Varieties of Civil Religion by Robert Bellah and Phillip E. Hammond

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Chapter 6: Pluralism and Law in the Formation of American Civil Religion

While Rousseau is generally credited with coining the term "civil religion," analysis of civil religion in sociology has been influenced more by Emile Durkheim. Durkheim was, of course, an intellectual heir to Rousseau, but nevertheless a gap of great proportions separates them: For Rousseau civil religion is a sensible thing for leaders to Create and encourage; for Durkheim it is an emergent property of social life itself.

On this rather simple difference hangs a conceptual issue obscuring almost all contemporary analyses of modern-day civil religion. Those influenced by Rousseau often begin with a bias *against*civil religion on the grounds that it is or easily can be an idolatrous fraud perpetrated on naive believers. Those influenced by Durkheim, by contrast, often begin with a bias *in favor* of civil religion on the grounds it is inevitable in any case and may -- in its finest forms at least -- be the transcendental expression of the profoundest values of a people.

Each of these points of view is therefore likely to have a blind spot, an aspect of civil religion left unquestioned and thus never made problematic in theory. For those largely in the Rousseau camp this blind spot is their difficulty in taking seriously the claims of a civil religion. Durkheim's followers, on the other hand, give little thought to the question of *how* a civil religion comes to be. This chapter addresses the latter question by looking at the role played by religious pluralism and law in the formation of America's civil religion.

Durkheim's Conception of Religion

Generally speaking, Durkheim's civil religion theory has been understood o mean that, to the degree a collection of people is a society, it will exhibit a common ("civil") religion. A corrupt, though understandable, interpretation of this theory holds that religion therefore unites a people or integrates the society. Such an interpretation is plausible, of course, if one reads literally Durkheim's definition of religion (what "unites into one single moral community"). Other statements in *The Elementary Forms* are just as conducive to that interpretation (for example, *"Rites are means by which* the social group reaffirms itself periodically").[1]

But it is the fact of unity more than the fact of religion with which Durkheim begins. Religion

is more the *expression* of an integrated society than it is the *source* of a society's integration. "Men who feel themselves united, partially by bonds of blood, but still more by a community of interest and tradition, assemble and become conscious of their moral unity." Durkheim goes on. "They are led to represent this unity."[2] Here is the key passage. It is in this kind of reasoning that Durkheim connects religion and integration – not that religion produces the cohesive society but rather that the phenomenon of cohesion has a religious quality.

This argument is not at all unknown. In 1937 Talcott Parsons observed that the real significance of Durkheim's work on primitive religion lay in his recognition not that "religion is a social phenomenon" but that "society is a religious phenomenon."[3] In other words, the very existence of society – the fact of stable social interaction itself -- implies religion. The question is whether and how it is expressed.

Durkheim, of course, found religion expressed in the totemistic practices of the Arunta. The persuasiveness of his argument lies in the rather direct link between the *experiences* of unity allegedly felt by the Arunta and their ritualistic *expressions* of that unity. But Durkheim did not mean his theory to rest on the directness of this link. ("We cannot repeat too frequently that the importance which we attach to totemism is absolutely independent of whether it was universal or not."[4]) Had Durkheim lived longer, he very likely would have pursued the religious significance of societal integration in a modern context. When he asked rhetorically, "What essential difference is there between an assembly of Christians celebrating the principal dates of the life of Christ . . . and a reunion of citizens commemorating . . . some event in the national life?" he was certainly hinting at this issue.[5] But it was only a hint. Was he noting that Christianity is no longer the language by which unity is expressed? Did he believe he could identify the "religions" that do express for modern societies what totemism expressed for the Arunta? Would he agree that these are "civil" religions?

Answers to these questions are not easy to come by. The analysis of modern civil religion gives evidence of one rather direct application of Durkheim's thesis -- expecting in any society a reasonably close analogue to totemism. This work in civil religion, however, fails to deal with the "linkage" that totemism so conveniently provided. Why should a people, *dis*united by denominationalism, multiple ethnic traditions, class differences, and such be led to represent their unity anyway? Around what are they unified? Arguing they are unified by a civil religion may be a difficult task, but it is made easier if a plausible case can be made for why a civil religion might develop in the first place.

This chapter therefore attempts to outline two related issues: (1) How has a single, uniting religion emerged out of the variety of Christian (and non-Christian) groups in American society? (2) Is this religion simply "there," to be expressed by those Americans who choose to do so, or are there structural settings (analogous to the "effervescent" phases in Durkheim's Arunta) where its enunciation is, so to speak, fostered, even compelled?

The common interpretation of Durkheim's thesis -- that a society is integrated to the degree it possesses a common religion -- is therefore given two twists in what follows: First, the major terms in the thesis are reversed and taken to mean that to the degree a society is integrated the expression of its integration will occur in ways that can be called religious. And second, because conflict obviously endangers societal integration, wherever resolution of conflict occurs is a likely scene for the expression of this religion. In the religiously plural society, churches cannot resolve conflicts, at least between parties from different churches. Buy legal institutions *are* called upon to do so. Without claiming that legal institutions – and they alone

-- are responsible for American civil religion, I argue only that law has played a critical role in that civil religion's development.

In developing this argument I shall (1) take a close look at the notion of religious pluralism, finding it to mean much more than mere multiplicity of groups defined by ecclesiastical characteristics; (2) look at the historical form taken by pluralism in American society as a set of pressures to which responses were required; and (3) identify the "religiousness" of the response made by legal institutions. In so doing I am attempting to apply Durkheim's thesis to religiously plural societies and thereby show how a civil religion can develop.

