

---

## Church and State in an Age of Globalization

Robin W. Lovin

Follow this and additional works at: <https://via.library.depaul.edu/law-review>

---

### Recommended Citation

Robin W. Lovin, *Church and State in an Age of Globalization*, 52 DePaul L. Rev. 1 (2002)  
Available at: <https://via.library.depaul.edu/law-review/vol52/iss1/2>

This Article is brought to you for free and open access by the College of Law at Via Sapientiae. It has been accepted for inclusion in DePaul Law Review by an authorized editor of Via Sapientiae. For more information, please contact [digitalservices@depaul.edu](mailto:digitalservices@depaul.edu).

# CHURCH AND STATE IN AN AGE OF GLOBALIZATION

*Robin W. Lovin\**

## INTRODUCTION

Harold Berman began his DePaul Church/State Lecture in 1994 with an observation about the way these discussions are usually framed. He said, “We usually think of the relationship between law and religion from a legal perspective and only rarely if at all from a religious perspective . . . . We speak often of what law requires of religion and only rarely of what religion requires of law.”<sup>1</sup> Berman proposed we turn the question in the other direction, moving from the requirements of religion to the shape of law, rather than from the requirements of law to the permitted scope of religious activity.

In that lecture, Berman also recognized something that most of us are now, eight years later, only beginning to understand: Questions about religion and law, or about law and religion, whichever way you pose them, take on new dimensions and new urgency when you see them in a global perspective. Professor Berman spoke about finding “a common spiritual faith that will support the emerging common law of an emerging world community.”<sup>2</sup> We have learned, since 1994, to call that process “globalization.” Having become more familiar with it, we may be less optimistic than Berman. He was ahead of his time, however, in recognizing its pervasiveness and importance.

In this Article, I want to continue Berman’s inquiry into how the process of globalization is changing our understanding of religion and its relationship to law and other centers of authority. I will proceed in three steps. First, I want to explore what it is about new global realities that leads us to pose questions about church and state or religion and law in new ways. I will argue a key effect of globalization is to reduce the importance of the state and the state’s law in relation to

---

\* Cary Maguire University Professor of Ethics, Southern Methodist University. This Article was originally delivered as the Nineteenth Annual Lecture of the Center for Church/State Studies at DePaul University.

1. Harold Berman, *Law and Logos*, 44 DEPAUL L. REV. 143 (1994).

2. *Id.* at 144.

other social forces and powers. The state is still very important and powerful, but its role is being reduced, which reverses the direction of things since the beginning of the modern era. One reason why we now think to ask what religion requires of law is that a fundamental change is happening in the role of the state. That means we also have to develop new assessments of a multiplicity of institutions, authorities, and values that have previously been subordinated to the authority of the state.

The second part of this essay will attempt to develop a model based on the plurality or diversity of authority in a global society. To understand how authority works in a pluralistic context, I will draw on several ideas from the history of Western Christian thinking about these matters. While globalization is new, the problem of multiple authorities and overlapping systems of law was the normal state of affairs prior to the emergence of the modern sovereign state. Theologians and church leaders developed normative ideas about how to resolve problems posed by multiple authorities, and those ideas have had a continuous development in Christian ethics and moral theology that continues today. While they have been neglected in most discussions of what law requires of religion, they have new relevance in an age of globalization.<sup>3</sup>

Finally, we will return to the question Berman originally posed: What does religion require of law? In this concluding section, we will consider the *rule of law* as a religious idea, embodying norms of interdependence and mutual restraint that are essential not only for the state, but for all social institutions, including the church.

## II. GLOBALIZATION

If we ask why our thinking usually moves from law to religion, and rarely from religion to law, the historical answer is: That is how the modern West has defined the role of law. Ever since we took the power to raise an army away from local barons and charismatic hermits and gave it exclusively to the sovereign state, the state's law has provided the framework within which persons and institutions can pursue their aims and goals. One result of this has been the privatiza-

---

3. There are, of course, very large questions about how and whether those ideas have parallels in other religious traditions and how they might work themselves out differently in cultural environments where other traditions are dominant. However, the fact that the global religious environment is complex does not excuse us from thinking about how the Western Christian tradition, which is more familiar to most of us, might lead us to approach the problems of globalization. At some point, a study in comparative religious ethics will be essential to completing the investigation I am beginning here. In the meantime, an exploration of Christian ethics and moral theology is sufficiently ambitious.

tion of religion and religious claims. Although religion may be uniquely convincing and motivating for individuals,<sup>4</sup> it becomes, for legal purposes, simply another individual preference, which persons are free to pursue as they like within the framework law provides.

