"THE RELIGIOUS FOUNDATIONS OF CIVIL RIGHTS LAW" AND THE STUDY OF LAW AND RELIGION IN AN INTERDISCIPLINARY FRAMEWORK*

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> Of all the dispositions and habits which lead to political prosperity, religion and morality are indispensable supports . . . let it simply be asked where is the security for prosperity, for reputation, for life—if the sense of religious obligation desert . . . and let us with caution indulge the proposition that morality can be maintained without religion. George Washington—*Farewell Address*[1]

There is often a message in a title. The title chosen for the Symposium, "The Religious Foundations of Civil Rights Law," is no exception. Though the initial impression of its meaning will vary in accordance with the interests of the individual reader, the basic message of the Symposium is a simple one: law and religion are fundamentally related.

For much of our Nation's history, the close relationship among law, morality, and religion has been taken for granted. In recent years, however, the nature of the relationship has become obscured as constitutional lawyers, judges, policy advocates, and, of late, politicians have urged the separation of religion and public morality.[2] Thus, to the extent that overtly religious principles cannot be justified on nonreligious grounds, their validity as a foundation for public policy has been called into question.[3] In this view, law and public moral-

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1. D.H. MATHESON, HISTORY OF THE FORMATION OF THE UNION UNDER THE CONSTITUTION 569-70 (1941), *quoted in* C.J. ANTINEAU, A.T. DOWNEY, E.C. ROBERTS, FREEDOM FROM FEDERAL ESTABLISHMENT 188 (1964).

2. *See generally* R.J. NEUHAUS, THE NAKED PUBLIC SQUARE (1984). *See also* sources cited note 14 *infra*.

3. *See, e.g.*, Bowers v. Hardwick, 106 S. Ct. 2841, 2854 (1986) (Blackmun, J., dissenting) ("[F]ar from buttressing his case, petitioner's invocation of *Leviticus*, *Romans*, St. Thomas Aquinas, and sodomy's heretical status during the Middle Ages undermines his suggestion that [the law] represents a legitimate use of secular coercive power."); Marsh v. Chambers, 463 U.S. 783 (1983) (justification of legislative prayer as "deeply embedded in the history and

ity—what Robert Bellah has termed "civil religion"[4]—should be separated from traditional religion and "private morality"[5] in the same manner that "separation of church and state" attempts to divorce the secular state from the concerns of religious institutions and believers.

The choice of civil rights law as the symposium topic was, therefore, a deliberate one. Civil rights law is not only a critical issue of public policy, it is also the primary context in which much of the current discussion of the relationship between law and religion takes place.[6] Because, the relationship of civil rights law to religion, ethics, and morality is complex and multi-faceted, it is an ideal place to begin to explore the many levels the law influences, interacts with, and draws support from religion, religious institutions, and religious believers.

One thing is clear from the outset. By its very nature, the task of exploring the relationship of religion to civil rights law is interdisciplinary. Historians, sociologists, theologians, and philosophers, to name only a few, have contributed much to the development of the theories on which civil rights law is based, but legal analysis does not typically seek out these perspectives unless they are useful in proving a dis-

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tradition of this country"); Stone v. Graham, 449 U.S. 39 (1980) (per curiam) (posting the Ten Commandments on the walls of public schools serves no educational function); Walz v. Tax Comm'n, 397 U.S. 664, 680, 687, 692-94 (1970) (Brennan, J., concurring) (justification of religious tax exemption on grounds that religious organizations "contribute to the community in a variety of nonreligious ways"); McGowan v. Maryland, 366 U.S. 420 (1961) (justification of Sunday closing laws on secular grounds). *See also* text at note 28 *infra*.

4. R.N. BELLAH, THE BROKEN COVENANT: AMERICAN CIVIL RELIGION IN TIME OF TRIAL (1975). Bellah has noted that "the question, and it is the most delicate issue of all, is how the civil and noncivil religions are to be related." Bellah, *Response* in THE RELIGIOUS SITUATION: 1968 389 (D.R. Cutler ed. 1968) *quoted in* J.L. CUDDIHY, NO OFFENSE: CIVIL RELIGION AND PROTESTANT TASTE 27 (1978).

5. Although "religion," "morality," and "private morality" are not conceptually the same, the terms are used interchangeably in this paper to describe that which is, for legal purposes, "nonsecular." For present purposes, however, it is sufficient to note that the courts appear to use the terms interchangeably in some cases, and to differentiate them in others. The treatment of these terms and concepts in the cases has provoked considerable commentary in the legal literature, and would be an appropriate subject for another symposium. Choper, *Defining "Religion" in the First Amendment*, 1982 U. ILL. L. REV. 579; Freeman, *The Misguided Search for the Constitutional Definition of "Religion"*, 71 GEO. L.J. 1519 (1983); Greenwalt, *Religion as a Concept in Constitutional Law*, 72 CALIF. L. REV. 753; Johnson, *Concepts and Compromise in First Amendment Religious Doctrine*, 72 CALIF. L. REV. 817 (1984).

