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Religious Freedom and the Rule of Law: Exporting Modernity in a Postmodern World

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RELIGIOUS FREEDOM AND THE RULE OF LAW: EXPORTING MODERNITY IN A POSTMODERN WORLD?[1]

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A curious fact about the academic study of religion today is that there is little agreement about the definition of the object of its study. "Religion" remains largely undefined. While dozens of definitions have been proffered, none has gained widespread acceptance. Indeed the passing years bring more definitions and less agreement. As a scholar of religion, it is my view that one way of getting a purchase on this elusive topic is by approaching it from the perspective of law. There is a real sense, I think, in which "religion" cannot be understood apart from an understanding of the cluster of ideas around the invention and regulation of modern religion, including religious freedom, disestablishment, and the separation of church and state, ideas that are largely indebted, on the religious side, to liberal protestant theological reflection and culture . . . protestant is here spelled with a small "p." But more importantly for many, perhaps, from a public policy standpoint, putting aside the arcane concerns of religion scholars, I would argue that the instability of religion as a category, given this history, radically undermines contemporary political commitments to protect religious freedom.

I use protestant here loosely to describe a set of political ideas and cultural practices that emerged in early modern Europe in and after the Reformation, not in a narrow church-y sense. Religion, "true" religion some would say, on this modern protestant reading, is private, voluntary, individual, textual, and believed. Public, coercive, communal, oral and enacted religion, "false" religion to some, the religion of most of the world and that with which most religion scholars are concerned, has been carefully and systematically excluded, both rhetorically and legally, from the modern world. Crudely speaking, it is the first kind, the modern protestant kind, that is free. The other kind is closely regulated by law.

Sorting out the history of the working out of this dualism and its ramifications is complicated, implicated, one might say, in the entire development of individualism in Western thought.[3] Let us consider for a minute just the American chapter in this story. What reasons are given in the United States for protecting religious freedom? There is a well-worn path in American political discourse concerning the constitutional goals of the other First Amendment freedoms: freedom of speech, of the press and of association. These freedoms are often explicitly connected in this discourse to theories of democratic governance. Far less well developed is the conversation about the political goals of legally protected reli-

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1. This paper is a slightly revised version of a paper I delivered at the Annual Meeting of the Association of American Law Schools on January 3, 2003. It was written for oral presentation and lacks full scholarly apparatus. An article based on this paper will be published in a festschrift for Professor Hans Kippenberg of the University of Bremen. (Forthcoming 2003 from Walter de Gruyter under the title RELIGION ALS LONGUE DURÉE, edited by Brigitte Luchesi and Kocku von Stuckrad).

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3. Furthermore, one might begin the story at various points. *See, e.g.*, MARCEL GAUCHET, THE DISENCHANTMENT OF THE WORLD: A POLITICAL HISTORY OF RELIGION 14 (1997).

gion.[4] Religious freedom and the separation of church and state are so fundamental to American identity that the deep underlying structure is rarely explored, in spite of all the talk about religion and politics in this country.[5] Americans across the political and theological spectrum affirm religious freedom as foundational. End of conversation. It is heresy to suggest otherwise.

Several reasons for the American constitutional arrangement with respect to religion are implicit, if not fully realized, in the erratic history of the religion clauses. For some proponents of freedom, reason enough is that the only alternative they see is religious establishment. They, like Jefferson, fear rule by impious clerks, or, like Nativists, rule by the Pope. For others, religious freedom seems more explicitly rooted in a certain understanding of the human person in society. On this reading, the best hope we can have for a democratic society is one constructed in the context of a marketplace of ideas. Religious freedom is required because free religion makes us better citizens. Or perhaps it is religion itself that makes us better citizens? There is a long history in this country of religion being reduced to Sunday school morality in service of the common good. For yet others, religious freedom is required because a full expression of the self requires it. For these religious freedom may be best understood as a respect for conscience, religiously based or otherwise. Some would espouse religious freedom because God demands it. Because God scorns a forced faith. Finally, perhaps most persuasively from my point of view, religious freedom, indeed religion itself, is important because religion can be prophetic. It can provide an extra-state location for critiquing government. Religion can be a resource for alternative human visions that challenge and enrich discussion of public policy. Like other deeply rooted social facts, the strength of the U.S. commitment may lie in the multiplicity of these explanations and a reticence about insisting on any one, in what might be called an underlying but never fully articulated overlapping consensus, a consensus that even its diversity is fundamentally indebted to a protestant religious understanding. American protestant Christianity is, for the most part, disestablished, non-doctrinal, moralistic, individualist, pietist, and based in the Word, broadly understood.