Religious Pluralism

The term "pluralism" is widely used today by social scientists. At a minimal level it refers simply to heterogeneity. In the hands of political scientists, anthropologists, and political sociologists, for example, arguments occur over whether pluralism impedes or secures democratic government. Theorists also differ in their understanding of how pluralism works -- whether it provides multiple channels to power holders or supplies group anchorage for would-be alienated individuals. And there is the intricate argument that pluralism permits multiple but contradictory group memberships, thus making political conflict erupt more often within an individual or a group than between contending political factions.

For all the specifications of "pluralism," however, the concept as used in political analysis almost always refers to heterogeneity of *groups*. And since modern societies commonly contain several religious groups, the notion of religious pluralism has been seen as analogous to or even synonymous with racial or ethnic pluralism.

There is, of course, nothing incorrect in this usage. Methodists *are* a different group from Presbyterians, just as Catholics are different from Protestants or Christians from Jews. Still, the incompleteness of this notion of religious pluralism is apparent if instead of denominational differences one looks at historicocultural differences: the Judeo-Christian tradition versus the Islamic tradition, a Western versus an Oriental religious outlook, a mystical versus an ascetic perspective. What can religious pluralism mean if reference is not to denominational or group heterogeneity but to a multiplicity of nonempirical belief systems? Understood this second way religious pluralism builds on the classical understanding of religion in sociology and therefore requires fuller discussion.

Whether formulated by Durkheim (a system of beliefs and practices related to sacred things), by Weber (that which finally makes events meaningful), or by Tillich (whatever is of ultimate concern) religion in its "classical" sense refers not so much to labels on a church building as to the imagery (myth, theology, and so forth) by which people make sense of their lives -- their "moral architecture," if you will.[6] That human beings differ in their sensitivity to and success in this matter of "establishing meaning" there can be no doubt. Moreover, people certainly differ in the degree to which they regard historic, institutionalized formulations as personally satisfactory. Thus some are churchgoers and some are not; some would change the prevailing theology or ritual and others would not. Societies might be said to differ in whether they offer only one or more than one system for bestowing ultimate meaning.

Teggart asserted social change results from "the collision of groups from widely different habitats and hence of different idea-systems."[7] And if Teggart assumed human history records few stable "pluralistic" situations (that is, single habitats with multiple idea systems), he was

very likely correct. The word "religion" in its plural form does not even enter the language the West until the mid seventh century and does not become common until the eighteenth. Closely related words – piety, obedience, reverence, and worship – never do develop plural forms.[8]

Religious pluralism (in the sense "religion" is used here) is not equivalent, then, to a choice between Rotary and Kiwanis, the Cubs or the White Sox, the Methodists or the Presbyterians. Rather, as Teggart notes, the consequence for the individual of confronting competing idea systems is liberation from "traditional group constraints" and "enhanced autonomy."[9] Correlatively, Smith observes the word "religions" (plural form) comes into use only as one "contemplates from the outside, and abstracts, depersonalizes, and reifies the various systems of other people of which one does not oneself see the meaning or appreciate the point, let alone accept the validity."[10] In other words, though religious pluralism can mean the existence simply of religious differences, it can also refer to a situation qualitatively different from other pluralisms: When one meaning system confronts another meaning system, the very meaning of "meaning system" changes.

In the Western world this change is most readily seen in the separation of church from state -- the explicit differentiation at the structural level of religion and polity. But as Maclntyre, referring to British society, contends, "It is not the case that men first stopped believing in God and in the authority of the Church, and then subsequently started behaving differently. It seems clear that men first of all lost any over-all social agreement as to the right ways to live together."[11] The accuracy of this time sequence determines the viability of the notion of religious pluralism being presented here: If the separation of church and state is regarded as only a political event, then churches are seen as voluntary associations, and pluralism indicates merely the presence of multiple religious groupings. Alternatively, if the separation of church and state arises from a situation of competing meaning systems (that is, is essentially a political response to a *religious* state of affairs), then the existence of multiple churches indicates something far more profound than simply a choice of religious groups. Needless to say, this latter interpretation of religious pluralism is the one used here.

My previous comments are no mere attempt to legislate the use of terms in sociological discourse. They mean to suggest that viewed in a certain way the concept of religious pluralism can have new theoretical importance.

John Courtney Murray, in discussing the "civilization of pluralist society," uses the notion of religious pluralism in both senses outlined.[12] First, religious pluralism implies different people's different histories -- here Murray essentially is merely relabeling those differences. Second, because discussion of concrete affairs goes on in abstract terms -- in "realms of some theoretical generality"-- pluralism implies the existence of different sets of terms, different realms. Discourse, Murray says, thus becomes "incommensurable" and confused. Compare MacIntyre's analysis: "If I tell you that 'You ought to do this,'... I present you with a claim which by the very use of these words implies a greater authority behind it than the expression of my feelings.... I claim, that is, **I** that I could point to a criterion . . . you too ought to recognize. . . . It is obvious that this activity of appealing to impersonal and independent criteria only makes sense within a community of discourse in which such criteria are established, are shared." [13] Kingsley Davis says it more succinctly yet: "As between two different groups holding an entirely different set of common-ultimate ends, there is no recourse."[14]

Religious pluralism need not imply *entirely* different sets of "common-ultimate ends," of "impersonal and independent criteria," or of "moral architectures." But it may be argued that some level of sharedness must exist for institutions to exist, and religious pluralism would appear to reduce that sharedness.

But does it? Once a society permits multiple meaning systems to exist side by side, does it cease to *be* a society? Doubtless that can happen, but it is more normal for a society to work toward a new, more generalized, common meaning system. It is easier to form a social contract than for all to go to war against all. Still, as is now recognized, "mere" social agreement, a rationally derived document, is insufficient. Commitment to its rightness is also required. Every contract has its noncontractual element, Durkheim said; every legal order possesses its charismatic quality, Weber noted. And that noncontractual element, that charismatic quality, that commitment is articulated finally in terms that are (by definition) "religious." In a single society, then, can more than one set of religious terms exist? And if they coexist, can they continue to function as they are thought to function in a society with a religious monopoly?

