address, "The Path of the Law." The address has been applauded for its clarity and forthrightness; it has been declared to be "probably the most influential essay in American legal thought"; and it has been condemned as a fundamentally un-American, even totalitarian, form of jurisprudence. I begin with Holmes' address because it contains an illuminating structural ambiguity about the central meaning of law. It opens with its famous "bad man" theory of law, a theory that underlies much of the legal practice in America and that is presupposed in many popular judgments about the real meaning of law and the actual character of the legal profession. But as it develops, especially as it concludes, the address presents an appreciably different comprehension of law, a comprehension that presses toward social purpose.

10. Holmes' address was first published in 10 Harv. L. Rev. 457 (1897). It has been republished subsequently in innumerable collections.
11. Golding, supra note 8, at 37.
Holmes' initial prescription is that if one wishes to understand law in its most essential meaning, one must look at it operationally.

If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, not as a good one who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience. From this perspective, Holmes presents his widely quoted definition: "The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law." This is what constitutes the law in all its manifestations—criminal law, tort law, contract law, procedural law. Legal duty to the bad man means not something he has an obligation to do; it is rather "a prophecy that if he does certain things he will be subjected to disagreeable consequences by way of imprisonment or compulsory payment of money." Law is an obstacle, a hurdle, and a likely consequence of action which one must consider in planning rationally how to fulfill one's desires or to pursue one's goals, whatever those desires and goals happen to be. Notions of right, wrong, duty, obligation, responsibility, promise, or care are devoid of their ordinary meaning in the legal system, for law is simply a prediction that, should one act in certain ways, the court is likely to exact a payment or to force imprisonment. Such payment or imprisonment is merely a price of doing business. In the development of one's course of action, one must determine whether to avoid or to risk the consequences of probable court action.

From the standpoint of the bad man theory, the lawyer is the master of the conditional clause. Given a set of circumstances, a lawyer outlines alternative courses of action and announces the likely consequences of each. He is adviser to the corporation, to the governmental official, to the private citizen, to the criminal defendant, or to anyone who has some intimation that public force must be reckoned with. His is the expertise of avoidance or mitigation. By virtue of his knowledge of the taught tradition of the law, the current state of the codes, and the wiles and ways of his judicial siblings, his role is to assist persons to evade court action altogether or at least to minimize the unpleasantries of court decision. The lawyer's ultimate dictate is the client's desire.

Thus the bad man definition of law allegedly entails no reference to morality and a fortiori no reference to religion. It is strictly an operational under-

14. Id. at 461.
15. Id.
standing of law. In its stark realism, the bad man theory is impressive; to many interpreters it is the central point in Holmes' legal thought.

However, the last portion of Holmes' address presents a strikingly different approach to law. In it, Holmes distinguishes two ways of comprehending a given rule of law: the way of tradition and the way of rationality. On the one hand, to understand a rule of law, one should study its historical origins and development. The reasons for the rule lie in the motives that promoted its initial formulation and have sustained it over the decades. But, insists Holmes, the way of tradition by itself should not be determinative of law. The past should not dictate the present.

It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.16

The alternative is the way of rationality. Rationality, in Holmes' usage, looks to the future. It is concerned with consequences, ends, and purposes. Thus, "a body of law is more rational and more civilized when every rule it contains is referred articulately and definitely to an end which it subserves, and when the grounds for desiring that end are stated or are ready to be stated in words."17 The study of the law's past is only helpful as it contributes to the understanding of law as aimed at social ends. Law should be perceived not operationally but teleologically. Law is not a probing of what courts have done or a prophecy of what courts will do. Law is an instrument to fulfill social purposes. What courts have done in the past and what courts are likely to do in the future might well be a violation of law. "Cessante ratione legis, cessat et ipsa lex." (When the reason for the law ceases, the law itself ceases.)18 Tradition can be wrong. The bad man might attain his objectives through the courts, but in contravention to the law. This means that what courts do should be scrutinized, criticized, and corrected in light of what the law really is. To Holmes, in the last portion of his address, an understanding of the reality of law requires both a study of jurisprudence as "simply law in its most generalized part"19 and a study of political economy as presenting the basic character of the social order, for it is not judicial behavior, but "[t]heory [that] is the most important part

16. Id. at 469.
17. Id.
of the dogma of the law." By "theory" Holmes means a consideration of the "ends which the several rules seek to accomplish, the reasons why those ends are desired, what is given up to gain them, and whether they are worth the price."