6. Church-state controversies arising under the Religion Clauses of the first amendment, U.S. Const., Amend. I, are generally litigated under federal civil rights laws prohibiting deprivation of rights "under color of any [state] statute, ordinance, regulation custom or usage," 42 U.S.C. § 1983, as are more general assertions that governmental action has deprived an individual "of any rights, privileges, or immunities secured by the Constitution and law [of the United States]." *Id.*

puted point. The symposium which follows suggests a different approach: that it is useful for legal scholars and jurists to consider, on a regular basis, the significant contributions that other disciplines can make to legal analysis and understanding.

I.

When, in 1789, the United States Congress adopted the Northwest Ordinances, it recognized that "[r]eligion, morality, and knowledge [are] necessary to good government and the happiness of mankind."[7] More importantly for present purposes, the Congress drew a clear connection between the public's need for "religion, morality and knowledge," and the duty to assure that education—the means by which they were to be acquired—was available to the citizenry at large.[8]

To many Americans, the idea that religion and "private morality" are inextricably intertwined with public morality would be considered a truism. But the ideas concerning law, religion and morality so eloquently expressed in George Washington's farewell address and the Northwest Ordinances are not without controversy. To others, Washington's words might be considered an inappropriate use of religion to make a political point—a point which could be made just as effectively (or so the argument goes) by reference to purely secular terminology.[9] Whereas it once was possible for the late United States

7. Statutes of 1789, c.8 (August 7, 1789). In full, the Congressional sentiment was expressed as follows: "Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools, and the means of education shall be forever encouraged."

8. *Id.* Given this history, it is ironic that the primary area of legal conflict in matters of law and religion has been over the role of religion in education. *See, e.g.*, Edwards v. Aguillard, 107 S. Ct. 2573 (1987); Ohio Civil Rights Commission v. Dayton Christian Schools, 477 U.S. 619 (1986), *rev'g and remanding*, 766 F. 2d 932 (6th Cir. 1985), *vacated on remand* 802 F.2d 457 (6th Cir. 1986); Witters v. Washington Department of Services for the Blind, 474 U.S. 481 (1984); *rev'g*, 102 Wash. 2d 624, 689 P.2d 53 (1984); Bender v. Williamsport Area School District, 475 U.S. 534 (1986), *vacating and remanding*, 741 F.2d 538 (3d Cir. 1984); Ball v. School District of Grand Rapids, 473 U.S. 373 (1985); Wisconsin v. Yoder, 406 U.S. 205 (1972); West Virginia Board of Education v. Barnette, 319 U.S. 624 (1943).

9. *Cf.*, Abington School Dist. v. Schempp, 374 U.S. 203, 294-95 (1963) (Brennan, J., concurring). *But cf.*, Bellah, *supra* note 4 at 153-53 (arguing that the decoupling of technical reason "from a larger religious and moral context" makes it impossible to stake out a sense of direction). *See generally* R. NEUHAUS, THE NAKED PUBLIC SQUARE (1984); Louisell, "Does the Constitution Require a Purely Secular Society?" in Symposium, *The Interaction of Law and Religion in the United States*, 26 CATH. U.L. REV. 17, 20 (1976). Professors Gewirth and Dougherty indirectly addressed the point made in the text in their description of the respective roles of moral philosophers and religious leaders in influencing the direction of social thought and policy. *See Panel Discussion: Philogophical Perspectives*, 5 J. Law & Relig. 149, 153-159 (1988).

Supreme Court Justice William O. Douglas to justify constitutional policy on the ground that "We are a religious people whose institutions presuppose a Supreme Being,"[10] it is doubtful that either Congress or the Supreme Court would utilize such overt references to religion or morality to legitimate current policy. To do so today would be far too controversial.[11]

Thus, the task set out for each of the symposium participants was to explore, from their own unique perspectives, the real and enduring ways in which religious and moral ideas have influenced the development of laws and legal concepts relating to civil rights.

The participation of religious institutions, leaders and individual believers in the development, first, of a civil rights ethic, and later, of civil rights law, is well-known in the American historical experience. One need only peruse the cases and the history to discover the extent to which the fuel of religiously motivated belief fed the fires of civil rights activism.

Perhaps less well-known to legal scholars specializing in civil rights law are the explicitly religious and moral foundations of the very concepts and approaches utilized by legal analysts every day.[12] The relationship between religion, morality, and civil rights laws at this basic level is not often discussed in the legal literature. But there is much to gain from such discussions: a rich intellectual tradition which transcends the often sterile legal realism of much contemporary legal scholarship;[13] a sense of historical and philosophical grounding

10. Zorach v. Clauson, 343 U.S. 312-13 (1952). It should also be noted that Justice Douglas' views concerning people who take their religion seriously appeared to change by the time he penned the following line in his concurring opinion in Lemon v. Kurtzman, 403 U.S. 602, 635-36 (1971): "One can imagine what a religious zealot, as contrasted to a civil libertarian, can do [as a teacher] with the Reformation or with the Inquisition." Since there was no evidence in *Lemon* that even one "religious zealot" was involved in the challenged program of educational assistance, the use of the term "religious zealot" to describe a teacher in a religiously-affiliated school says much about Justice Douglas' view of the relationship of religion, education, and civil rights. Although one historian has drawn the conclusion that "[o]nly civil libertarians, apparently, are fit teachers to be paid from the common treasury," MORGAN, THE SUPREME COURT AND RELIGION 111 (1972) *quoted in* Louisell, *supra* note 10, at 23, the implicit assumption is that commitment to strong religious beliefs is inconsistent with commitment to civil liberties.