Obviously, individuals do not generally confront each other's "moral architectures" in any direct fashion. Such situations do arise, of course, but manifestations of moral commitment more often occur as *institutional* conflicts and conflict resolution. The city government decides between road improvement and welfare payments. The corporation chooses to reward longevity or quality of service. The church elects to immerse or sprinkle. The citizenry is ordered to stop plowing and go to war. In all such instances (assuming the absence of sheer coercion) persons feel -- or can come to feel -- an *obligation* to justify their behavior. But this is not because of any prerecognized specific norm; there is no detailed prescription for every conceivable act. Rather, the obligation is in "realms of some theoretical generality," to use Murray's phrase. It is, as Talcott Parsons notes, a "generalized obligation" that is morally binding. A person or an institution demonstrates integrity not only by choosing right from wrong in a concrete situation but by maintaining a "commitment to the pattern over a wide range of different actual and potential decisions, in differing situations, with differing consequences and levels of predictability of such consequences."[15]

Such commitment in any but the simplest, thoroughly ascribed society must be to a "generalized symbolic medium," not to specific norms.[16] Given the integrative potential of such a generalized symbolic medium -- of action to action, policy to policy, person to person -- the question can be raised whether in a single society more than one such medium can exist. Or if "pluralism" exists, can any one medium command the same commitment it might in a monopolistic situation?

The relation between a "generalized symbolic medium of values 'and what I earlier referred to as "moral architecture" or "set of religious terms" is quite clear and has long been recognized. The "primary moral leadership in many societies," Parsons writes, "has been grounded in religious bodies, especially their professional elements such as priesthoods." [17]

Religious pluralism, as just interpreted, clearly has had enormous impact on those institutions regarded as religious before pluralization: churches, clergy, theology, and so forth. In some sense they become "less" religious if they no longer enjoy a monopoly in articulating the ideology by which ultimate meaning is bestowed. Reduction in ecclesiastical power, the transformation of ritual into a "leisure" time activity, and the "privatizing in general of

theology into pastoral counseling or religious "preference" all reflect this altered status.

If churches become less religious in some ways, some other places in the social structure may become *more* religious. If pressures are great in a society for a single generalized symbolic medium, a single reality-defining agency, and churches no longer are the targets of those pressures, the pressures will be exerted elsewhere. It is my contention that in America *legal* institutions feel those pressures greatly, that portrayal of the sacred or articulation of the charismatic tends to be expected of them. In this special sense the law has become more "religious." The pages that follow show how a "common American religion" emerged from religious pluralism and illustrate how current legal institutions express that common religion. In these efforts the Durkheimian blind spot is overcome; I will be investigating just how a civil religion -- in this case America's -- came to be.

Religion and Law

The impact of Puritanism on the common law is now widely acknowledged.[18] David Little has traced the close connections between Puritan theology and early seventeenth-century common law.[19] Considering the volatility of the seventeenth century, it is hardly surprising that religious and legal reformation possessed common elements. But tracing out those elements in detail is, as Little shows, an exceedingly difficult task. For example, the codifying common lawyer, Sir Edward Coke, remained a loyal Anglican all his life, paying no special attention to Puritan theological debates going on at the time. And yet in the jurisdictional struggle between church courts and common law courts Coke not only claimed the latter's superiority but justified the claim by reference to common law tradition.[20] In so doing he effectively sided with Puritanism in its struggle against Anglican traditionalism.

Pound's assertion of Puritanism's "impact" is not well documented. It does little more than show how "individualism" in the common law had analogues in Puritanism, but as Pound himself makes clear, this individualism in the common law has many other roots. Moreover, Puritanism may have contributed (or did contribute) as much to a renewed interest in "collectivism" in the law, considering the stress it placed on the covenant, on the "contractualism" it posited between man and God or man and man. David Little claims "explicit Puritan influence on the particulars of common law was nil." Nevertheless, he continues, "It is my contention that the concurrence of important tensions and changes in legal and religious outlook toward the end of the sixteenth and at the beginning of the seventeenth centuries is more than coincidence. In this I believe I am not far from Pound's interest . . . [in his effort] to understand how a system of law comes to embody and perpetuate a general way of looking at social life-a special system of values."[21]

The argument by which Little so carefully weaves together these two entities -- Puritanism and common law -- does not follow Pound, then, in method. He does not see a *direct* impact of one on the other. Instead Little argues the common law was in a fluid state at the time, seeking principles of legal interpretation for frequent new activities and conflicts. Where might such principles be found? More accurately, perhaps, how might they be articulated? Little's answer is twofold: First, the religious revolution of the seventeenth century -- a revolution that defined new "order" in the church, in the parish, in the "priesthood of all believers," and in social life generally -- provided an ideologically parallel case. Second, Puritan theological conceptions found outlet in the common law's articulation of its principles. "Obviously, the crown and the courts could not work together indefinitely so long as each was making the kind of claims to authority it was. A solution had to be found, but it

would have to come from sources other than the old English order [that is, the "ancient realm or the Anglican tradition"] The deep-seated tensions of early seventeenth-century English society had to be solved by some rather novel rearrangements of political and legal institutions."[22] In other words, Puritanism was an ordering" ideology *available* to a common law seeking theoretical foundation.