From the standpoint of this understanding of law, the lawyer is an agent of rational social purpose. While the client's desire is important, it is not paramount. Indeed, while the law in the books and the anticipated law of judicial decision are important, they are not paramount. The desires of the client and the law as articulated are subordinate to the reasonable ends a society yearns to realize through the legal processes. The ultimate responsibility of the legal profession is not to advise persons how to avoid the reach of law, but to promote the realization of the social ends intended by law. The lawyer may be an adviser and counsellor, but the lawyer's role is also to be a critic and creator. In the provocative phrasing of Lon Fuller, to be a lawyer is to participate in a long social history of the "collaborative articulation of shared purposes."

Henry Hart, in his quarrel with Mark DeWolf Howe's defense of Holmes' jurisprudence, insists that the beginning and the end of "The Path of the Law" are irreconcilable, and they would appear to be so as they are stated. They present radically different perceptions of law and of the lawyer's role. An operational definition or bad man theory of law looks primarily at legal sanctions and at the likelihood that courts will impose those sanctions. More precisely, the bad man and his lawyer will perceive sanctions not as sanctions, but only as costs to be cast in the accountant's ledger. On the other hand, a teleological definition or social purpose theory of law looks at legal directives and what they indicate about the character and qualities of social interaction. The teleologist, whether citizen or jurist, discerns law as an intentional and intelligible effort to accomplish certain goals.

Of the two theories, the bad man view cannot incorporate the social purpose view, for the former contains no direct concern for a rational rendering of social ends. Indeed, as Holmes himself illustrates, the bad man may take advantage of some confusion in formulated rules of law to flout and finally to frustrate intended social ends.

However, as Howe intimates in his response to Henry Hart, the social purpose definition of law might incorporate the bad man theory if, but only

20. Id. at 477.
21. Id. at 476.
22. See Fuller, A Rejoinder to Professor Nagel, 3 Nat. L.F. 83, 95-99 (1958).
24. Holmes, supra note 10, at 469-70.
if, the latter is altered in one vital way. The bad man theory must be re-conceived not as a theory of law, but as a rendering of how a bad man perceives law. The point is that, from the viewpoint of a social purpose theory of law, what the bad man perceives is not law as such; he perceives only a pattern of expected reactions of public force should he act in a given way. To perceive law as law is to perceive intended social purposes of a rationally justifiable character and to accept those purposes as binding upon one’s conduct.

If this method of reconciling the two parts of “The Path of the Law” is plausible, then so far as that address is concerned perhaps the name of Oliver Wendell Holmes, Jr., does not belong on the list of American realists as has been assumed. Perhaps his position on the understanding of law can be taken as an adumbration of the purposive view of law one finds in the writings of a later American theorist, Lon Fuller. One should not, of course, overlook Holmes’ open and avowed intellectual skepticism, moral relativism, stress on the need for concreteness in legal analysis, or his rejection of notions of law that assume it to be a “brooding omnipresence in the skies.” What is significant is that even a hard headed legal realist engaged in defining law finds it necessary to incorporate in that definition the goals, aims, ends, and purposes that persons in society intend to realize. Furthermore, he insists upon a rational grounding for those goals, aims, ends, and purposes. While Holmes does not invoke the religious dimension himself, it is precisely at this point that law at least approaches, if it does not enter, the arena of religious concern.

V. RELIGION AS THE Via Salutis

As there are divergent legal systems throughout the world, so also there are divergent religious traditions. Similarly, as there is an array of distinguishable approaches to the definition of law, so also there have been various efforts to depict the innermost heart of religiousness. Josiah Royce, a contemporary of Oliver Wendell Holmes, Jr., and a fellow colleague at Harvard, constructed an illuminating formulation of the essential features of religion in his lectures on The Sources of Religious Insight:

The higher religions of mankind—religions such as Buddhism and Christianity—have had in common this notable feature, namely that they have been concerned with the problem of the Salvation of

27. See GOLDING, supra note 8.
28. See Bettis, supra note 9.
Man. This is sometimes expressed by saying that they are redemp-
tive religions—religions interested in freeing mankind from some
vast and universal burden, of imperfection, of unreasonableness,
of evil, of misery, of fate, of unworthiness, or of sin. 29