11. *See, e.g.*, J.L. CUDDIHY, NO OFFENSE: CIVIL RELIGION AND PROTESTANT TASTE (1978). Judge John Noonan's remarks contrasting the respective approaches of Justices Joseph Story and Oliver Wendell Holmes also casts light on some of the reasons for this development. *Concluding Panel Discussion*, 5 J. Law & Relig. 240. *See also* sources cited at note 14, *infra*.

12. *See generally* H. BERMAN, THE INTERACTION OF LAW AND RELIGION (1974).

13. *See, e.g.*, Dougherty, *Puritan Aspirations, Puritan Legacy*, 5 J. Law & Relig. 109 (1988); Neuhaus, *Nihilism Without the Abyss: Law, Rights, and Transcendent Good*, 5 J. Law & Relig 53 (1988) and Noonan, *Principled or Pragmatic Foundation for the Freedom of Con-*

for the legitimacy of law and religion as a topic of public importance;[14] new conceptual frameworks with which to approach difficult questions of public policy;[15] and an appreciation for the fact that value-laden ideas are not religiously or morally neutral.[16]

But in order to appreciate the significant contributions which can be made by moral insights and religious believers in a democratic society which values civil rights, one must first study the significant contributions which have already been made. Reference to those contributions is essential if the legal community is to break out of the intellectually inconsistent rut in which it finds itself with respect to what might be called "private morality," religion, and the issue of religious freedom as a civil right.[17]

That the contributions of religious ideas and moral theories are not currently perceived as valuable by mainstream legal writers in the civil rights field is apparent from a simple reference to basic textbooks in constitutional law. Whereas page after page is devoted to commentary concerning the important role of freedom of speech in a free and

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science, 5 J. LAW & RELIG. 203 (1988). *See also* Sturm, *The "Path of the Law" and the Via Salutis: A Naturalistic Perspective*, in Symposium, *The Interaction of Law and Religion in the United States*, 26 CATH. U.L. REV. 17, 35 (1976).

14. On the role of religion and private morality in forming the attitudes of public leaders, *cf.* Berman, *Conscience and the Law: The Lutheran Reformation and the Western Legal Tradition*, 5 J. Law & Relig. 177 (1988) and Tierney, *Religion and Rights: A Medieval Perspective* in 5 J. LAW & RELIG. 163 (1988) *with, e.g.*, Remarks of President Ronald W. Reagan to the Ecumenical Prayer Breakfast, Dallas, Texas, August 23, 1984; Remarks of Walter F. Mondale to the International Convention of B'nai B'rith, Washington, D.C., September 6, 1984; Governor Mario M. Cuomo, "Religious Belief and Public Morality: A Catholic Governor's Perspective" delivered to the Department of Theology, University of Notre Dame, South Bend, Indiana, September 13, 1984; Representative Henry J. Hyde, "Keeping God in the Closet: Some Thoughts on the Exorcism of Religious Values from Public Life," delivered at the Thomas J. White Center on Law & Government, School of Law, University of Notre Dame, South Bend, Indiana, September 24, 1984; Senator Edward M. Kennedy, "Faith and Freedom," delivered at Tavern on the Green, New York City, before the Coalition of Conscience, September 10, 1984.

15. *Cf.* Cahill, *The Catholic Tradition: Religion, Morality, and the Common Good*, 5 J. Law & Relig. 75 (1988) and Cover, *Obligation: A Jewish Jurisprudence of the Social Order*, 5 J. LAW & RELIG. 65 (1988) *with, e.g.*, Remarks of Prof. T. Schaeffer, "Legal Ethics and the Good Client," Brendan Brown Lecture Series, Catholic University of America, Washington, D.C., October 3, 1986 (legal ethics); Destro, *The Family and Public Policy* in The Pope John XXIII Medical-Moral Research and Education Center, *The Family Today and Tomorrow* 113-129 (1985); Caplow, *The Loco Parent: Federal Policy and Family Life*, 1976 B.Y.U.L. REV. 709, 712.

16. *See* Gewirth, *Moral Foundations of Civil Rights Law*, 5 J. Law & Relig. 125 (1988), and Neuhaus, *Nihilism Without the Abyss: Law, Rights, and Transcendent Good*, 5 J. LAW & RELIG. 53 (1988).

17. Johnson, *Concepts and Compromise in First Amendment Religious Doctrine*, 72 CALIF. L. REV. 817 (1984).

democratic society,[18] relatively little attention is given to the similarly important role played by freedom of religion.[19] In the opinion of this writer, such neglect of basic principle goes a long way toward explaining the fact that the nature of religious liberty as a civil right of independent significance is not as developed as it should be.[20]

In the next few pages, therefore, it is appropriate that some attention be given to the manner in which the symposium papers and commentary contribute to the ongoing development of a constitutional and practical jurisprudence of law and religion.[21] Individually and collectively, they provide a wealth of information and ideas which can be used profitably in the study of law.