Religious people appropriately resist this interpretation of their faith, but it is important to understand that the privatization of religion is not the result of some particular bias in modern law against religion. It is not so much that the law denies the truth of religious claims and says religious claims are, after all, *only* individual preferences. The law—or at least the kind of law that is made by modern states—simply does not know how to treat *any* idea or commitment as anything else.<sup>5</sup>

The conceptual world of the modern state is a fairly simple place. Its power is such that it has to deal internally only with a variety of private persons and institutions whose plans can be treated simply as preferences and whose pursuit of those preferences can be regulated by law. Externally, in the international arena, the state likewise ensures that it confronts only sovereign states like itself. It can protect itself from individuals who want to project their private plans across its borders, and the laws that other states make do not touch its own legal framework, which stands in sovereign isolation.

The privatization that accompanied the development of modern law effected a profound change in the Western understanding of ethics, law, and politics. At the beginning of Western philosophy, Aristotle understood *politics* as continuous with *ethics*.<sup>6</sup> That is to say, the decisions people make about politics and laws are similar to the decisions they make about their own lives. They encompass *goals*, which set out an understanding of the good life, and *rules*, which set out the right way to pursue the goals. Goals are essential because without them there cannot be a normative understanding of what the person or the community is trying to be. Rules are essential to keep people and groups from pursuing goals in ways that turn out to be self-defeating,

---

4. See CLIFFORD GEERTZ, *THE INTERPRETATION OF CULTURES* 87-125 (1973).

5. My point is simply that modern secular law is not inherently anti-religious. It is quite possible, as a matter of historical fact, that an important reason for the creation of modern states and secular law was to restrain civil conflicts resulting from religious differences, and that history may have left a deep imprint on how law deals with all deep convictions and commitments. For a more nuanced discussion of how the law does or does not distinguish religion from other kinds of beliefs and commitments, see Michael McConnell, *The Problem of Singling Out Religion*, 50 DEPAUL L. REV. 1, 42-47 (2000).

6. ARISTOTLE, *Nicomachean Ethics*, in *THE BASIC WORKS OF ARISTOTLE* 93 (Richard P. McKeon ed., 1941).

in ways that undermine other goals, or in ways that sacrifice the good of others for the good of one individual.

We see this classical Aristotelian system reproduced and systematized in Thomas Aquinas' treatise on law.<sup>7</sup> Aquinas locates the law that human authorities make in a comprehensive framework of natural and spiritual laws, which regulate the behavior of human beings and the natural world alike. But what is characteristic of human laws, the legitimate ones anyway, is that they are designed to regulate behavior in pursuit of the common good. A law that is not ordered toward the common good is not a law, and the one who promulgates such a law is not a legitimate ruler, but a tyrant.

Early modern philosophers, reflecting on the emergence of the modern state, understood these matters quite differently. The authority of law rests simply on the power of the ruler and is quite independent from the goals the law might serve. In fact, goals become increasingly irrelevant to the philosophical understanding of law. Modern moral theory summarizes this change in the sharp distinction between *deontological* ethics, in which actions and choices are justified by conformity to a rule, and *teleological* ethics, in which actions and choices are justified by the goals toward which they are directed.<sup>8</sup> Once the sharp distinction between rules and goals is in place, everyone, from first year philosophy students to professors of ethical theory, will have a hard time figuring out how to classify Thomas Aquinas, who seems to shape his rules by goals, and yet, at the same time, limits the pursuit of goals by his rules. The distinction, however, fits quite well with the modern state, in which law provides a framework of rules in which persons and institutions pursue privately chosen goals. Except in the fairly elevated reaches of constitutional law, goals are largely irrelevant once the law is enacted, and law says nothing about the choice of goals, except insofar as it says what you cannot do while you are trying to reach them.