In order to comprehend the force of this proposition and the full meaning
of religion, Royce divests the term “salvation” of the connotations that sur-
round it in any one particular religious tradition. To do this, one may con-
ceive of persons, as individuals or in social groupings, as beings of many con-
cerns, wants, and needs. They seek the necessities of life—sleep, food, and
shelter; they want power and pleasure; they seek out, at least to some degree,
truth, beauty, and peace; they are consumed with a variety of loves and
hates, joys and sorrows, creative designs and destructive intents. But from
a religious perspective, there is a paramount need or concern that supersedes
and permeates all others—the need for salvation.

The idea of the need for salvation is composed of two simpler ideas. The
first is the idea that there is one purpose or aim that is more important than
all the others. Compared to this purpose or aim, all others are subordinate
and secondary, even vain or trivial. It is, in the final analysis, the defining
purpose of life, the constitutive aim of existence. The second idea is that
prevailing conditions of existence are of such a character that the fulfillment
of this paramount purpose is in jeopardy. There seems to be a realistic possi-
bility that both individual life and social existence will fail in realizing their
true good. The possibility of failure brings the threat of meaninglessness,
the danger of dissolution, the risk of ultimate lostness. 30 In Royce’s
terms, there are three dimensions to religious experience: the Ideal, the
Need, and the Deliverer. 31 The Ideal is the vision of paramount purpose;
the Need is the vividly felt deficiency in attaining this purpose; the Deliverer
is that in whose presence, with whose power, and from whose light one attains
a way of salvation, a *via salutis*.

Royce’s depiction of the essential feature of religion is similar to other con-
temporary formulations. To Protestant Paul Tillich, religion construed most
broadly is a person’s or a people’s “ultimate concern.” 32 To Roman Catholic
Louis Monden, religious decision is the selection of a “fundamental option”—
a decision “with respect to the totality of existence, its meaning and its di-
rection.” 33 To humanist Erich Fromm, a person’s religion is the “frame

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30. *Id.* at 12.
31. *Id.* at 29.
of orientation and an object of devotion" constructed to make sense of the world and of human action within the world.\textsuperscript{34} To Mircea Eliade, a phenomenologist of religion, the heart and core of religion is the experienced "hierophany," or appearance of sacrality, which constitutes the genesis and foundation of one's meaningful cosmos, natural and social, within which structure one lives and which provides direction and pattern for one's life.\textsuperscript{35} To H. Richard Niebuhr, a theological interpreter of American culture, religion is a matter of faithful relations. In particular, religious faith is confidence in and loyalty to certain realities as objects of trust and centers of value.\textsuperscript{36}

There are differences that underlie these several efforts to define religion, and one should not treat these differences lightly. But for the purposes of this paper, they converge on one important point; namely, that religion is oriented to the future. The religion of a person or a people points in a particular direction, portrays a meaningful but yet to be fully actualized world, presents a new heaven and a new earth, provokes a pattern of action to be pursued, and promises a salvation that engages the attention of the one who believes even while it contrasts sharply with the ugly realities of the present.

Thus, within the Hebrew community, one example of a traditional religious community, there is the impressive vision of Jeremiah:

\begin{quote}
Behold, the days are coming, says the Lord, when I will make a new covenant with the house of Israel and the house of Judah, not like the covenant which I made with their fathers when I took them by the hand to bring them out of the land of Egypt, my covenant which they broke, though I was their husband, says the Lord. But this is the covenant which I will make with the house of Israel after those days, says the Lord: I will put my law within them, and I will write it upon their hearts; and I will be their God, and they shall be my people.\textsuperscript{37}
\end{quote}

The new day will be one of justice and righteousness, peace and plenty, a fulfillment of the persistent intent of a long covenantal tradition. The covenant, in its periodic manifestations, is indicative of the obligations of the people and the promises of the Lord God. To use the language of H. Richard Niebuhr, the covenant is the substance of the Hebrew people's confidence in and loyalty to YHWH (the Lord God of the people) as the one in whom they trust and to whom they are devoted as the center of value. As such, the covenant is the framework of governance for their lives. It is the ground and source of the law of their community. It stipulates for

\textsuperscript{34} E. Fromm, Psychoanalysis and Religion 21-26 (1950).
\textsuperscript{36} H. Niebuhr, Radical Monotheism and Western Civilization 11-23 (1960).
\textsuperscript{37} Jeremiah 31:31-33.
them the way of salvation out of a condition of suffering, injustice, oppression, and misery.