II.

The task of setting forth even the most basic summary of current constitutional theories regarding the "proper" relationship of law and religion is a daunting one. It will not be attempted here. Rather, the focus of these concluding comments will be on two key themes, each of which was addressed, directly or indirectly, by all of the symposium participants: the importance of morality, religion, and religious freedom as societal values having independent significance, and the role of religious values in the formation of public character and morality.

A. Religion, Morality and Religious Freedom as Values of Independent Significance.

The important role of speech in a democratic society is almost

18. *See, e.g.*, LOCKHART, KAMISAR, CHOPER & SHIFFRIN, CONSTITUTIONAL LAW 629 (6th ed. West 1986). ["The task is to formulate principles that separate the protected from the unprotected. But speech interacts with too many other values in too many complicated ways to expect that a single formula will prove productive."]

19. *Cf. id.* at 1027. ["This chapter concerns the 'religion clauses' of the first amendment . . . [and] attempts to accommodate [their] seemingly opposing demands . . ."]. It should be noted in passing that most of the Court's jurisprudence in the area of law and religion has been directed to explicating a "single formula" for resolving cases arising under the Religion Clauses: "separation of church and state." *Cf.* note 17.

20. *See, e.g.*, Destro, *Pastoral Politics and Public Policy: Reflections on the Legal Aspects of the Catholic Bishops' Pastoral Letter on War and Peace*, in PEACE IN A NUCLEAR AGE 356 (C. Reid ed. 1986) *reprinted*, 4 J. Law & Relig. 25 (1987); Destro, *Religious Freedom in the 1985 Supreme Court Term: Adrift on Troubled Waters*, 6 RELIGIOUS FREEDOM REPORTER 481 (1986). *See also* Johnson, *supra* note 17.

21. *See generally* H. BERMAN, THE INTERACTION OF LAW AND RELIGION (1974); Symposium, *The Interaction of Law and Religion in the United States*, 26 CATH. U.L. REV. 17 (1976). *See also* W. J. Wagner, *Reflections on the Symposium: An Ordered Inquiry Into the Relation of Civil Rights Law and Religion*, 5 J. Law & Relig. 3 (1988).

universally conceded. It was well-summarized by Alexander Meiklejohn:

> [What] is essential is not that everyone shall speak, but that everything worth saying shall be said. . . . Conflicting views may be expressed, must be expressed, not because they are valid, but because they are relevant. If they are responsibly entertained by anyone, we, the voters need to hear them. [To] be afraid of ideas, any idea, is to be unfit for self-government. Any such suppression of ideas about the common good, the First Amendment condemns with its absolute disapproval.[22]

Religion and what has been termed "private" morality, however, are perceived differently. Notwithstanding George Washington's laudatory views respecting the positive role played by religion and morality in the development of good government, there is no current consensus on the Supreme Court respecting the legitimacy of that role.[23] Because religion and religious freedom are generally perceived in the cases and by legal commentators as matters of individual (i.e. "private") rather than social concern, the legal conclusion is that government should take little or no active role in protecting and fostering them as important values.[24] Phrased another way, the dominant view

22. A. MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT, *reprinted in part in* LOCKHART, KAMISAR, CHOPER & SHIFFRIN, CONSTITUTIONAL LAW 684-86 (6th ed. West 1986).

23. In fact, it can be argued that a majority of the justices consider religious concepts of the common good to be illegitimate bases on which to rest public policy, especially where the result would conflict with their own opinions concerning the common good. Ever since the Supreme Court decided Walz v. Tax Comm'n, 397 U.S. 664 (1970), various members of the Court have been struggling to set out the boundaries of what they consider to be legitimate religious involvement in public affairs. In Lemon v. Kurtzman, 403 U.S. 602 (1971), for example, the argument that religious involvement in political debates was of questionable legitimacy had become what appeared to be an additional factor to be considered in judging the constitutionality of legislation challenged under the Religion Clauses of the first amendment. *See id.*, 403 U.S. at 622-24. Although the decision in McDaniel v. Paty, 435 U.S. 618 (1978), *rev'g*, Paty v. McDaniel, 547 S.W.2d 897 (Tenn., 1977), and Harris v. McRae, 448 U.S. 297 (1980) constitute a rejection of the most extreme applications of that argument, the theme that religion as an influence on the development of public policy is politically divisive and constitutional suspect runs like a strong undercurrent through the writings of Justices Brennan, Marshall, Powell, Stevens, and Blackmun. *See*, e.g., *Bowers v. Hardwick*, 106 S. Ct. 2841, 2854 (1986) (Blackmun, J., dissenting); Thornburgh v. American College of Obstetricians and Gynecologists, 106 S. Ct. 2169, 2187-88 (1986) (Stevens, J., concurring); Aguilar v. Felton, 105 S. Ct. 3232, 3239 (1985) (Powell, J., concurring); Harris v. McRae, 448 U.S. 297, 348 (1980) (Blackmun, J., dissenting); *id.* at 329 (Brennan and Marshall, J., dissenting). *See also* Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U. PITT. L. REV. 673 (1980); Gaffney, *Political Divisiveness Along Religious Lines: The Entanglement of the Court in Sloppy History and Bad Public Policy*, 24 ST. LOUIS U.L. REV. 205 (1980); Ripple, *The Entanglement Test of the Religion Clauses—A Ten Year Assessment*, 27 U.C.L.A. L. REV. 1995 (1980).