What is underplayed in this approach, however, is the additional role Puritan theology played in *legitimizing* religious pluralism. Calvinism, Anabaptism, and subsequent "Protestantisms" contributed a new interpretation of order; but *they also provided a theological rationale for ending church monopolies on articulating that order,* thus pressuring legal institutions into the attempt themselves. As one historian of nationalism puts it: "The Protestant Revolution, by disrupting the Catholic Church and subjecting the Christian community to national variations of form and substance, dissolved much of the intellectual and moral cement which had long held European peoples together. At the same time it gave religious sanction to the notion, already latent, that each people, and each alone, possessed a pure faith and a divine mission."[23]

Puritanism, then, did more than offer an alternative articulation of social values for seventeenth-century England even as it did more than provide parallel support to common lawyers in their fight against traditionalism. In addition, though not all at once, of course, Puritanism forced onto society's agenda the item of pluralism, the question of "religious liberty," the separation of church and state the matter of "intellectual and moral cement." In so doing it left legal systems, especially the common law tradition, the task of formulating a new religion, so to speak. This process is most clearly evidenced in the activity surrounding the U.S. Supreme Court, to which I turn presently. First, however, I must take two intermediate steps.

The first concerns the doctrine of religious liberty. I have just argued that Protestantism provided a theological rationale for ending church monopoly. Any doctrine of religious liberty will lead to the separation of civil authority from matters of faith, hence possibly to pluralism. But inasmuch as Zwingli's Zurich, Calvin's Geneva, or Puritan New England are ordinarily seen as having been religiously intolerant, the task of tracing the establishment of religious liberty is a critical one.

The first *idea* of religious freedom is, of course, lost to history, but it may be accurate to suggest 1523 as a significant date in the *social structuring* of the idea in the West. In October of that year Conrad Grebel and others (who "became" the Anabaptist movement) challenged Zwingli's use of civil power to enforce religious conformity. Bender highlights it thus: "Here is where the first break in the Reformation occurred that led inevitably to the founding of Anabaptism. In 1523-25, at Zurich, are the crossroads from which two roads lead down through history: the road of the free church of committed Christians separated from the state with full religious liberty, and the road of the state church, territorially fixed, depending on state support, and forcibly suppressing all divergence, the road of intolerance and persecution."[24]

The "logic" of religious toleration was established, then, even though occasions of reneging were obviously frequent. Thus Geneva must be considered a theocracy by all accounts, but Calvinism's English counterparts, the Presbyterians, really had no rebuttal for their "leftist Puritan" challenger, Henry Robinson. A real commitment to the doctrine of predestination, he said, precluded religious persecution. Those not elected by God could not possibly be saved;

"uniformity of profession" cannot be confused with "certainty of grace."[25] A doctrine of religious liberty and therefore of pluralism was clearly implied here, even if its widespread institutionalization was a long time in coming.

Soon after Henry Robinson came another Robinson -- this one the Reverend John -- who also symbolizes the Protestant theology of pluralism. As spiritual leader of what became the Mayflower Pilgrims (though he remained in Leyden, never coming to Massachusetts), John Robinson is remembered today as the author of the phrase, "The Lord hath more truth and light yet to break forth." One does not have to believe the Massachusetts colonists *wanted* to be religiously tolerant; it is enough merely to acknowledge that a theology allowing religious liberty (or legitimating pluralism) was being clearly enunciated, however long before it became practical reality.

The second step concerns law and authority in colonial America. Not surprisingly, without many of the traditional encumbrances the emerging American society was freer than old societies to manifest religious pluralism and its consequences. This is especially apparent in the Supreme Court's articulation of the newly emerging "common" religion. As will presently be shown, the history of the Court can be interpreted as a halting, hesitant, but "inevitable" effort to perform for American society the religious task of providing a common moral understanding. Before I deal with that dependent variable, however, I must take a second intermediate step, this time into colonial history.

American colonial life has been highly romanticized. With respect to the subject at hand, should one remember witch hunts or Roger Williams? Was Massachusetts Bay a theocracy or the fount of town meeting democracy? Historians' judgments on these questions vary, but it seems important to my thesis to maintain that the pressures of pluralism and their impact on legal institutions did not wait for the revolution and constitution making. Is there evidence in colonial America, then, that these pressures were felt from the beginning?

C. K. Shipton points out "there never was an established church in Massachusetts, there was no agreed-upon body of dogma, and serious moral deviation was punished by the state, not the church… Many of the normal functions of the established churches in Europe were here transferred to the state." Towns maintained a minister at public expense, it is true, but all inhabitants, including vocal Quakers, Baptists, and Presbyterians, participated in his selection, "with the result that the minister's theological difficulties were usually with the civil body rather than with the church."[26] Meanwhile the civil body -- township or colony -- was able to escape the "chaotic confusion of laws" in England by administering them "in one tribunal," according to Howe. Ecclesiastical, maritime, statutory, and equitable" laws were subsumed under the common law, which Bay colonists recognized as a set of unchanging principles of public law, principles which our usage would describe as 'constitutional.'" [27] G. L. Haskins goes further; the common law was the "cornerstone," the Bible merely the "touchstone," of early Massachusetts.[28]

It may have been an intensely moralistic atmosphere, therefore, but churches had no monopoly in defining what was moral. Anticipating the distinction between "professed doctrines of religious belief" and "actions" as it arose in *Reynolds* v. *United States* (98 US 145 [1879]) -- a case resulting in the prohibition of plural marriage -- came to see that religious "liberty" could become behavioral license unless the obligations between people were subject to the jurisdiction of a secular tribunal. By mid eighteenth century in New Haven, William Livingston rephrased a "Puritan principle" to read "The civil Power

hath no jurisdiction over the Sentiments or Opinions of the subject, till such Opinions break out into Actions prejudicial to the Community, and then it is not the Opinion but the Action that is the Object of our Punishment."[29]

Shipton suggests this principle of freedom of thought, often believed to be state policy first in Virginia, whence it entered the U.S. Constitution as a "natural right," may have been borrowed from Puritan New England. If the revivalistic Great Awakening (1730-1745) was a last ditch effort to reinstate the ‘old order" against the onslaught of the coming denominational pluralism, it would be accurate to say the cause was hopeless. The Puritan "old order" itself quite clearly contained the ideas that had already destroyed its ordering capability.