One could argue that the functional public theology of the First Amendment is narrower still. While usually present in its invisible secularized garb, public American Protestantism, when overt, creates its own divisions. A recent case filed in the United States District Court for the District of Columbia by some 700 or so Navy Chaplains, *Adair v. England*, reveals the implicit liberal protestant theology at the heart of American legal doctrine concerning religion.[6] The case is particularly revealing because the plaintiffs are mainstream American Christians, not members of marginal religious communities.

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4. *But see, e.g.*, FRANKLIN I. GAMWELL, THE MEANING OF RELIGIOUS FREEDOM (1995).

5. *See* PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE (2002), which makes the argument that "separation" as a political project was a response to Catholic immigration in the nineteenth century. *See also,* THOMAS CURRY, FAREWELL TO CHRISTENDOM: THE FUTURE OF CHURCH AND STATE IN AMERICA (2001), which makes the argument that Americans have never made a full commitment to the radicalism of the religious clauses.

6. Adair v. England, 183 F. Supp. 2d 31, 35-38 (2002).

The military chaplaincies were established, in the words of the Department of Labor, "to provide for the free exercise of religion for all members of the Military Services."[7] The *Adair* plaintiffs, identifying themselves, in Navy parlance, as "non-liturgical" or "low-church" Protestants (capital "P" Protestants), allege that they are discriminated against by the Navy. Non-liturgical Protestants are apparently understood by the Navy to be those churches that do not have a formal liturgy, whose clergy do not wear clerical dress and which do not practice infant baptism. In other words, Baptists, evangelicals, Pentecostals, and charismatic Christians, among others. Making claims based in the first and fourteenth amendments, plaintiffs say that the Navy unconstitutionally favors Catholic and "liturgical Protestant" chaplains in hiring, in coveted assignments, and in promotions. Navy demographics reveal, they say, Christian religious representation in the armed forces to be roughly divided as follows: 25% Catholic, 8% liturgical Protestant and more than 50% non-liturgical. Navy chaplain hiring quotas, however, provide for one third Catholic, one third liturgical Protestant and one third non-liturgical Protestant and other.[8]

In part, the alleged discrimination seems to be a matter of entrenched power, possibly class-based power. Liturgical Protestant chaplains have managed, it is claimed, through control of the promotion system, to favor their own. But it is also a matter of theology. In newspaper articles about the case, the plaintiffs and their lawyers say that the Navy dislikes the exclusive theology preached by the Baptist, Pentecostal and non-denominational Christian preachers.[9] The Navy, it seems, favors a theology of religious pluralism and universal salvation. Conservative and evangelical chaplains are less likely, for example, to be asked to preach a Christmas sermon on a base. Intolerance is not welcome, even if religiously motivated. In other words, we are all Unitarians now, even Catholics.

Summary judgment was denied in *Adair v. England* in August 2002. The case is now in discovery. There are many interesting challenges for the Adair Court, beginning with the Navy's terminology. Is it constitutional? Is it legal? Is it rational? To divide American Christians legally into Catholic, Liturgical Protestant, and non-liturgical protestant? Will the divisions not simply multiply and divide endlessly like American religion? Where to put Mormons, Quakers, and Christian Scientists? But more fundamentally, assuming for a moment that the plaintiffs are right and that the Navy is in fact trying to establish liberal theology, in some sense, can the Navy discriminate against what it understands to be intolerant religion? The plaintiffs will try to persuade the court that this is an equal protection case. But religion is not like race. Maybe some religions are un-American.

So . . . one difficulty facing proponents of religious freedom is that what I will call "post-modern" religion, religion that rejects parts of the modern project, religion that does not always play nice. Religion can be illiberal. It can refuse to

7. U.S. Department of Labor Directive 1304.19 at ¶ 3 *at* http://www.dtic.mil/whs/directives/corres/pdf/d130419_091893/d130419p.pdf (Sept. 18, 1993).