24. *See, e.g.*, Bender v. Williamsport Area School District, 475 U.S. 534 (1986); *vacating*

is government must be "neutral" with respect to all matters involving religion.[25]

The view that government policy must be separated from its religious or moral roots in both the development and implementation of public policy, however, ignores a central point made explicitly by Pastor Neuhaus, and implicitly by each of the other authors: "Law and laws are not self-legitimating."[26] By its nature, law is not neutral.

> Something can only be declared legitimate by reference to something else. . . . It is without meaning to speak of morally legitimate law except by reference to the good from which it is begotten and to which it is accountable. Theories which attempt to explain law and calculations of self-interest should assiduously avoid trying to distinguish between legitimate and illegitimate law. Of course, such theories can address what is *procedurally* legitimate, but they cannot address what is substantively or morally legitimate. They cannot, in short, distinguish between what is legal and what is right.[27]

To suggest, as one Supreme Court Justice has done recently, that "traditional Judeo-Christian values . . . cannot provide an adequate justification for [the law]" because "[t]he legitimacy of secular legislation depends instead on whether the State can advance some justifica-

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and remanding, 741 F.2d 538 (3d Cir. 1984); Estate of Thornton v. Caldor, Inc., 472 U.S. 703 (1985); Everson v. Board of Education, 330 U.S. 1 (1947); Lubbock Independent School District v. Lubbock Civil Liberties Union, 669 F.2d 1038 (5th Cir. 1982), *cert. denied*, 459 U.S. 1155 (1983); Brandon v. Board of Education of Guilderland Central School Dist., 635 F.2d 971 (2d Cir. 1981), *cert. denied*, 454 U.S. 1123 (1981). *But see* 20 U.S.C. § 4071(A) (Equal Access Act); Student Coalition for Peace v. Lower Merion School District Board of Directors, 776 F.2d 431 (3d Cir.1985). *compare* Wallace v. Jaffree, 472 U.S. 38, 105 S. Ct. 2479, 2496, 2504 (O'Connor, J., concurring in the judgment) ("The solution to the conflict between the religion clauses lies not in 'neutrality,' but rather in identifying workable limits to the Government's license to promote the free exercise of religion.")

25. *See* P. KURLAND, RELIGION AND THE LAW 18 (1962): Gianella, *Religious Liberty, Nonestablishment and Doctrinal Development—Part I, The Religious Liberty Guarantee*, 80 HARV. L. REV. 1381 (1967).

26. Neuhaus, *supra* note 16 at 53.

27. *Id.* (emphasis in the original). *See also* Gewirth, *supra* note 16 at 129. ("[L]aws are presented as means to ends, including the stable regulation of social conflicts and the maintenance of social peace. Morality, on the other hand, determines which ends are ultimately justified and which modes of regulation and of peace are worthy of being established and maintained. . . . Hence, it is through moral critiques that the rightness of such regulations is determined."). *Cf.* Faver, *Religion, Research and Social Work*, 12 SOCIAL THOUGHT 20, 22 (Summer, 1986):

> Scientific research produces knowledge that can, in a limited sense, inform the means of reaching valued ends. It cannot, however, determine or define the ends which should be valued, nor, for that matter, can it determine the morality and appropriateness of the means themselves. Thus, the "master stories" produced by scientific research are incomplete pictures of reality, and social work needs knowledge beyond that which science can provide.

tion for its law beyond its conformity to religious doctrine,"[28] is to beg the question. All law is based on moral principles,[29] and it is safe to assume that in most cases there will be those who would apply different moral principles to reach a different policy result. The important task is to determine whether such laws can be justified as consistent with both the rights of the individual and the community's best judgment concerning the common good.[30]

The point, of course, is that religion is an important source of the moral values upon which all law is based. It is certainly not the sole source of such values, as Professor Alan Gewirth's superb commentary on the logical relationship of morals to civil rights persuasively demonstrates,[31] but it is important in its own right nevertheless.