There are three additional points of significance about the general definition of religion presented above. First, religion is not merely an individual matter. There is, to be sure, a profound insight in Alfred North Whitehead's affirmation that "[r]eligion is what the individual does with his own solitariness"\(^{38}\) for solitariness is indeed an essential component of ultimate concerns, fundamental options, salvatory visions, theophanous experiences, and faithful relations. However, religion also has a public face, for it is a societal phenomenon embodied in community life. The social institutions of a religious group are forceful witnesses to the solitary meaning of its innermost faith. The purposes and policies of the social order of the religious community are expressions of the sense of its way of salvation.

Second, religion, in its final implication, has the character of an all-encompassing Gestalt. The religious concern is not merely one concern among others. It has a wholistic reach, and is totalitarian in intent. This does not mean that religion necessarily seeks centralized institutional control of human behavior, but it does mean that the fundamental understanding of religious faith provides a basic framework for perceiving, interpreting, and evaluating the total world of the religious actor. This applies, it can be argued, even in the circumstances of an industrialized society, where religion has, by force of circumstances, become private and compartmentalized.\(^{39}\)

Third, on the basis of at least some of the definitions suggested above, it is legitimate to propose that human existence, individual and social, is inescapably religious. Religion is present in a meaningful sense wherever persons live, move, and have their being. This is not to say that all forms of religious faith are the same, that all expressions of religion are an unalloyed good, nor that all persons have a hidden, if not open, allegiance to a traditional religious community by virtue of historical influence. But this proposition does declare that even in the absence of traditional faith, there is some functional equivalency, for neither solitary nor combined human action can occur except as an expression of some ultimate concern, some framework of orientation and devotion, some form of loyalty to and confidence in a center of value. There lurks behind all human emotion and motivation some vision of the way of salvation, however dimly perceived or monstrously construed.

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38. A. WHITEHEAD, RELIGION IN THE MAKING 16 (1960). Whitehead was a contemporary of Holmes; Religion in the Making was first published in 1926.
Thus, the implication of Royce's understanding of religion is perhaps clear. Any set of social purposes is, at its base, religious. Any understanding of fundamental social needs is rooted in some soteriological vision. Any comprehension of the full depth of public existence will understand it as related to a way of salvation. Hence, if the ultimate ground of law is social purpose, that is, if the function of law is to fulfill social purpose, and if social purpose is basically religious, then there is an essential connection between law and religion. One cannot define law adequately without some reference to the actual religiousness of the society within which the law functions.

VI. RATIONAL RELIGION AND THE IDEAL OF CIVILIZATION

The general thesis to this point is that the path of the law and the way of salvation converge upon common ground, the ground of fundamental social purposes. Both law and religion are enterprises that attend to felt needs and to the creation of new possibilities and obligations of action. But, to speak the obvious, not all social purposes are honorable. Indeed, as one surveys the course of history, the depths of evil and oppression that mankind has visited upon his fellows in the name of both legality and sacrality are shockingly impressive. This is perhaps why Holmes suggested that the genuine sense of law is discernible only through the means of rational criticism. *Per analogia* this is perhaps why, in the sphere of salvation, we should attend to efforts at rational criticism and rational construction. In particular, I suggest we examine Alfred North Whitehead's effort to formulate a rationally refined understanding of religious intuition.40

According to Whitehead, the original moment of religion is intuition into the ultimate character of reality. Intuition is followed by expression, but religious expressions vary widely. They may be primitive or sophisticated, affective or intellectual, ritualistic or mythical. Rational religion, while grounded on original intuition, is a transformation of old forms of expression by attention to the generality of ideas.