8. *Adair*, 183 F. Supp. 2d at 35-38.

9. *See, e.g.*, Amy Green, *Chaplains Hit Navy with Bias Lawsuit*, CHICAGO TRIBUNE, July 13, 2001, at 8.

occupy the legal space set apart for it by protestant theology and modern law. Since the 1970s, in fact, illiberal religion seems to be bursting out all over. Yet the appeal of a modernist notion of religion dies hard. It seems to solve so many problems. I recently received a call from a law professor interested in reform of marriage law to include same-sex marriage. She was puzzled as to why religious marriage and civic marriage could not just be separated. Why was it not enough for religious groups to discriminate within the group? Letting the state define religion differently? She seemed puzzled that religious people would want to define marriage for everyone. Why were they not content with the space they were assigned? Religion, as she understood it, was private and voluntary, and free — even if repellent.

Similarly, I was watching Europa Europa[10] with my adolescent son. A powerful movie, Europa Europa tells the story of a young boy fleeing Nazi persecution. He goes through a series of identity changes. He is captured first by the Soviets and becomes a communist. He is then adopted by an aristocratic German family and becomes the very model of a cultured German. In each persona, in a series of painful scenes laced with black humor, he attempts to conceal his circumcision. Finally, he is recognized and mocked for being a Jew. My son's immediate response was that he was no longer a Jew. He had voluntarily renounced his faith at the beginning of the film when he joined the communist youth. How could religion remain a salient feature of his identity after that? It made no sense to persecute him for it.

For the law professor and for my son, one of whom is Jewish and the other of whom is Roman Catholic, religion is something individual, chosen, private—and believed, something publicly and politically invisible . . . and harmless, in other words. It should neither determine the choices of the religious outsider nor persist beyond a voluntary renunciation. Each was genuinely shocked that religion might be understood any other way—and so give rise to violence and intolerance. I think each would be stymied by the *Adair* case, but the *Adair* case neatly presents, without mentioning Islam, the dilemma faced by religious freedom activists today.

Two oft-stated goals of American foreign policy today, apart from regime change in Iraq and a free market, are one, international enforcement of guarantees of religious freedom and, two, global extension of the rule of law. Religion and law, yoked in various ways over the centuries of Western history, are here linked to provide the *sine qua non* for free and open societies. Consider these words from the State Department's 2002 International Religious Freedom Report:

> It is the policy of the United States Government to promote religious freedom worldwide, for every human being, regardless of religion, race, culture or nationality. . .every human being has a fundamental right to believe, worship and practice according to

10. CCC Filmkunst/Les Films du Losange (1990).

> his or her own conscience. . . [R]eligious freedom is universal in its importance and applicability. It is one of those "unalienable rights" acknowledged in our own Declaration of Independence—a right not granted by governments, but rather the birthright of every human being, in every nation and culture . . . A government that knowledges and protects freedom of religion and conscience is one that understands the inherent and inviolable dignity of the human person. Such a government is far more likely to protect, through the rule of law, the other rights fundamental to human dignity. . . [11]

Religion freely chosen by the individual and secular law impartially and democratically administered by a state dedicated to due process and human rights are here proclaimed the "natural" characteristics of human society.

Are religious freedom—American style—and the rule of law what human dignity require? Modesty, at the very least, suggests that Americans begin with the acknowledgment, all too rarely made, that even in America, "belief, worship and practice" are not always fully and unreservedly protected . . . and that, even here, the rule of law is often incomplete. But I do not simply want to point to our failure to live up to our own ideals. It is the ideals themselves that I want to discuss here, lest we once again find ourselves hawking shopworn goods that have long since passed their sell dates. "Imperial liberalism," the anthropologist Richard Shweder calls it, in a recent article.[12]

Indeed, far from being "natural," I would argue, even in Western democracies religious freedom and the rule of law are modernist constructs, constructs that have been largely subsumed by capitalist and scientific understandings of the human person and of society, understandings only occasionally relieved by religiously defined possibilities or by the humanism of legal liberalism. While some in the legal world seem to think that religion will rescue law, and maybe some in religious circles think that law will rescue religion, I suggest that it could well be the case that these idealistic instantiations of modernist myths cling to one another as to a drowning man, while the survivors, both oppressors and liberators, are otherwise occupied. Both law and religion today compete with other, arguably more powerful, systems for epistemic and regulatory authority.