But "ordering" could not be avoided. "Natural rights mean simply interests which we think ought to be secured," but it is clear that legal institutions increasingly had the task not only of securing those rights but of defining them as well.[30] Laws, that is to say, not only would inform citizens what to do and what not to do but would have to serve as well to assess the *morality* of what they did. The common law as influenced by Puritanism in England, then, was transferred to America, but in the transfer its moral-architectural ("religious") features stand out because the pressures of pluralism also stand out. To a degree hitherto unknown in the West, people were free to adopt any religion. The consequence, however, was that the simultaneously emerging common law was forced to take up the slack, giving it, as Pekelis insists, a "religious and moralistic character."[31] That is to say, the pressures for a single moral architecture (single "reality-defining" agency, single "generalized symbolic medium") were felt in common law institutions. American society well illustrates the effect of those pressures.

The Religious Character of Legal Institutions

The institutions of the common law seem to have had their "religious" flavor for a long time. The law for Edward Coke, writes David Little, "is more than the measure of reason. It is . . . the measure and source of virtue as well."[32] Just as Puritanism had the effect of making every issue a moral question, so also, as Pound noted, did every moral question become a legal question.[33]The notion of "contempt of court," as found in English and American law, illustrates the point well:

> The Anglo-American idea . . . means that the party who does not abide by certain specific decrees emanating from a judicial body is a contumacious person and may, as a rule, be held in contempt of court, fined and jailed . . . Now, this very concept of contempt simply does not belong to the world of ideas of a Latin lawyer. It just does not occur to him that the refusal of the defendant . . . may, as soon as a judicial order is issued, become a matter to a certain extent personal to the court, and that the court may feel hurt, insulted, "contemned."[34]

Where the law is highly codified, where, so to speak, the law is asked to specify duties -- the situation more nearly found in "civil law" or Latin cultures -- the courts can act more administratively, less "judgmentally." But where the task of justifying, articulating, or "interpreting" the law is asked of the courts -- where "aspirations" as well as "duties" are at issue -- courts must take on a "religious" character.[35] Only in a sense, Pekelis reminds us, does the United States have a written constitution. "The great clauses of the Constitution, just as the more important provisions of our fundamental statutes, contain no more than an appeal

to the decency and wisdom of those with whom the responsibility for their enforcement rests."[36] Whether courts are thought to interpret" or to make the law, the fact remains that common law courts find and give *reasons* for their decisions. And in the act of reasoning they do more than cite statutes; they also develop the single symbolic moral universe -- the moral architecture. The common law, then, has a "collective" character as pronounced as the individualism more often viewed as its distinctive feature. Any *concerted* effort, even to promote individual interests, will yield a collective enterprise. But if religious liberty is among the promoted interests, the concerted effort takes on an interpretative task *on behalf of* the collective.

> We must say that the aspects of legal life in England and America . . . do not substantiate the contention of the individualistic character of the common-law technique. On the contrary, the strength of the enforcement devices, the clerical and moralistic character of the legal approach at large, the duty of disclosure, the close control exercised by the community upon the individual and upon the law, if compared with the analogous legal institutions of the Latin countries, seem to disclose rather a more collectivistic than a more individualistic character of the common-law system. . . . It seems to us that what is generally considered as and taken for the individualistic aspect of American life is simply the existence and coexistence of a plurality of communities and -- let's not be afraid of this quantitative element -- of an extremely great number of communities of various types.[37]

Though this chapter's central notion, religious pluralism, is rendered by Pekelis simply as "communities of various types," the elements of the argument are all there by implication: (1) Plurality of the religious systems requires redefinition of order but does not escape the need for order. (2) Legal institutions therefore are called upon not only to secure order but to give it a uniformly acceptable meaning as well. (3) The result is a set of legal institutions with a decided religiomoral character. The historical context of these forces in the West has led the common law to become their medium, the legal philosophy of the Enlightenment their symbols, and the U.S. judicial system most concretely their vehicle of expression.

No clearer illustration can be found than Nelson's analysis of the legal situation in Massachusetts during the years just before and after the revolution. In prerevolutionary times, he notes, juries reached verdicts and applied the law consistently "largely because men selected to juries shared a . . . set of ethical values and assumptions."[38] By the 1760s, however, this ethical unity no longer obtained because Puritan theology itself contained the seeds of pluralism; the Great Awakening was but the early eighteenth-century flowering of those seeds, leading to religious diversity in New England. The result was that as soon as "jurors could no longer agree whether a community gained or lost when, for instance, a millpond flooded a meadow, jury verdicts indeed became 'fluctuating estimates' that were 'utterly indefinite and uncertain,' and *it became essential to transfer to the judiciary the power of finding law*" (italics added). Moreover:

> By the beginning of the nineteenth century . . . judges were abandoning the notion that they should adhere rigidly to precedent.... [The difference] was less in what the courts did than in their understanding of what they properly could do… . As long as juries had found the law . . . adherence to precedent had imposed little burden on the legal system. . . . But once the law-finding power passed to judges, who began to exercise it by rendering written opinions that remained available for all to read, precedent threatened to impose a straight-jacket on future legal development and to bar all

future legal change.[40]

One can inquire whether other institutions also served to express those moral standards. Thus, "Congress quickly assumed a theological function and began interpreting events in religious terms and exhorting other patriots on doctrine and morality. . . . But as the early years faded and the years of war began to pass, Congress made progressively fewer pronouncements which required any reference to the foundation of things in God and busied itself more and more with mundane affairs such as the disposition and pay of the Continental Army."[41]

More importantly, however -- and more in keeping with the Durkheimian spirit of this chapter -- one can ask if any agency in American society has been *required* to express those moral standards. I assert here that such a "theological function" was unavoidably thrust upon the judicial system. Ethical diversity then, or what I have called religious pluralism, had the effect of putting onto the judicial agenda the task of declaring, indeed promulgating, the moral standards for the community at large. The culture may yet have been Puritan at its roots, but the courts replaced the churches as the vehicle for expressing the moral standards of that culture.