Rational religion is religion whose beliefs and rituals have been reorganized with the aim of making it the central element in a coherent ordering of life—an ordering which shall be coherent both in respect to the elucidation of thought, and in respect to the direction of conduct towards a unified purpose commanding ethical approval.41

In its construction, rational religion must consider and take into account three concepts that arise from religious intuition:

41. *Id.* at 30.
1. the value of an individual for itself;
2. the value of the diverse individuals of the world for each other; [and],
3. the value of the objective world which is a community deriv[ed] from the interrelations of its component individuals, and [which is] also necessary for the existence of each of these individuals.42

As Whitehead draws out the implications of these concepts, several doctrines result. First, religion reveals the interdependence of the members of the universe; its topic is the individual in the community. Within Whitehead’s framework, in one form or another, each event incorporates the universe. Each entity, individual and social, is an arrangement of the whole of reality. There is a convergence of the world, actual and ideal, in each event. On the human level, the person cannot be adequately understood as an isolated being, for the person is in essence social in a universal sense.

Second, each entity, each person, is also limited. It is what it is by virtue of its unique grasp of the universe. It has its own character, its own manner of being, its own particular aim. To Whitehead, each entity, event, person, and society has its own importance. It makes a contribution of itself to the universe, and is a novel moment within the passage of reality.

Third, in its basic intuition, religion discerns the active presence of God within that passage. God apprehends the world for what it is, and his purpose is paramount in the world. In general, God’s purpose is the attainment of value. Apart from value, nothing could exist. God acts toward the increase of value by presenting to each entity a vision of what it might become in order to maximize the value in the world.

God is that function in the world by reason of which our purposes are directed to ends which in our own consciousness are impartial as to our own interests. He is that element in life in virtue of which judgment stretches beyond facts of existence to values of existence. He is that element in virtue of which our purposes extend beyond values for ourselves to values for others. He is that element in virtue of which the attainment of such value for others transforms itself into value for ourselves.48

But God’s action on the world is persuasive, not coercive; it is a matter of reason and not of brute force. Although God “is the mirror which discloses to every creature its own greatness,”44 the creature must make up its own mind and must determine its own being. In this sense, “every act leaves

42. Id. at 58.
43. Id. at 151-52.
44. Id. at 148.
the world with a deeper or a fainter impress of God."

Within this framework, God is a constant companion, a judge, and a deliverer. The way of salvation is the way of God's purpose. This is a way of construing what is meant in the religious scriptures of Hinduism, Buddhism, Hebraism, and Christianity in their glorification of dharma, torah, and agape. Dharma, torah, and agape are ways of salvation.

Granting this general concept of rational religion in which God is that which lures persons and societies toward the attainment of value, what, in substance, is it that God intends? More narrowly, what is the aim discerned by rational religion within the realm of social process which is the primary arena of the relevance of law? Placing together Whitehead's writings in Religion in the Making and Adventures of Ideas, I would argue that civilization is the most fundamental of social purposes within this framework. Civilization is a comprehensive notion, admittedly difficult to define, yet understood as a felt ideal for life on this earth. But what does civilization mean? Whitehead rejects efforts to exalt prior epochs as exemplars of civilization, offering instead a definition that is inclusive of the basic dimensions of religious intuition. "I put forward as a general definition of civilization, that a civilized society is exhibiting the five qualities of Truth, Beauty, Adventure, Art, Peace."\[46\]

This highly suggestive definition cannot and need not be fully explored within this context. Rather, for the project at hand, it will suffice to concentrate on the two qualities of Adventure and Peace. Our general objective, it will be recalled, is to ascertain whether reference to religion is required to understand the meaning of law. The particular thesis under consideration at this point is that the interests of rational religion and law understood as fundamental social purpose converge in common concern for the qualities of civilization, in particular for the qualities of Adventure and Peace. As the thesis unfolds, it will be argued that these qualities entail the kinds of freedom of expression represented in the first amendment.

Adventure is an essential component of civilization because of the impossibility of maintaining any static form of perfection. The only alternatives in social life are advance or decadence. Whitehead grounds this doctrine on three metaphysical principles. The first is the principle of process. Every actual entity, individual and social, comes into being and passes out of being. In its absorption of the past and its anticipation of a future, it is a creative

\[45\] Id. at 152.

\[46\] A. Whitehead, Adventures of Ideas 274 (1967). This work was originally published in 1933.
moment in the passage of time. Following its creative formation, it must
give way to a new moment of contemplation and action.