The academic study of religion, as I have said, has been much occupied in the last twenty-five years with a search for origins, not for the origin either of religion in general or even of particular religions — those were Victorian projects — but for the origin of the term "religion," and of scholarly interest in "religion." The religious historian, Jonathan Z. Smith, recently reviewed the etymological history of "religion."[13] He concluded that "religion," in its modern

11. Bureau of Democracy, Human Rights, and Labor, U.S. Department of State, *The International Religious Freedom Reports for 2002*, at http://wwwstate.gov/g/drl/rls/irf/2002/13607pf.htm (Oct. 7, 2002).

12. Richard A. Schweder, et al, *'What About Female Genital Mutilation?' and Why Understanding Culture Matters in the First Place*, in ENGAGING CULTURAL DIFFERENCES: THE MULTICULTURAL CHALLENGE IN LIBERAL DEMOCRACIES 235 (2002).

13. Jonathan Z. Smith, *Religion, Religions, Religious, in* CRITICAL TERMS FOR RELIGIOUS STUDIES (Mark Taylor, ed., 1998).

sense, used to describe a universal attribute of human society, originates in the seventeenth century. It is a term invented by Europeans to describe the others they encountered in their "explorations." Noting that most languages lack a word for "religion," he insists that "'[r]eligion' is not a native term; it is a term invented by scholars for their intellectual purposes."[14]

The anthropologist Talal Asad would add to Smith's etymology that this colonialist invention of "religion" as an autonomous cultural form can only be understood in the context of the invention of the nation-state. "[The] separation of religion from power," he says, "is a modern Western norm, the product of a unique post-Reformation history."[15] He continues:

> [W]hat appears to anthropologists today to be self-evident, namely that religion is essentially a matter of symbolic meanings linked to ideas of general order (expressed through either or both rite and doctrine), that it has generic functions/features, and that it must not be confused with any of its particular historical or cultural forms, is in fact a view that has a specific Christian history.[16]

"Religion" as an autonomous social and cultural form, he says, emerges from religious practices embedded in the medieval church. Asad, an anthropologist of Christianity and Islam, insists that

> From being a concrete set of practical rules attached to specific [medieval] processes of power and knowledge, religion has come to be abstracted and universalized. In this movement we have not merely an increase in religious toleration . . . but the mutation of a concept and a range of social practices which is itself part of a wider change in the modern landscape of power and knowledge. That change included a new kind of state . . .[17]

In other words, religion, like law, education, etc., is differentiated, as sociologists would say, from other social institutions, in the early modern period, and is changed in the process of that differentiation. Religion becomes "religion"—both as an object of academic study and as a tool of the emerging modern state.

The story of the invention of modern religion has both a European and an American version. They are related but the European version has been more clearly marked by the social history of war, beginning with the wars of religion in the first half of the seventeenth century. Europeans today live more openly with the ruins, ideational and material, of a long and complex, often horrifying, religious history, inscribed in the land and in the culture. An ocean's remove

14. *Id.* at 281.

15. TALAL ASAD, GENEALOGIES OF RELIGION: DISCIPLINE AND REASONS OF POWER IN CHRISTIANITY AND ISLAM 28 (1993).

16. *Id.* at 42.

17. *Id.* at 42-43.

from that violence, the American story of religion has been determined chiefly by law, by immigration, and by religious pluralism. Americans have been "pilgrims in their own land," as Martin Marty puts it,[18] a land strangely empty. Americans create their religion anew in spaces quite clearly, and intentionally, bounded by their law. Secular law and the denominational form of religion have developed together. As Sidney Mead has argued, "religious freedom and the challenge of the frontier's unchurched shaped certain colonial religious patterns into the structure we recognize as American denominationalism."[19] (There is, of course, a violence underlying the American story, a violence retold in black churches and in Indian country, among other places, but it is less evident in the majority story, than in Europe).