Religion in the Legal System: A Disappearing Rhetoric

Little documentation is needed for the claim of an expanding judiciary in American history. "Actually, between 1820 and 1890 the judges were already taking the initiative in lawmaking. Far anticipating the leadership of the executive or administrative arms, the courts built up the common law in the United States -- a body of judge-made doctrine to govern people's public and private affairs."[42]

The present thesis, however, contains a critical corollary less widely acknowledged: With this expansion the judiciary adopted the task of articulating the collective's moral architecture. Federal judges, as Albanese puts it, "rode circuit with the gospel of the civil religion and preached sermons in which the Constitution, its virtue and its promise, figured prominently."[43] Of course, many have spoken of "the nine high priests in their black robes" and of the sacredness imputed to the Constitution and other artifacts of the legal order. But in keeping with Eugene V. Rostow's characterization of the contemporary Supreme Court as a "vital national seminar," it is worth noting that the original charge to the Court was only that it render an aye or a nay.[44] It quickly began handing down written opinions also, however, and under Marshall began the practice of trying for a single majority opinion, which gave 'judicial pronouncements a forceful unity they had formerly lacked."[45]

With the expansion of judicial explanation came the difficult problem of knowing what religious rhetoric, if any, was allowed in the explanation. I have already referred to the *Reynolds* v. *United States* case (1879) wherein Mormon polygamy was outlawed. "Can a man excuse his practices . . . because of his religious belief?" asked Mr. Chief Justice Waite. "To permit this would be to make the professed doctrines of religious belief superior to the law of the land. . . ." Were "religious" exceptions to be made, the opinion held, "then those who do *not* make polygamy a part of their religious belief *may be found guilty* and punished" (98 US 145 [1879], italics added).

Here in a single decision is exemplified the paradox confronting American courts because they are in a religiously plural society -- a paradox that hands to them the erstwhile religious task of articulating a moral architecture. On the one hand citizens cannot use religious beliefs

to justify any and all actions. On the other hand truly religious belief, it is thought, *ought* to be manifest in action; else why assume in finding Reynolds innocent society might find nonpolygamists guilty? Protestantism enhanced the development of the concept of religious liberty and thus religious pluralism. But this in turn led, as Pound and others saw, to making everything a moral question yet also a legal question. Courts, then, could not resolve legal questions without resorting to moral answers. But the rhetoric and imagery available for expressing these moral answers could not be drawn from the language of orthodox religion as the implications of religious pluralism became clearer. Instead the rhetoric -- if it was to have *general* meaning -- had to be drawn from another sphere, but from a sphere no less religious in its functioning.

Thus says Bickel:

> The function of the Justices . . . is to immerse themselves in the tradition of our society and of kindred societies that have gone before, in history and in the sediment of history which is law, and . . . in the thought and the vision of the philosophers and the poets. The Justices will then be fit to extract 'fundamental presuppositions' from their deepest selves, but in fact from the evolving morality of our tradition. . . . The search for the deepest controlling sources, for the precise 'how' and the final 'whence' of the judgment . . . may, after all, end in the attempt to express the inexpressible. This is not to say that the duty to judge the judgment might as well be abandoned. The inexpressible can he recognized, even though one is unable to parse it.[46]

It would be difficult to find a better description of "religion" as it is outlined in classical sociology.

This change in rhetoric that the courts have felt obliged to use is readily illustrated in so-called church-state cases.

> 1. *Church of the Holy Trinity* v. *United States,* 143 US 226 (1892). Events in our national life, wrote Mr. Justice Brewer, "affirm and reaffirm that this is a religious nation." Moreover, in holding that a statute prohibiting aliens from being imported for labor was not intended to prevent a church from hiring a foreign Christian minister, the Court quoted approvingly from two previous judicial opinions showing "we are a Christian people, and the morality of the country is deeply ingrafted upon Christianity" and "the Christian religion is a part of the common law of Pennsylvania."
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> **2.** *United States* v. *Macintosh,* 283 US 605 (1931). Forty years later the Court was faced with a question of whether citizenship could be denied a person because he held reservations about taking arms in defense of his country. It is evident, said Mr. Justice Sutherland, "that he means to make his own interpretation of the will of God the decisive test which shall include the government … . We are a Christian people, according to one another the equal right of religious freedom, and acknowledging with reverence the duty of obedience to the will of God. But, also, we are **a** nation with the duty to survive." Citizenship was denied.
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> 3. *Zorach* v. *Clauson,* 343 US 306 (1952). Two decades later in its decision that released-time religious instruction is permitted provided it occurs off public school

grounds the Court asserted -- in Mr. Justice Douglas's words -- that "We are a religious people whose institutions presuppose a Supreme Being." This statement, as well as the result, drew the dissent of Mr. Justice Black, who claimed, "Before today, our judicial opinions have refrained from drawing invidious distinctions between those who believe in no religion and those who do believe."