The second principle is that each actuality, individual and social, is finite.
To be what it is, it must exclude alternative possibilities. While each person
and each culture may attain a certain form and a certain measure of perfec-
tion, it should in time give way to alternatives. The Divine Eros is conceived
"as the active entertainment of all ideals, with the urge to their finite realiza-
tion, each in its due season."47 If a society is not open to fresh experimenta-
tion, then either staleness, repetition, or conventionality set in or the adven-
ture of imagination breaks through the rules of expectation and "produces
the dislocations and confusions marking the advent of new ideals for civilized
effort."48

The third principle supporting the quality of adventure is the principle of
individuality with its accompanying problem of harmony. Our lives are dom-
inated by the persistent presence of multiple enduring individualities, each
pressing its own character and claims upon us. For strength of experience,
persons and societies must attend to these individualities as such. "Thus,
civilization in its aim at fineness of feeling should so arrange its social re-
lations, and the relations of its members to their natural environment, as to
evoke into the experiences of its members Appearances dominated by the
harmonies of forceful enduring things."49 Such arrangements require appreci-
ation of the value of discord. Discord enhances the whole when it high-
lights the individuality of its members. Indeed, "progress is founded upon
the experience of discordant feelings. The social value of liberty lies in its
production of discords."50 Adventure includes the search after new com-
binations and harmonies of discordant individualities.

Whitehead defines Peace both as "a quality of mind steady in its reliance
that fine action is treasured in the nature of things"51 and as a "Harmony
of Harmonies."52 Peace is essential to civilization as a religious concept and
as a social concept. On its more religious side, the sense of peace is the
intuition that what one does and what one is matter. The actualities of
existence, social and individual, matter because they are apprehended by
God, the Harmony of Harmonies and the universal unity of adventure.
Without that intuition, action falters and life is senseless. On its more social

47. Id. at 277.
48. Id. at 279.
49. Id. at 282.
50. Id. at 257.
51. Id. at 274.
52. Id. at 285.
side, Peace dictates the need for both order and love. Order is dictated by the problem of harmony, but forms of harmony vary in value according to their success in magnifying the individual actualities, that is to say, in promoting strength of experience. Love is dictated by the correlative problem of attending to the importance and value of the individual. An individual may be rated in a two-fold way: "partly on the intrinsic strength of its own experiences and partly on its influence in the promotion of a high-grade type of order."

It is perhaps clear, even from this compact discussion, that Adventure and Peace as essential qualities of civilization indicate, among other things, the persistent need in the social order for both individuality of expression and extensiveness of concern. A society oriented towards the ideal of civilization as its fundamental purpose must, therefore, create effective means for protecting, encouraging, and respecting divergent visions of life, for without such visions, Adventure and Peace languish and civilization is diminished. Therefore, within the framework of Whitehead's concept of rational religion, a social system in which genuine respect for freedom of expression is a central component, is an integral part of the way of salvation.

The more general import of this argument is that rational religion is an essential resource for the discernment of those fundamental social purposes which are, in turn, the source and ground of law. In other words, civilization is a definitive ideal of both religious and legal action. The more particular import of the argument is that religion and law as interpreted above have a common concrete interest in the kinds of freedom of expression formulated in the first amendment of the Bill of Rights of the United States Constitution, for these kinds of freedom are required by Adventure and a high grade of Peace.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

VII. FREEDOM OF EXPRESSION: RELIGIOUS IDEAL AND LEGAL TASK

A few years ago, Thomas I. Emerson of the Yale Law School published a provocative "general theory of the First Amendment." While many details of the theory are worthy of close examination, only certain aspects of

53. Id. at 292.
54. U.S. CONST. amend. I.
the theory have particular bearing on the thesis constructed to this point. These aspects are here cast into a form not found in Emerson's own writings. It is doubtful whether Emerson would even accept the form, although in my judgment, the form does not distort Emerson's intent. The form adopted is the social counterpart of Royce's dimensions of religious experience: Ideal, Need, and Deliverer.

First, Emerson understands that the principle of free expression is not just one principle among many.