Hans Kippenberg, professor of religion at the University of Bremen and a leading European scholar of religion, has recently written a book tracing the development of the scholarly investigation of religion in modern Europe beginning with the philosophers of the Enlightenment.[20] Kippenberg concludes that religion, paradoxically perhaps, has been "good to think" for moderns, an indispensable element, in fact, of the modernist project.[21] In response to the wars of religion, Kippenberg begins, the philosophers, from Hobbes and Hume to Kant and Rousseau, assigned to religion a limited but crucial function for the modern secular nation-state: the production of morality. The romantics, Herder, Schliermacher, Hegel and Schopenhauer, reacting against the hyper-rationality of the philosophers, celebrated religion as the realm of tradition, of feeling, and of the irrational. Religion was about one's experience of the world, not about being good.

During the same period, historical archaeological investigation of the Bible and a flood of new evidence about non-Christian religions, beginning with the discovery of the Rosetta Stone in 1799, was working to radically relativize the religion of both the philosophers and the romantics. Darwin's and Lyell's discoveries led to an examination of Biblical texts that entirely undermined biblical chronology, massively lengthening human history, and prompting a feverish rethinking of religion in human history. Some nineteenth century European theorists proposed that language was the key to understanding the history of religions-tracing back key religious terms, they argued, would enable one to discover the original true religion, common to all the Aryan peoples, since corrupted by the "disease of language." Others proposed a story of religious progress from "natural" religion to "ethical" religion. News of contemporary tribal societies led to theories of the "primitive" and their relationship to the story of religion. Arguments were had as to whether religion precedes myth or myth precedes ritual. How was sacrifice to be understood? What was magic? Americans, too, contributed to the social scientific investigation of religion. Most notably, William James. Religion, he opined, after a survey of the testimony of religious

18. MARTIN E. MARTY, PILGRIMS IN THEIR OWN LAND: 500 YEARS OF AMERICAN RELIGION (1984).

19. SIDNEY E. MEAD, THE LIVELY EXPERIMENT: THE SHAPING OF CHRISTIANITY IN AMERICA 133 (1963).

20. HANS G. KIPPENBERG, DISCOVERING RELIGIOUS HISTORY IN THE MODERN AGE, (Barbara Harshaw, trans., Princeton University Press, 2002).

21. *Id.* at 187-95.

virtuosos, is "the feelings, acts, and experiences of individual men in their solitude, so far as they apprehend themselves to stand in relation to whatever they consider divine."[22] The contemporary field of religious studies traces its origins to these Victorian theorists.

Note that virtually all of this scholarship is culturally protestant. Jonathan Z. Smith, mentioned above, has delineated the peculiar coming together of Protestant theology and scholarship about religion in a little book called *Drudgery Divine*,[23] which shows how virtually all modern biblical scholarship was apologetically motivated, and until very recently, shaped by protestant theological doctrine about biblical interpretation.

Interestingly, religion did not disappear under this intense and often skeptical scrutiny, in the U.S. or in Europe. Or at least talk of religion did not disappear. Indeed religion and religious studies are flourishing, if bookstores and websites are any evidence. But scholars of religion are deeply divided as to the end product of the modern study of religion. Is it that "religion" has been shown to be so historically specific to the story of the West that it cannot be understood to have any persistent universal referent? This would seem to be the position that most anthropologists and historians seem to take. They prefer other categories and other ways of explaining human motivation and behavior. Religion for them is epiphenomenal. For others, "religion" usefully describes, in some complicated way that incorporates all of the discoveries as well as the post-modern critique, a universal cultural product dependent on structures of human consciousness, one that is usefully mapped using such categories as myth, ritual, sacrifice, code, canon, and cult, one that is common to all societies.

But the story of the invention of religious studies, in spite of Asad and others, often omits the political and legal structures that have constrained its activity. While "religion" may be the invention of scholars, it is also the invention of politicians, lawyers and judges, and of scholars with political agendas. The extraordinary rhetorical power of the idea that Americans, with a little help from Europe, invented religious freedom, a power that transcends many conventional political divides, conceals a complex and violent history. The success of the American commitment to religious freedom, depends, in a sense, I would argue, on a bargain struck at the end of the eighteenth century: Religion was to be free but only in so far as it was understood to be individual, believed, and chosen, in other words, in so far as it was protestant.