4. *United States v. Seeger,* 380 US 163 (1965). Here, in another conscientious objection case, the Court decided "belief in relation to a Supreme Being," thus exemption, is to be determined by "whether a given belief that is sincere and meaningful occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God of one who clearly qualifies for the exemption." More than monotheistic beliefs qualify -- Mr. Justice Clark noting the "vast panoply of beliefs" prevalent. Seeger's beliefs qualified, therefore, and he was exempted. In a concurring opinion, Douglas went further in acknowledging how pluralism forces rhetorical change. Hawaii, he noted, at the time the Selective Service law was passed (1940), probably had more Buddhists than members of any other "faith," and how could a concept like Supreme Being be helpful in determining a Buddhist's eligibility for exemption? This from the justice who thirteen years earlier had written that American institutions "presuppose" a Supreme Being.

5. *Welsh* v. *United States*, 398 US 333 (1970). The result in *Welsh* was identical with that in *Seeger,* the Court finding the facts to be the same so that the legal application was the same. The opinion, by Mr. Justice Black, contained an even more expanded notion of religion, however. Exemption from Selective Service is to be allowed on "registrant's moral, ethical, or religious beliefs about what is right and wrong," provided "those beliefs be held with the strength of traditional religious convictions." Moreover, inasmuch as the government had argued that Welsh's beliefs were less religious than Seeger's, the Court responded this "places undue emphasis on the registrant's interpretation of his own beliefs. The Court's statement in *Seeger*that a registrant's characterization of his own belief as 'religious' should carry great weight . . . does not imply that his declaration that his views are nonreligious should be treated similarly . . . very few registrants are fully aware of the broad scope of the word 'religious' [as interpreted by law since *Seeger*]."

It is instructive to see what developed in the course of a century. In *Reynolds* the Court recognized that "religion" is not defined in the Constitution but agreed that even if the state had no power over opinion, it was free to regulate actions. And polygamy, it said, has always been "odious" to Western nations, leading as it does to "stationary despotism." Therefore though there is no implication that Mormon *opinion* is punishable by law, Mormon *action* clearly is. A few years later the Court can speak of the "Christianity" of the nation, of its people, and of its morality, which therefore permits a church (though not a secular employer) to import alien labor. Though a *church* is entitled to special exemption from a law for religious reasons, an *individual* is not. Even if "We are a Christian people," and even if Macintosh is a professor in a Christian seminary, the government's interest in self-preservation is greater than a person's right to religious free exercise.

In *Zorach* v. *Clausen* the remark that "We are a religious people" might be seen as gratuitous -- this is the only case here involving the establishment rather than the free exercise clause -- except that what is allowed by the Court is a *religions* program. Black, in dissent, wonders about the rights of *irreligious* people; are they protected by the First Amendment mention of

"religion?" They might be, it would appear from the *Seeger* and *Welsh* cases, since what is "religion" gets an even broader interpretation, to the point in *Welsh* where Black says the law may have to regard as religious something persons themselves claim is nonreligious.

At this point it would seem the definition of religion is so broad as to be meaningless in deciding cases, at least free exercise cases. From a time when the rhetoric used to justify a decision could be presumptively Christian, there comes the time when it cannot even be presumptively religious. *Seeger* and *Welsh* set out a distinction -- any sincere and meaningful belief occupies a place parallel to that of orthodox belief. As Harlan argued in his concurring opinion in *Welsh,* however:

> My own conclusion . . . is that the Free Exercise Clause does not require a State to conform a neutral secular program to the dictates of religious conscience of any group. . . . [A] state could constitutionally create exceptions to its program to accommodate religious scruples. That suggestion must, however, be qualified by the observation that any such exception in order to satisfy the Establishment Clause of the First Amendment, would have to be sufficiently broad to be religiously neutral. . . . This would require creating an exception for anyone who, as a matter of conscience, could not comply with the statute.

"Religion" for legal purposes becomes simply "conscience," and Congress, if it is to grant conscientious exemptions, "cannot draw the line between theistic or nontheistic beliefs on the one hand and secular beliefs on the other." For all intents, assuming the eventual "triumph" of Harlan's position or something like it, the law simply dispenses with the notion of religion as commonly understood. Having tried for a century to regard it on its own terms -- as sacred, special, and compelling -- courts realize the attempt is futile. All efforts to allow "free exercise" of religion *because it is religion* conflict with the requirement of "no establishment" or special treatment. Religious pluralism requires articulation of "highest obligation" not in orthodox religious language but otherwise. What form does this take?

Religion in the Legal System: An Emerging Civil Religious Rhetoric

If the analysis here is correct, a new rhetoric is still in developing stages. Were this new civil religion -- this new moral architecture – fully mature, it would be part of the common culture, but instead considerable doubt is expressed over the shape, authenticity, even the existence of an American civil religion. I do not postulate a fully mature civil religion here, however. Instead I argued commitment to religion liberty (pluralism) makes impossible the use of the rhetoric of any *one* religious tradition; so pressures are great to create a new rhetoric, that is, find a new religion. In the American case this new rhetoric is found in the common law and develops in legal institutions. Procedure takes precedence over substantive precepts and standards, not because *procedures* are uniquely required in plural societies -- all societies require procedures -- but because the *rhetoric* of procedure is required to justify outcomes between parties whose erstwhile religions are different.[47] The rhetoric of procedure thus becomes the new common or civil religion.

It is in this context that the jurisprudence of Lon Fuller can best be understood. When he remarks on the impossibility of distinguishing the law that *is* from the law that *ought* to be or when he discusses the imperceptible line between the "morality of duty" and the "morality of aspiration," he is insisting the law itself has concretely the task of portraying the ideal, whether it wants to or not.[48] And though Fuller has not included this point in his argument, I

argued here that the "law" takes on this task to the degree that "religion" is denied it as a result of pluralism. Thus the "internal morality" of the law informs and guides a judge even though the "external morality" (interests) of contending parties must remain of no concern to him.[49] Fuller finds a "natural law" rubric congenial for analyzing this process, a fact that bespeaks even more the degree of transcendency that the law takes on.