It comprehends a vision of society, a faith and a whole way of life. . . . It is put forward as a prescription for attaining a creative, progressive, exciting and intellectually robust community. It contemplates a mode of life that, through encouraging toleration, skepticism, reason and initiative, will allow man to realize his full potentialities.\footnote{56} The principle of free expression is, in Whitehead's sense, a principle of civilization. Emerson insists that "to guarantee the maintenance of an effective system of free expression" is the root purpose of the first amendment, and that any adequate theory of the first amendment must fully support that purpose.\footnote{57} In this connection, a major question of existing theories of the first amendment is how they reconcile free expression with conflicting social values and purposes. On the basis indicated, Emerson rejects those theories that would limit free expression according to a bad tendency test, a clear and present danger test, and an ad hoc balancing test because in each instance the use of the test constitutes an actual or potential threat to the vision of society that underlies the principle of free expression. The alternative is a modified form of absolute test—an affirmative theory, to use Emerson's term—which seeks to preserve the principle of free expression by shifting the problem of reconciliation from one of degree to one of definition. The questions are: What is expression as distinguished from action? What constitutes abridgement? What is encompassed in the reach of law? The intent in this approach is to honor the freedoms formulated in the first amendment as occupying a preferred position in the structure and procedures of the society precisely because of the governing purposes of the society.

The perspective of rational religion broadens the Ideal articulated by Emerson, for, from this perspective, these freedoms are to be respected as expressive of the Ideal for all social and personal existence, the Ideal of civilization with its qualities of Adventure and Peace. Furthermore, within this
framework, individuality of expression, necessary as it is for civilized life, is conjoined with concern. Freedom of expression is conceived not individualistically, but as a requisite for the enhancement of both individual experience and social ethos.

But the Ideal stands in stark contrast to the Need. By drawing together comments scattered throughout his text, one can see that Emerson seems to have developed his theory in response to modern conditions which constitute a dire threat to the principle of freedom of expression. "The natural balance of forces in society today tends to be weighed against individual expression." That understatement is meant to indicate the effects of radical transformations wrought in 20th-century industrial societies.

The changes which have taken place and which are still in progress are all essentially the product of technological advances. These changes in their economic, social, and political aspects, are industrialization, urbanization, and the proliferation of organization. These changes have tended to stifle individuality of experience and freedom of expression. They have fundamentally altered patterns of property ownership and control. They have committed unorganized persons and minority groups to conditions of virtual powerlessness unless their cause is assumed by some form of large public or private organization in a new style of noblesse oblige. They have molded the expectations and styles of personal life and created a conformist society. They have concentrated control of mass media of communication into the hands of a few corporations so that "instead of a system of open communication in which all the facts and a diversity of opinion are available in the market-place of ideas, our system approaches a closed one in which only a single point of view with minor variations can find an outlet." They have created the conditions for far-reaching manipulation of public belief and opinion.

Indeed, there are exceedingly powerful forces within modern society that militate against the prospects for civilization. Where once, in the history of constitutionalism, the primary threat to freedom of Adventure and a high order of Peace in the social process was government, now the threat derives from many sources. "One of the outstanding characteristics of modern democratic society has been the development of private, in the sense of nongovernmental, centers of power" which "have come to possess extensive authority over the welfare of their individual members," which "generate large and impersonal bureaucracies," and which "exercise monopolistic or near
monopolistic power” over the lives of individuals and smaller associations.\textsuperscript{61} The question is how to recapture the vision and reality of civilization within these organizational forms, how to stimulate the creation of a social order devoted to the qualities of Adventure and Peace, and how to instill each person, each official, and each association with a sense of individual character and a respect, even a love, for difference. So far as this question is accepted as a matter of fundamental social purpose, it is a matter of both religious and legal responsibility.

A critical question of theoretical and practical import in the discernment of Ideal and Need is: What are the grounds on which the Ideal is perceived as Ideal, and the Need perceived as Need? Emerson rests his construction on an explicit premise which he invokes repeatedly. A fundamental social decision to create a system of free expression was made at the moment the first amendment was ratified and that social decision is sustained as a central component in the purposes of the American people. Thus, Emerson declares that the adoption and continued acceptance of the first amendment

imply that some fundamental decisions with respect to reconciliation [of freedom of expression with other social values and objects] have been made, that a certain major balancing of interests has already been performed. These judgments, these prior balancings, are those which necessarily flow from the decision to put into operation a system of free expression, with all the values that such a system is intended to secure, in the realistic context of the actual functioning of society and its legal institutions.\textsuperscript{62}