Thus, it should be abundantly clear that religion and morality play a role in society not unlike that of speech: they inform the debate, and provide the basis on which laws may be legitimated. Protection of religion and religious liberty must therefore be seen as an important social interest as well, not simply because they implicate the freedom of individuals, but because they play an important role in fostering the development and dissemination of the moral ideals upon which the

28. Bowers v. Hardwick, 106 S. Ct. 2841, 2854 (1986) (Blackmun, J., dissenting) (sodomy restrictions and the right to privacy). Justice Blackmun's views are a good example of the manner in which the terms "religion" and "religious" are equated with the concept of "private" morality in an attempt to distinguish them from that which is "secular" or "public." See note 5 *supra*. *See also* Thornburgh v. American College of Obstetricians and Gynecologists, 106 S. Ct. 2169, 2187-88 (1986) (Stevens, J., concurring) (protection of unborn from abortion would be an illegitimate adoption of a religious view of prenatal life); Harris v. McRae, 448 U.S. 297, 348 (1980) (Blackmun, J., dissenting) (abortion funding; "the Government 'punitively impresses upon a needy minority its own concepts of the socially desirable, the publicly acceptable, and the morally sound' "). *See also* CONSTITUTIONAL ASPECTS OF THE RIGHT TO LIMIT CHILDBEARING, REPORT TO THE UNITED STATES COMMISSION ON CIVIL RIGHTS (April, 1975) at 28-29 (arguing that "[a]n anti-abortion law or constitutional amendment would not pass [constitutional] muster" because of its basis in identifiable religious tradition).

29. *See* Dougherty, *supra* note 13 at 118-120 (discussing both religious values and the role of social contract theory); Gewirth, *supra* note 16 at 125-131; *Panel Discussion* (*Philosophical Perspectives* at 149 (Gewirth noting that "justice is primarily a moral, rather than a legal concept.")

30. *See* Cahill, *supra* note 15 at 77-80 (Discussing the complementary relationship between individual rights and the common good); Cover, *supra* note 15 at 69-73 (the jurisprudence of obligation); Noonan, *supra* note 13 at 212 (values reflective of the human good); Tierney, *supra* note 14 at 170 (of the 12th Century's "awareness of the balance between individual and community"). *Cf.* Letter of Thomas Jefferson to a Committee of the Danbury Baptist Association, (January 1, 1802), *reprinted in* A. KOCH & W. REDEN, THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON 332-33 (1944) ("[Man] has no natural right in opposition to his social duties"). *See also* Brown, *Individual Liberty and the Common Good—The Balance: Prayer, Capital Punishment and Abortion*, 20 CATH. LAW. 213, 220 (1974). *See generally* Harris v. McRae, *supra*, 448 U.S. at 319-20 (law is not unconstitutional because it appears to be in conformity with one or more religious traditions).

31. Gewirth, *Moral Foundations of Civil Rights Law*, 5 J. Law & Relig. 125 (1988).

law itself is based. An "absolute" separation[32] of law from religion would, as Washington noted, remove an essential support upon which rest "the security for prosperity, for reputation , [and] for life."[33]

B. The Role of Religious Values in the Formation of Public Character and Morality.

If one message is clear from the symposium papers taken as a whole, it is that religious and moral values play an essential role in the formation of public character, morality, and policy. Recognition of this fact by the legal community, particularly legal scholars and judges, would, in this writer's opinion, go a long way toward eliminating the rather fundamental suspicion of matters religious which appear in post-1948 cases and commentary.

Perhaps the most obvious place to start clearing up this suspicion is to encourage greater scholarly attention to the contribution of religion to the protection of religious liberty itself. Professor Brian Tierney's article points out, for example, that "in Medieval Christendom, the resistance of the church always prevented national monarchies from congealing into theocratic despotisms in which all individual rights would have been extinguished."[34] Judge John Noonan's paper recounts the contributions of early theologians, St. Thomas Aquinas, Baruch Spinoza, and Roger Williams, to the development of a "principled" as well as a "pragmatic" vision of freedom of conscience.[35] And in the American experience, the influence of religious dissent in the development of generalized concepts of religious liberty—including freedom of conscience—is unmistakable.[36]

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32. Although discussed at great length in legal commentary, the concept of "absolute" separation is chimerical. The Jeffersonian metaphor of a "wall of separation between church and state," which first appeared in his famous Letter to the Danbury Baptists, *see* note 30, *supra*, is, in the words of the Supreme Court, a "useful figure of speech," but it does not provide "a wholly accurate description of the practical aspects of the relationship that in fact exists between church and state." The "wall" is, in fact, only a "blurred indistinct and variable barrier depending on all the circumstances of a particular relationship." Lynch v. Donnelly, 465 U.S. 668, 104 S. Ct. 1355, 1362 (1984), *quoting* Lemon v. Kurtzman, 403 U.S. 602, 614 (1971).

33. *Cf.* KELSEN, THE PURE THEORY OF LAW (M. Knight trans. 2d ed. 1967) (on law as a coercive order); Machiavelli, *Discourses Upon the First Ten Books of Titus Livy*, Book One, XI-XII, in THE PRINCE AND SELECTED DISCOURSES: MACHIAVELLI 104 (D. Donno trans. 1966) ("Where a fear of God is lacking, the state must either fail or be sustained by a fear of the ruler which may substitute for the lack of religion.")

