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Introduction

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SYMPOSIUM

INTERACTION OF LAW AND RELIGION IN THE UNITED STATES

INTRODUCTION

*Leslie Steven Rothenberg**

The commercial tackiness of the Nation's Bicentennial celebration is thankfully behind us, but the occasion of its celebration prompted many thoughtful reexaminations of our past and visions of our future. The Symposium which follows is the result of an interdisciplinary effort to examine the historical interaction of law and religion in the United States. While not intended to provide a comprehensive view of this relationship, these three papers examine the American experience from three different perspectives. The papers were originally presented at the Second Annual Program of the Section on Law and Religion of the Association of American Law Schools, which met in Washington in December 1975.

The Symposium begins with a provocative topic discussed in an equally thought-provoking paper by Professor David W. Louisell: *Does the Constitution Require a Purely Secular Society?* In his paper, Professor Louisell probes the question raised by Mr. Justice Rehnquist in his dissent to the Supreme Court's decision in *Meek v. Pittenger*¹ as to whether the establishment clause of the first amendment requires not only religious neutrality on the part of government, but also judicial support for a purely secular society. This is a development which Professor Louisell views as not only "tilting the Constitution against religion," but also "literally turning the religion clause on its head."

Professor Louisell is Elizabeth Josselyn Boalt Professor of Law at the University of California, Berkeley, School of Law. He is co-author of two widely

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1. 421 U.S. 349 (1975).

used casebooks on evidence² and civil procedure,³ and is the author of other books⁴ and many scholarly articles.⁵ As a member of the American Law Institute, Professor Louisell has long been concerned with the underlying values found in law, medicine, and religion.

The second of the three papers is the product of Professor Douglas E. Sturm. His thoughtful paper, *The "Path of the Law" and the Via Salutis: A Naturalistic Perspective*, examines the writings of two American legal philosophers, Oliver Wendell Holmes, Jr. and Thomas I. Emerson, and two American religious philosophers, Josiah Royce and Alfred North Whitehead, as a means of exploring the interrelation of legal and religious theories in the development of American jurisprudence. Professor Sturm finds a very close historical and doctrinal relationship which he feels is worthy of continued nourishment.

Professor Sturm is the Presidential Professor of Religion and Political Science at Bucknell University in Lewisburg, Pennsylvania. After receiving his Ph.D at the University of Chicago, Professor Sturm was a Fellow at the Harvard Law School in 1964-65, where he studied legal philosophy and jurisprudence under Professor Lon Fuller. (He subsequently wrote an article for the Stanford Law Review on Professor Fuller's theory of law.⁶) Professor Sturm has been a study fellow for the Council of Learned Societies, a director of the Institute for the Study of Human Values, and a cross-disciplinary fellow of the Society for Religion in Higher Education. His scholarly interests extend over three disciplines: legal philosophy, political science, and religion.

The concluding paper of this Symposium deals with a topic largely unappreciated by modern legal scholars of constitutional law: *Thomas Jefferson's Religious Views and Their Influence on the Supreme Court's Interpretation of the First Amendment*. From the faculty of that great university which

2. D. LOUISELL, D. KAPLAN & J. WALTZ, *CASES AND MATERIALS ON EVIDENCE* (3d ed. 1976).

3. D. LOUISELL & G. HAZARD, *CASES AND MATERIALS ON PLEADING AND PROCEDURE, STATE AND FEDERAL* (3d ed. 1973).

4. See, e.g., A. EHRENZWIEG & D. LOUISELL, *JURISDICTION IN A NUTSHELL—STATE AND FEDERAL* (3d ed. 1973); D. LOUISELL & H. WILLIAMS, *MEDICAL MALPRACTICE* (1969); D. LOUISELL, *TRIAL OF MEDICAL MALPRACTICE CASES* (1960).

5. See, e.g., Louisell, *The Burdick Proposal: A Life-Support Amendment*, 1 HUMAN LIFE REV. 9 (1975); Louisell, *Euthanasia and Biathanasia: On Dying and Killing*, 22 CATH. U.L. REV. 723 (1973); Louisell, *Abortion, the Practice of Medicine and the Due Process of Law*, 16 U.C.L.A.L. REV. 233 (1969); Louisell, *The Procurement of Organs for Transplantation*, 64 NW. U.L. REV. 607 (1969); Louisell, *The Man and the Mountain: Douglas on Religious Freedom*, 73 YALE L.J. 975 (1964); Louisell & Jackson, *Religion, Theology, and Public Higher Education*, 50 CALIF. L. REV. 751 (1962).

6. Sturm, *Lon Fuller's Multidimensional Natural Law Theory*, 18 STAN. L. REV. 612 (1966).

Jefferson founded, the University of Virginia, David Little, Professor of Religious Studies, provides a glimpse into Jefferson's contribution to the growth of American law. The architect of Monticello was also the originator of the phrase, "wall of separation between church and state," and his religious views were of considerable importance to the United States Supreme Court in its late 19th-century interpretations of the first amendment's "free exercise" clause. This influence was particularly evident in the Court's decisions in *Reynolds v. United States*⁷ and *Davis v. Beason*,⁸ the Mormon polygamy cases which Professor Little analyzes in his paper.

Holder of a doctor of theology degree from Harvard University, Professor Little studied legal philosophy at the University of Frankfurt and ethics at the University of Marburg in Germany. He has been a Kennedy Traveling Fellow at Harvard and a Morse Fellow at Yale, and had served, prior to arrival at the University of Virginia in 1971, on the faculties of both the Harvard and Yale Divinity Schools. Professor Little is the author of a book which provides indispensable insights into the relationship of law and religion in prerevolutionary England.⁹

The Association of American Law Schools Section on Law and Religion seeks to encourage such scholarly inquiry and wishes to express its appreciation to both the scholars whose work is set out here and to the Catholic University Law Review for its interest in publishing this Symposium.

7. 98 U.S. 145 (1878).

8. 133 U.S. 333 (1890).

9. D. LITTLE, RELIGION, ORDER, AND LAW: A STUDY IN PRE-REVOLUTIONARY ENGLAND (1969).