In short, the power of the modern state has been marked by the rise of deontological systems of law and the privatization of goals and goods. We think from law to religion because that is how the modern world has taught us to think. We also think from law to business, from law to ethnicity, from law to education, and even from law to family for the same reason. Privatization, the reduction of all sorts of ideas, goals, relationships, and systems of authority to the status of preferences, is essential to the concept of the modern state. The very fact

---

7. 2 THOMAS AQUINAS, *SUMMA THEOLOGIAE* 993-1119 (English Dominican Fathers trans., 1981).

8. See CHARLES TAYLOR, *SOURCES OF THE SELF* 53-90 (1989).

that we call it into question and can sensibly ask what religion might require of law is an indication that a basic change may be underway.

Religious leaders and thinkers have known for a long time that the model of individual preference is not a particularly good way to describe the role religious faith plays in the lives of its adherents. In recent years, we have concentrated on the social costs of privatized religion, suggested by Robert Bellah and his colleagues,<sup>9</sup> or the discounting of religious commitment documented by Stephen Carter.<sup>10</sup> Those problems are important, but the attention we have given to the specific problems of privatized religion in America may have obscured a larger movement in which the privatization that modern law imposes on all sorts of beliefs and institutions is losing its grip globally, and across a far broader swath of life than religion alone.

When we hear people talk about “globalization,” whether in fear or in hope, we tend to think first of changes that result from the activities of multinational corporations, which can no longer be held accountable to a single, sovereign, legal framework. To that extent, corporate “preferences” are no longer “private.” Multinational corporations have the power to impose goals on individuals and on states, and they can pursue them in ways such that it begins to make sense to ask: What does multinational business require of the law?

These new economic powers lead, directly or indirectly, to dramatic cultural changes in which other powers assert themselves as more than preferences.<sup>11</sup> Workers may feel disenfranchised by the multinational corporation, but the demand for their labor creates mass movements of people at the upper and the lower ends of the economic and educational spectrum that disrupt what has previously been an exclusive relationship between one private citizen and one sovereign state. The global experience that was once confined to a few cosmopolitans and missionaries is now common to a large number of technical specialists and unskilled workers, and the institutional and cultural continuity across borders that once was found only in the church is now provided, in many cases, by international corporations. Even for those who do not actually move from country to country to follow jobs and opportunities, globalization of commerce creates a new, global culture in which new technologies, ideas, and entertainment circulate freely,

---

9. ROBERT N. BELLAH ET AL., *HABITS OF THE HEART: INDIVIDUALISM AND COMMITMENT IN AMERICAN LIFE* 232-49 (1985).

10. STEPHEN CARTER, *THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION* (1993).

11. *See generally* THOMAS L. FRIEDMAN, *THE LEXUS AND THE OLIVE TREE* 194-211 (2000). Journalists have perhaps been quicker than economists to track the cultural effects of globalization.

so it is increasingly difficult to distinguish a teenager's bedroom in a suburb of Dallas, Texas from one in Moscow or Kiev. All of these changes that follow from the globalization of business and communication make it more difficult for states to treat ideas, goals, and commitments simply as the preferences of individuals.

The modern state can no longer operate on the simple model that reduces everyone's goals and commitments to personal preferences regulated by a neutral, deontological framework of rules that tells everyone how to pursue those preferences within a particular set of borders. Indeed, as we have learned since September 11, 2001, the modern state can no longer assume that the only important entities it confronts beyond its borders are other sovereign states. We usually assume states that become subject to the goals of international corporations are simply weak states, lacking the economic or political strength to assert their sovereignty in ways the model says sovereignty is supposed to work. We are discovering, however, that even in the most basic area of national security, sovereignty is not what it used to be.

In short, while scholars of religion have been worried about the privatization that makes it difficult to establish public correlates for the authority and power faith has in our personal lives, recent events have seriously undermined the modern system of law and sovereignty that made such privatization plausible. At the end of the nineteenth century, a well-informed observer would have said that privatization was, more or less, complete in the Christian West and awaited only its inevitable extension to other religions, regions, and cultures. By the end of the twentieth century, something quite different has happened. Privatized areas of life have been reclaiming authority and refusing to play by the legal rules established by the modern state. Business plans, ethnic loyalties, technical skills, academic competence, and even the power of unskilled labor, all refuse reduction to private preferences and demand recognition on their own terms.