I call this a bargain. It was not a literal bargain, of course. It was a gradually negotiated bargain, negotiated in both academic and legal engagements. In different ways throughout the American colonies, the idea and practice grew that religion properly belonged to the individual. Each individual was master of her own religious fate. Anne Hutchinson and others in the colonies who suffered persecution for this view, proved prophets in the long run. Americans recognize no human authority when it comes to religious orthodoxy. Free religion is believed, something internal and private, hence the synonym "faith."[24] And

22. WILLIAM JAMES, THE VARIETIES OF RELIGIOUS EXPERIENCE 31 (1996).

23. JONATHAN Z. SMITH, DRUDGERY DIVINE: ON THE COMPARISON OF EARLY CHRISTIANITIES AND THE RELIGIONS OF LATE ANTIQUITY (1990).

24. *See*, Donald S. Lopez, Jr., *Belief, in* CRITICAL TERMS FOR RELIGIOUS STUDIES 28 (Mark C. Taylor, ed., 1998).

religion is freely chosen, not something determined by your family or by your ethnic identity. Religion that is communal rather than individual, enacted rather than believed, and given rather than chosen, the religion of most of the world, is not true religion, and therefore is not entitled to be legally protected.

This new religion, the religion invented by the Reformation and by Enlightenment thinkers and politicians, was something that would serve the emerging nation state. Summarizing the modern scholarly investigation of religion, Talal Asad adds:

> It may be a happy accident that this effort of defining religion converges with the liberal demand in our time that they be kept quite separate from politics, law and science-spaces in which varieties of power and reason articulate our distinctively modern life. This definition is at once part of a strategy (for secular liberals) of the confinement, and (for liberal Christians) of the defense of religion.[25]

Religion survived politically when it adhered to the Faustian bargain it struck with the emerging liberal state. Any demand by religious illiberals, of the right or the left, that liberals put their money where their mouths are and extend the protection of religion to all religion, causes problems.

As Philip Hamburger has dramatically shown in his new book, *Separation of Church and State*, anti-Catholicism was a key element in the increasing American commitment to a strict separation of church and state, beginning in the antebellum period. If a public role for Catholics was to be the result of a broad reading of religious freedom, then a hyper-privatization and separation of religion was necessary. Rather than share public space with Catholics, Protestants relinquished their own claim to that space. That hyper-privatization lasted well past World War II. Today, however, as Catholics have entered fully into mainstream American political life and into participation in the liberal hegemony, privatization and separation are ending, as can be seen in the recent school cases. Separation is no longer seen to be necessary—at least as far as keeping the Catholics out is concerned. And the free exercise clause has simply been eviscerated. The religion of the Supreme Court today is less and less the modernist source of morality, and more and more just one more private association, one more "point of view." Equality and neutrality rule the roost.[26] Religion may have been good to think, as Kippenberg argues, for the moderns, but today it has much less traction.

Now to turn for a moment to law, modern law. A parallel story of law could be told, and has been in a number of recent works. Law, too, Donald Kelley has argued, while greatly transformed in the modern period, has been good to think for moderns. In *The Human Measure,* Kelley argues that law in the West has

25. TALAL ASAD, GENEALOGIES OF RELIGION: DISCIPLINE AND REASONS OF POWER IN CHRISTIANITY AND ISLAM 28 (1993).

26. *See* Willifred F. Sullivan, *Neutralizing Religion or What is the Opposite of 'Faith-based?'*, HISTORY OF RELIGIONS JOURNAL 41:4 (2002).

been a prime site of reflection on the human condition.[27] He is eloquent in recounting the Western philosophical dance between nomos and physis. In spite of the apparent dominance of science, he insists that we still live anthropocentrically:

> The forces of Physis are intimidating. Across the ages natural science has affected to tear off the cultural masks hiding "reality," but beneath there is always another disguise, another persona (which signifies a mask as well as a human subject); though "put to the question," as Bacon thought, "nature will lie to the very end." In the investigation of human "nature" in historical context, in other words, there is no end to myth-no "last" myth to be deciphered. The strength of social thought in the "nomical" mode is that it accepts the limits of human insight, and rejects the "abuses of reason" that perennially recur in the effort to reduce human experience to a manageable code. . . [28]

Law appears, on his reading, a hero of humanistic values. The book ends: "King Nomos rules."[29]