Conclusion

Legal institutions do not take on this transcendent or civil religious task single-handedly, of course. Public schools certainly play a critical role in socializing youngsters into the "transcendence" of the law. As Kohlberg has framed the issue:

> It has been argued . . . that the Supreme Court's Schempp decision [prohibiting school sponsorship of prayer and Bible reading] calls for the restraint of public school efforts at moral education since such education is equivalent to the state propagation of religion conceived as any articulated value system. The problems as to the legitimacy of moral education in the pubic schools disappear, however, if the proper content of moral education is recognized to be the values of justice which themselves prohibit the imposition of beliefs of one group upon another. . . . [This] does not mean that the schools are not to be "value-oriented.". . .The public school is as much committed to the maintenance of justice as is the court.[50]

One can, however, usefully distinguish agencies for socialization into the civil religion from agencies for articulating or elaborating it. Public schools are the new "Sunday schools," it might be said, whereas courts are the new pulpits.

Notes:

1. Emile Durkheim, *Elementary Forms of Religious Life* trans. Joseph Swain (New York: Collier,1961[originally published in French in 1912]), pp. 62 and 432.

2. Ibid., p. 432.

3. Talcott Parsons, *Structure of Social Action* (New York: McGraw-Hill, i937), p. 427.

4. Durkheim, *Elementary Forms.* p. 114.

5**.** Ibid., p. 475.

6. P. L. Berger and Thomas Luckmann, "Secularization and Pluralism,")*Yearbook for the Sociology of Religion,* 2 (1966), pp. 73-85, refer to "sacred comprehensive meanings for everyday life."

7. Fredrick J. Teggart, *The Process of History* (New Haven, Conn.: Yale University Press, 1918), p.118.

8. Wilfred Cantwell Smith, *The Meaning and End of Religion* (New York: Macmillan. 1963),

p. 43.

9. Teggart. *The Processes,* p. 118.

10. Smith, *The Meaning,* p. 43.

11. Alasdair MacIntyre, *Secularization and Moral Change* (London: Oxford University Press, 1967), p. 54.

12. John Courtney Murray, *We Hold These Truths* (Garden City, N.Y.: Doubleday. 1964), p. 27.

13. MacIntyre. *Secularization,* p. 52.

14. Kingsley Davis, *Human Society* (New York: Macmillan, 1950), p. 543.

15. Talcott Parsons. *Politics and Social* Structure (New York: Free Press, 1969). p. 445.

16. Ibid., p. 455.

17. Ibid., p.452.

18. Roscoe Pound, "Law in Books and Law in Action," *American Law Review.* 44 (1910), pp. 12-34, and *The Spirit of the Common Law* (Francetown, N.H.: Marshall Jones, 1921).

19. David Little, *Religion, Order and Law* (New York: Harper & Row, 1969).

20. Ibid., p. 185.

21. Little, *Religion,* pp. 239 and 240.

22. Ibid., p. 225.

23. C. J. H. Hayes, *Nationalism: A Religion* (New York: Macmillan, 1960), p. 36.

24. Harold S. Bender, *The Anabaptists and Religious Liberty in the Sixteenth Century* (Philadelphia: Fortress Press, 1953). p. 8.

25. Little, *Religion,* pp. 255-256.

26. C. K. Shipton, "The Locus of Authority in Colonial Massachusetts," in G. A. Billias, ed., *Law and Authority in Colonial America* (Barre, Mass,: Barre Publishers, 1965), pp. 137 and 138.

27. Mark De W. Howe, "The Sources and Nature of Law in Colonial Massachusetts," in Billias, *Law and Authority.* pp. 14-15.

28. G. L. Haskins, *Law and Authority in Early Massachusetts* (Hamden, Conn.: Archon Books, 1968), esp. chap. 10.

29. Shipton, "The Locus," p. 143.

30. Pound, *The Spirit,* p. 92.

31. Alexander Pekelis, *Law and Social Action* (Ithaca, N.Y.: Cornell University Press, 1950). p. 56.

32. Little, *Religion,* p. 177.

33. Pound, *The Spirit,* p. 43.

34. Pekelis, *Law.* pp. 45-46.

35. Lon Fuller, *The Morality of Law* (New Haven, Conn.: Yale University Press, 1964).

36. Pekelis, *Law,* p. 4.

3**7.** Ibid., pp. 66-67.

38. William E. Nelson, *Americanization of the Common Law. The Impact of Legal Change on Massachusetts Society, 1760-1830* (Cambridge, Mass.: Harvard University Press, '975). pp. 165-166.

39. Ibid., p. 166.

40. Ibid., p. 171.

41. Catherine Albanese, *Sons of the Fathers* (Philadelphia: Temple, 1976), p. 194.

42. J. Willard Hurst, *The Growth of American Law* (Boston: Little Brown, 1950), p. 85.

43. Albanese, *Sons,* p. 218.

44. Eugene V. Rostow, "The Democratic Character of Judicial Review," *Harvard Law Review.* 66 (1952), p. 208.

45. Robert McClosky, *The American Supreme Court* (Chicago: University of Chicago Press, 1960), p. 40.

46. Alexander Bickel, *The Least Dangerous Branch* (Indianapolis: Bobbs-Merrill, 1962), pp. 236-238.

47. Talcott Parsons, *Societies: Evolutionary and Comparative Perspectives* (Englewood Cliffs, NJ.: Prentice.Hall, 1966), p. **27.**

48. Lon Fuller, *The Law in Quest of Itself* (Boston: Beacon Press, 1966), and *The Morality.*

49. Fuller, *The Morality,* pp. 131-132**.**

50. Lawrence Kohlberg, "Education for Justice: A Modern Statement of the Platonic View,"

in J. M. Gustafson et al., eds., *Moral Education* (Cambridge, Mass.: Harvard University Press, 1970),pp. 67-68.