It sometimes seems religion alone remains "privatized" in the sense I use that term here. To that extent, Stephen Carter's complaint that we are a "culture of disbelief" makes sense.<sup>12</sup> Religious claims may be uniquely disadvantaged in Europe and North America, because we have lived with their privatization for so long that we have a hard time conceiving them in any other way.

That is, in fact, what makes many people a little nervous about Berman's question: What does religion require of law? Being so ac-

---

12. See CARTER, *supra* note 10.

customed to the modern arrangement in which the state's law sets the parameters for religious activity, we assume the alternative is a reversal in which religion sets the parameters for law. Religion is not privatized in Iran or Saudi Arabia, and the Hindu nationalists in India do not see it as a matter of individual choice. Those models do not commend themselves to most people in Western Europe or North America. What else is possible?

### III. PLURALISTIC AUTHORITY

Western thinking about law and religion predates the modern relationship between the two that has become so familiar to us. The choices are not limited to making religion the sole authority or reducing it to a private preference. In Europe, religion gave rise to an idea of law that contributed to a flourishing, pluralistic, institutional environment. Law provided the regularity and order that allowed multiple legal systems to coexist.

Systems of law existed before the modern state came into being. Indeed, the first of them, after the collapse of Roman authority in Western Europe, was the system of canon law that the church created in the eleventh century. After that, other systems developed and coexisted in various states of systematization and coordination. Alongside the church's law was the king's law, the customary law of the locality, and the rules of guilds and merchants' associations.<sup>13</sup> University authorities could punish scholars and townspeople alike with fines, banishment, or imprisonment for a wide range of infractions.<sup>14</sup>

That period in Western history provides some insight into the situation that is emerging as the process of globalization advances. In a global economy and culture, international law, free trade zones, regional human rights courts, and environmental treaties acquire increasing authority, not just in relations between sovereign states, but also in the practical decisions of individuals who are planning business ventures, seeking employment, or promoting ideas. Ethnic groups and religious movements likewise have to be taken into account, because people who move around in this global environment take their ethnic identities and their religious observances with them. Islamic law used to be a matter for comparative religion classes, if anybody knew about it at all. Now it determines, in part, how things are run in the high school cafeteria.

---

13. HAROLD BERMAN, *LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION* 85-86 (1983).

14. See ALAN COBBAN, *THE MEDIEVAL ENGLISH UNIVERSITIES* 67-72 (1988).



This pluralization of authority will only increase as globalization accelerates. Management of the environment and control of disease will require effective and enforceable international rules. Open labor markets will make skilled workers less dependent on regulations legislated in their home countries and more strictly accountable to the standards their professions uphold internationally. The global communications revolution will offer states a pointed choice between ideological conformity accompanied by stagnation, or progress accompanied by dissent. The world we are moving into will look less like the present system of state law and private preferences, and more like the jumbled, conflicted, energetic world of Europe on the brink of the modern age.

While legal theory offers few resources for thinking about a future shaped by multiple independent authorities, Christian ethics and moral theology provides a number of models from which we might begin to craft a more comprehensive understanding of law and authority in a global context. These models originated precisely from the effort of theologians and church leaders to deal with the emerging modern state as secular rulers brought an end to the overlapping jurisdictions and pluralistic systems of law and threatened the independent authority of the church. These theological reflections have been kept current by centuries of adjustment to secular law and the secular state, and they have been sharpened in the twentieth century by the challenges that totalitarian states have posed to the independence and survival of religious institutions. However, to make use of this history today, we need to explore its implications beyond the specific questions of church and state to see a larger picture of society as a whole, shaped by the relationships between its various institutions and authorities.<sup>15</sup>

Martin Luther (1483-1546) and the Protestant reformers began by clearly separating different forms of authority appropriate to the church and to the "temporal authority."<sup>16</sup> Luther's insight was that the temporal authority has quite specific functions to perform, especially providing security and maintaining order. The right question to ask is not how good or pious the secular ruler might be, but how well

---

15. See 1 ERNST TROELTSCH, *THE SOCIAL TEACHING OF THE CHRISTIAN CHURCHES* 31-34 (1992).

16. MARTIN LUTHER, *Temporal Authority: To What Extent It Should Be Obeyed*, in MARTIN LUTHER'S BASIC THEOLOGICAL WRITINGS 678 (Timothy R. Lull ed., 1989). It should be clear by now that we cannot read Luther's treatise as an essay on the problem of church and state as we conceive it today. We should think of him instead as dealing with a common problem in his time, sorting out problems of jurisdiction where two different authorities make overlapping claims.