In Emerson’s understanding, the United States is committed to a “prior judgment,” a “prior decision,” and a “prior balance struck by the framers of the First Amendment.”\textsuperscript{63} In the face of current circumstances, one may wonder how deep that commitment is, but, granting Emerson’s understanding, the maintenance of a system of free expression is, in Holmes’ language, a basic social end already decided upon but still accepted that defines what the law in this area is. This social end, often violated, not fully comprehended, and institutionalized only fragmentarily, is a definitive component of the law itself in the United States. Furthermore, to Emerson, this social end is not arbitrary. It was adopted and continues to be sustained for good reasons. A system of free expression functions as a method for individual fulfillment, for attaining truth, for participatory decisionmaking,

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\textsuperscript{61} Id. at 106-07.
\textsuperscript{62} Id. at 59.
\textsuperscript{63} Id. at 14-15, 59, 64, 71, 77, 81, 86, 93, 99, 115.
\end{flushright}
and for effecting a healthy balance between stability and change in the social order.\textsuperscript{64}

In sum, therefore, the explicit premise of Emerson's construction of Ideal and Need is a set of rational decisions and commitments to a preferred or even overriding social purpose. It perhaps can be asserted that the envisioned social purpose is a reality that impinges upon prevailing circumstances, that stands in contrast to and in judgment upon its violation, and that provokes thought and action on its behalf. In this sense and to this degree, adopting the understanding of religion provided above, the ground of Emerson's construction possesses a distinctly religious cast. Emerson does not himself claim this, and, consequently, the most that can be said is that there appears to be an implicit religious ground for his general theory of the first amendment, and thus for his presentation of the principle of the freedom of expression as occupying a vital place in American law. But, assuming the plausibility of this claim, then, in this area of concern, the convergence of law and religion pertains to a basic purpose of the common life of persons in this nation. The reality of the purpose, so long as it continues to have a governing claim upon this people, is that of a Deliverer.

As already indicated, however, Emerson's attention is intentionally limited to the American scene. The perspective of rational religion extends the reference and deepens the ground. Rational religion, with its concern for the qualities of civilization, would make universal the relevance of the principle of freedom of expression and would ground that principle not merely on the presumed consensus of a people, but, more profoundly, on a metaphysical understanding of the relation between God and the world. God is the Deliverer, calling mankind to embody in the institutions and ethos of social life the qualities of Adventure and Peace which require for their effective rendering a genuine freedom of expression.

\textbf{VIII. REPRISE AND POSTLUDE}

To state the thesis of the argument of this paper as directly and as baldly as possible, a Holmesian understanding of law as rational social purpose provokes a question to which a Whiteheadian understanding of religion provides a response, albeit a highly general response. The question is, what purposes are to govern the structure of society and thus constitute the ground and meaning of law? The response is, the purpose of God, who intends the attainment of value in the temporal world through the pursuit of the qualities of civilization. Within this framework, not only does the definition of law en-

\textsuperscript{64} Id. at 3-15.
tail reference to religion, but more specifically, law and religion are under a common obligation to advance freedom of expression as manifesting the urge to Adventure and to a high order of Peace.

One final remark: there are two important practical consequences of the general argument of the paper. One has to do with the substance of legal education; the second has to do with the character of the legal profession.

With exceptions and variations, the case law method has tended to constitute the core of American legal education for many decades. A dominant assumption of the method is that the way of tradition is the path of the law. But Holmes declared that "[t]heory is the most important part of the dogma of the law," and theory presses toward a rational consideration of purposes. Given the manner in which this thesis has been construed above, law schools should attempt to conjoin a study of tradition with social analysis, to qualify case method with teleological concern, and to infuse the teaching of decisional and statutory law with the philosophy of religion. The religious dimension of reality is the deepest source of law. In its absence, education in law is deficient.

Furthermore, the dominant responsibility of the legal profession is not to serve the express interests of the client nor to act as officers of the court within a given jurisdiction. The jurist has instead a transnational, transcultural responsibility, a responsibility to the Ideal of civilization. The proper and complete role of the jurist is not the application of the law as given, but is instead the transformation of legal processes to conform more nearly to the ground and definitive aim of law. Is this not what Holmes meant in the concluding passage of his famous address?

The remoter and more general aspects of the law are those which give it universal interest. It is through them that you not only become a great master of your calling, but connect your subject with the universe and catch an echo of the infinite, a glimpse of its unfathomable process, a hint of the universal law.

That, at least, is the conclusion of one combination of American theories of law and religion.

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65. Holmes, supra note 10, at 477.
66. Id. at 478.