34. Tierney, *supra* note 14 at 167-168.

35. Noonan, *supra* note 13 at 208-210.

36. *See, e.g.*, Larson v. Valente, 456 U.S. 228 (1982) (Unification Church); Thomas v. Review Board of the Indiana Employment Security Division, 450 U.S. 707 (1981) (Jehovah's Witnesses); Wisconsin v. Yoder, 406 U.S. 205 (1972) (Amish); Sherbert v. Verner, 374 U.S.

Beyond the contribution of religious ideals to freedom of conscience is the immense contribution of religion and morality to the development of laws and legal systems which undertake to protect both the interests of the individual and the common good. Not surprisingly, every moral viewpoint summarized in the symposium proceeded, not from a generalized concept of "rights," but from the perspective of duty.[37] That such an approach could have a significant impact on current legal thinking in many areas was succinctly pointed out by Professor Cover:

> What have these stories [of Sinai] to do with the ways in which the law languages of these respective legal cultures are spoken? Social movements in the United States organize around rights. When there is some urgently felt need to change the law or keep it in one way or another a 'Rights' movement is started. Civil Rights, the right to life, welfare rights, etc. The premium that is to be put upon an entitlement is so coded. When we 'take rights seriously' we understand them to be trumps in the legal game. In Jewish law, an entitlement without an obligation is a sad almost pathetic thing.[38]

In contemporary American civil rights discourse, the concept of duty is not well-developed, even though acceptance by some of their social duties is central to the enjoyment of many rights by others.[39] Perhaps the best example of this relationship of right and duty is the

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398 (1963) (Seventh-Day Adventists); Torcaso v. Watkins, 367 U.S. 488 (1961) (nonbelief); United States v. Ballard, 322 U.S. 78 (1944) ("I Am"); People ex rel Ring v. Board of Education of District 24, 245 Ill. 334, 92 N.W. 251 (1910) (Catholic). *See* generally J. Madison, "Memorial and Remonstrance Against Religious Assessments" (1785) *quoted in*, Everson v. Board of Education, 330 U.S. 1, 63-72 (1947) (Rutledge, J., dissenting) (noting the need to accommodate more than the views of "Quakers and Mennonists"); Little, *Thomas Jefferson's Religious Views and Their Influence on the Supreme Court's Interpretation of the First Amendment*, 26 CATH. U.L. REV. 57 (1976); M.MALBIN, RELIGION AND POLITICS (1978).

37. Berman, *supra* at 196-199 (Oldendorp's view that the "magistrates are ministers [i.e. servants] of the laws" with a duty to do equity (*Billigkeit*) in every case); Cahill, *supra* at 77 (legally protected rights do not derive from government, but inhere in human nature and community; Cover, *supra* 67-69 (*mitzvah*; right follows obligation); Dougherty, *supra* at 119-120 (purpose of social contract theory was the grounding of rights and obligations); Gewirth, *supra* at 135 (the "Principle of Generic Consistency: Act in accord with the generic rights of your recipient as well as of yourself.") and Panel Discussion *Philosophical Perspectives*, at 157-158 (differentiating between "strict" and "nonstrict" (supererogatory) duties); Neuhaus, *supra* at 62 ("Democracy becomes a political community worthy of moral actors only when we engage the question of the good."); Noonan, *supra* at 210 (Williams' view that freedom of conscience is the manifestation of the duty of every Christian to follow the will of God as manifested by Jesus Christ); Tierney, *supra* at 174 ("a concern for the moral integrity of human personality led to the first stirrings of natural rights theories").

38. Cover, *supra* at 67.

39. Professor Gewirth described this as a "strict" duty. *Panel Discussion: Philosophical Perspectives*, at 157-158.

concept of "equal protection of the laws." If, as Neuhaus puts it, the Supreme Court's current jurisprudence of civil rights holds that "human rights are coterminous with the individual's ability to claim and exercise such rights,"[40] the law is in a difficult position indeed. By its very terms, the equal protection clause of the fourteenth amendment[41] imposes a duty upon government to provide protection on an equal basis.

While it is certainly possible to see such a governmental duty[42] in terms of "rights," it would be difficult to justify describing a right to equal protection in the manner in which Professor Cover described rights generally: as "trumps in the legal game."[43] By definition, those who most often attempt to invoke the protection of the legal guarantee of equal protection are precisely the "discrete and insular minorities" who are least able to enforce their claims without governmental assistance. They hold no trump cards.

A jurisprudence of equal protection, like other topics discussed in law and legal training which might be informed by a duty model,[44] would not utilize the concept of "right" in the manner of a trump card.[45] Instead, it would proceed from the assumption that the duty of equal protection is part and parcel of the " 'common good [which is] to be shared by all members of the body politic,' "[46] not because

40. Neuhaus at 57 (Referring to Roe v. Wade, 410 U.S. 113 (1973). *Cf.* Prof. Gewirth's response to a question concerning the existence of duty to those who cannot benefit from it. *Panel Discussion: Philosophical Perspectives*, at 159-160. *Cf.*, Bowen v. American Hosp. Ass'n, 476 U.S. 610 (1986); Brophy v. New England Sinai Hospital, 398 Mass. 417, 497 N.E.2d 626 (1986).