he is performing those specific functions.<sup>17</sup> Luther characteristically overstates his point, giving the temporal ruler *unlimited* authority over life and property and restricting the church exclusively to matters of belief.<sup>18</sup>

Jean Calvin (1509-1564) further developed Luther's distinction and gave a more positive account of the uses of law in both religious and secular contexts.<sup>19</sup> Specifically, he coupled the idea of authority with *vocation*, or calling, suggesting that each place in society has its function and its own authority derived from God's will, rather than from human law.<sup>20</sup> Calvin's idea that the authorities who make law are themselves limited by it had an important influence on the development of a constitutional government. The idea of sovereign authorities bound together by mutual agreement, as it has developed in the federal system in the United States, is hardly conceivable apart from Calvinist ideas: differentiated callings, covenant commitments, and respect for the boundaries of different authorities.<sup>21</sup> For our purposes, however, the key idea in this tradition is the concept of multiple centers of authority differentiated by social functions. This was given a definitive theological formulation by a more contemporary Calvinist, Abraham Kuyper (1837-1920).<sup>22</sup>

Kuyper set the modern problem of church and state in a larger context by dividing social life into a number of relatively independent "spheres" such as government, business, family life, and church.<sup>23</sup> Each of these spheres has its own sovereignty, even if that sovereignty is not defended by force as the sovereignty we associate with the state. Our lives are lived in these different spheres, and harmonizing the requirements of their various sovereignties is the source of our most persistent practical problems and our largest moral dilemmas. The issue of church and state is an instance of a more general kind of prob-

---

17. *Id.* at 666.

18. *Id.* at 679. The distinction between spiritual and temporal power, sometimes called the "two swords," goes much further back. It was given classical formulation by Pope Gelasius I at the close of the fifth century. See BRIAN TIERNEY, *THE CRISIS OF CHURCH AND STATE, 1050-1300*, at 8-11 (1988). The earlier distinction was essential to the formulation of Luther's point in 1523, but in his hands it becomes a difference in the ends as well as the means appropriate to the two authorities.

19. 2 JEAN CALVIN, *INSTITUTES OF THE CHRISTIAN RELIGION* 724-25 (John T. McNeill ed., 1960).

20. *Id.*

21. See generally ROBERT BELLAH, *THE BROKEN COVENANT* (1975); WILLIAM EVERETT, *GOD'S FEDERAL REPUBLIC* (1988); Robin Lovin, *Equality and Covenant Theology*, 2 J.L. & RELIGION 241 (1984).

22. See ABRAHAM KUYPER, *CALVINISM* 17-32 (Eerdmans ed., 1943).

23. *Id.* at 90.

lem that is pervasive in social life. The relations between church and state may be historically important, but the problems are not different in kind from the tensions between family life and business, business and culture, or government and education.

Dietrich Bonhoeffer (1906-1945) arrived at a very similar way of describing the multiple authorities in social life. He talked about the "divine mandates," which are the places in life where God's commandment calls us to specific ways of responsible living.<sup>24</sup> Like Kuyper's spheres, Bonhoeffer's divine mandates include areas such as government, family, work, and religion.<sup>25</sup>

For Bonhoeffer, living in Nazi Germany, the boundaries between these mandates became particularly important. Having seen what happened when government put itself at the center of life and displaced family, church, and business from their proper roles, Bonhoeffer stressed the way in which each mandate is its own center of authority, and yet each requires the others to function properly to do its own job well. Here again, the problems of church and state, with which he was all too well acquainted, become an example of a more general social problem: How can these relatively autonomous mandates, or spheres of life, mutually limit each other so the social system as a whole functions well?