While few would deny the power of the return today to "rule of law" talk, few would also deny its compromised nature. Law in the U.S. is being de-constitutionalized and the same law, which had enabled greater equality and provided mechanisms for enforcement and intervention by the poor, now works to create structures for the accumulation of wealth and the legitimation of state violence. Tim Murphy argues in a recent book written in answer to Kelley that the power and humanity of the common law depended on a hierarchy of authority that was linked to Christianity[30] and depended on what he calls "the penetrative scheme." He concludes that law today is only one among a group of parallel structures, among which we might include religion, which compete for power. Each is dependent only on its persuasive capacity because hierarchy has been permanently dethroned. Evocation of the "rule of law," Murphy says, can become a cover for a dangerously depoliticized law:

> [T]he more law is detached from politics in systemic terms--i.e. the further we move away from the era of adjudicative government-the more 'irresponsible' both lawyers and judges become, or at least, the more they can claim (and perhaps feel) that their primary responsibility is to 'the law itself', or 'the rule of law' or 'legality', self-referential labels or, in other terms, myths.[31]

Ironically, perhaps, modern religion, private, voluntary, individual, and believed, like modern law, also depended on the "penetrative scheme," and on hierarchical authority.

27. DONALD R. KELLEY, THE HUMAN MEASURE: SOCIAL THOUGHT IN THE WESTERN LEGAL TRADITION (1990).
28. *Id.* at 282.
29. *Id.* at 283.
30. *See* TIM MURPHY, THE OLDEST SOCIAL SCIENCE?: CONFIGURATIONS OF LAW AND MODERNITY (1997).
31. *Id.* at 207.

Both religion and law make both nomical and physical claims. Each has its natural law mode and its historically conditioned engagement with local knowledge. Efforts by both, however to challenge effectively the capitalist and scientistic physis can only be partial. Each may have more success at the contingent and provisional. Guyora Binder has recently described law, and other cultural products as discursive fields, without autonomous authority.[32]

Hazardous as it is to speak of either modernity or post-modernity, and I do so here in lower case, as a short hand for a set of historical events rather than as an ideological commitment, I venture to ally myself here with those who believe that a real change has occurred in the last fifty to hundred years-in which the break-up of the colonial empires, the triumph of the market, and the pace of scientistic explanation for human motivation, has so eroded the modern confidence in free religion and in law, that caution at least is necessary when United States power is mobilized to promote their extension. Activists promoting religious freedom today appear to see their task as the simple one of inclusion-inclusion by analogy, in the modernist regime of religious freedom, of religious groups that have been historically discriminated against, both here and abroad. The missionary fervor of this effort is particularly dramatic in the curious case of those working to promote the rights of new religious movements in Europe. There are many others, including those who with to have rights to proselytization legalized.

All of these efforts are undermined, in my view, by their reliance on outdated modernist definitions of religion—and law. Outsiders are not always willing to conform their religious practices to their demands. And law can only do so much. After the decision in the *Lyng v. Northwest Indian Protective Association* case,[33] for example, it became clear to Indian activists that the First Amendment could not do the work that was asked of it. Not simply because of prejudice or even of the threat to federal sovereignty. But explicitly because "religion" as a category did not describe the claim that was made in *Lyng*. Vine Deloria and others called for a return to treaties as a more promising avenue for the protection of native practices.[34]

The startling disjuncture between claims of religious freedom and the denial of such self-determination to much of the world's religion, on the one hand, and the appearance of widespread realpolitik instead of the rule of law, in America's internal regulation as well as in defense of its sovereignty and policing of its borders, suggests a need for a reexamination of rationales for laws privileging religion and the bargain made by the Protestant churches, a bargain that Sidney Mead called "the Trojan horse in the comfortable citadel of [American] denominationalism."[35]

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32. *See* LOOKING BACK AT LAW'S CENTURY (Austin Sarat et al.eds., 2002).

33. Lyng v. Northwest Indian Protective Ass'n, 485 U.S. 439 (1988).

34. Vine Deloria, Jr., *Trouble in High Places, in* NATIVE AMERICAN RELIGIONS AND CULTURAL FREEDOMS 355 John Wunder ed., 1999).

35. SIDNEY E. MEAD, THE LIVELY EXPERIMENT: THE SHAPING OF CHRISTIANITY IN AMERICA 66 (1963).