41. U.S. Const. Amend. XIV. By its terms, the equal protection clause applies only to the several states, but the Supreme court has construed the due process clause of the fifth amendment, U.S. Const. Amend. V, as including "an equal protection component." *See, e.g.*, Weinberger v. Wiesenfeld, 420 U.S. 636, 638 n.2 (1975); Schlesinger v. Ballard, 419 U.S. 498, 500 n.3 (1975); Bolling v. Sharpe, 347 U.S. 497 (1954). *See generally* Karst, *The Fifth Amendment's Guarantee of Equal Protection*, 55 N.C.L. REV. 541 (1977); J. NOWAK, R. ROTUNDA & J. YOUNG, HANDBOOK ON CONSTITUTIONAL LAW 516-19 (1978).

42. The duty is also imposed by statute on certain classes of individuals for the benefit of others deemed to be in need of protection. *See, e.g.*, Age Discrimination in Employment Act, 29 U.S.C. § 621 (1982); The Education for All Handicapped Children Act of 1975, 20 U.S.C. § 1400 (1982); Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (1982) (prohibiting discrimination in federally funded programs against those with disabilities); Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.* (prohibiting discrimination in employment on the basis of race, sex, national origin, and religion).

43. Cover, *supra* at 67.

44. Family law, the law of estates and trusts, and social welfare policy are good examples.

45. *See, e.g.*, Local No. 93 v. City of Cleveland, 106 S. Ct. 3063 (1986); Local 28 of the Sheet Metal Workers' International Ass'n v. Equal Employment Opportunity Comm'n, 106 S. Ct. 3019 (1986); Wygant v. Jackson Board of Education, 476 U.S. 267 (1986); Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561 (1985).

46. Cahill, *supra*, at 76 quoting John XXIII, *Pacem in Terris* (Peace on Earth).

there is an abstract "right" to such treatment, but because it is the only formulation of the concept of equality before the law which "touches the whole man, the needs both of his body and of his soul."[47]

The benefits and applications of an interdisciplinary approach to the problems of law and other disciplines[48] can be multiplied almost endlessly. Analysis of equal protection from a duty model is but one example. The practical utility of the rich traditions of religion and philosophy in the development of legal policy are amply illustrated by the papers of Professors Cover, Gewirth, and Noonan, each of which provides concrete examples of the manner in which they can be applied in a contemporary legal setting.[49]

The point, of course, is the same as that made at the beginning of these comments: that law and religion are related in fundamental ways which are directly relevant to the formulation and study of the law. It is the hope of those who planned and funded the Symposium that interdisciplinary interest in the topic of law and religion will grow as the academic community begins to appreciate the substantial

47. *Id. Cf.*, Gewirth, *supra* at 144-147 (discussing the difficult problem of preferential treatment under the civil rights laws and its consistency with the Principle of Generic Consistency) and *Panel Discussion: Philosophical Perspectives*, at 151-52 (same, indicating that the civil rights laws are directed toward what is [sic] claimed to be submerged groups, especially but not restricted to blacks and women."). *See also* Destro, *Equality, Social Welfare, and Equal Protection*, 9 HARV. J.L. & PUB. POL. 51 (1985) (arguing that the civil rights laws are focused on individuals rather than groups, and that a balance between the related, but distinct, concepts of "civil rights" and "social welfare" can be achieved through a proper interpretation of the duty of equal "protection" imposed on government by the fifth and fourteenth amendments to the Constitution of the United States).

48. *See, e.g.*, Faver, *Religion, Research and Social Work*, *supra* note 27, at 22-23.

> [I]f we are willing to go beyond the scientific method, to give up our faith in science alone, we will discover that the great religious traditions, though much abused, have within them the seeds of faith that is more adequate for our task. We will find alternative centers of value and images of power to guide our search for more adequate explanations of reality. Our religious traditions . . . force us to recognize our finite human condition and the limitations of human knowledge—realizations that free us to consider multiple types and sources of truth in our search for adequate "master stories" or explanations of reality (*see* Imre, *The Nature of Knowledge in Social Work*, 29 SOCIAL WORK 41-45 (1982)). Such a faith—with a central value of justice, a reliance on the power of love rather than force or manipulation, and an openness to multiple ways of knowing—will affect every stage in the process of knowledge development for the profession. It will affect, more specifically, our formulation of problems for study, our methods of seeking answers to questions, and our interpretations of the findings from our search.

49. Cover, *supra* at 72-73 (discussing Estelle v. Williams, 425 U.S. 501, 504-05 (1976) and the "right" of a prisoner to appear in the courtroom without prison garb); Gewirth, *supra* at 144-147 (affirmative action and the Principle of Generic Consistency); Noonan, *supra* at 203-204 (discussing the trial of St. Joan of Arc).

impact it can have on the direction of law and policy.[50] The practical need for such research and cooperation is great, and the theoretical questions are virtually limitless. Review of "The Religious Foundations of Civil Rights Law" is an excellent place to begin.

50. *See, e.g.*, Brown v. Board of Education, 347 U.S. 483, n.11 (1954) (psychological evidence as basis for constitutional holding that "separate is inherently unequal").