Max Stackhouse has recently offered a restatement of this perspective on social life that runs from Luther through Calvin and Kuyper to Bonhoeffer, developing its importance for the emerging global economy. For him, as for earlier Calvinists, the idea of *covenant* is central. A covenant defines a relationship between two parties. They are not necessarily equal partners. They may be as different as God and humanity, but the relationship between them is stated in terms that are mutually acknowledged and formulated into law-like principles. That kind of covenant defines the relationships between persons in these various spheres or mandates of social activity, and Stackhouse argues that it is also the best way to understand the relationships between the various interlocking and overlapping centers of authority that are emerging in the process of globalization.<sup>26</sup>

Stackhouse's fruitful use of the covenant theme to interpret global relationships should not, however, lead us to develop the theological model too narrowly, as if one has to be a Protestant, or even a Calvin-

---

24. DIETRICH BONHOEFFER, *ETHIK* 392-98 (Todt et al. eds., 1992).

25. Bonhoeffer's enumeration of the mandates varied somewhat in his ethics manuscripts. "Culture" is sometimes included, along with "Education," and in one place "Friendship." *Id.*

26. Max Stackhouse, *Public Theology and Political Economy in a Globalizing Era*, 14 *STUD. CHRISTIAN ETHICS* 80 (2001).

ist of some sort, to appreciate globalization, while Catholic, Orthodox, or pietist Christians cast a more skeptical eye. Aquinas' idea of law also offers a way to understand how a variety of relatively independent spheres of life work in harmony with one another. Aquinas' treatise on law argues that every system of human law is limited by both "natural law" and "eternal law," which set boundaries on what the positive law can legitimately claim.<sup>27</sup> It is only on the basis of such an overarching restriction on the claims of each of the spheres of life that we can explain how the harmony of the different systems of law and law-like regulations that is functionally necessary is also conceptually possible. Without some idea of a higher law, there is no reason to suppose these different spheres or mandates that make up social life are not simply in competition with one another, vying for control and attempting to spread their distinctive laws over larger and larger areas of human activity.

The Catholic social encyclicals have developed this into a concept of "subsidiarity."<sup>28</sup> Subsidiarity regards society as a system of relatively independent, yet integrated social systems, united by the fact they all serve the development of the human person. Each system needs to function well on its own terms, and yet functioning well does not mean simply that the school, business, or church runs like a well-oiled machine. They function well when they all work together for the benefit of a whole person, living in a harmonious society. That idea, which has been particularly well developed in Catholic social ethics around problems of welfare, education, and family life *within* the United States, needs to be developed more explicitly in the context of globalization.

Christian ethics and moral theology thus provide a rich variety of resources for thinking about the authority, community, and law in the pluralistic institutional environment that globalization is rapidly creating for us. These resources need to be explored in greater depth in their historical contexts, given more systematic formulations by contemporary theorists, and integrated with one another so their insights do not appear sectarian. When that is done, these traditions, precisely because they predate the emergence of the distinctly modern problems of church and state, may have much more to say that is relevant to the post-modern globalized world than the systems of legal theory and constitutional law that have often dominated the church-state discussion.

---

27. AQUINAS, *supra* note 7, at 996-97.

28. See CHARLES E. CURRAN, CATHOLIC SOCIAL TEACHING, 1891-PRESENT 141-44 (2002).

We should not think about globalization in terms of a global regime that would cover more territory with a single system of sovereign law. "World government" does not seem to be what we are developing. Rather, we find ourselves living in relatively independent, but also necessarily interrelated spheres of activity, recalling Kuyper's "spheres" or Bonhoeffer's "mandates."<sup>29</sup> Law, in the broader conception of law this new reality requires, is not always enacted by legislatures, but it comes into being in a variety of ways, as each sphere of human activity defines what is essential for its own functioning and what is required of those who participate in it. At the global level, these new laws regarding environmental controls, trade policy, and human rights sometimes trump the legislated laws enacted by nation states because there are specific treaties or conventions that require it, and sometimes simply because the nation state cannot, over the long run, afford not to participate in the broader global system in which this new kind of law is emerging.

Individuals, too, are affected by this pluralization of authority in the globalized environment. Consider the situation of an individual professional person, for example, a professor of history in Kyoto or an engineer in Karachi. As the spread of global culture, trade, and business practices make it easier for the Pakistani engineer or the Japanese professor to relocate to Chicago or London, the hold of the familiar, legislated law passed by the governments of Pakistan or Japan on those individuals is weakened. In a relatively free society like Japan, this weakening might not be noticed, but it makes an important difference in China or Cuba, where governments face a choice between the enormous cost of becoming a totally closed society or opening themselves to global influences that may be incompatible with the way of life they have tried to legislate.

At the same time engineers and history professors find the grip of national legislation perceptibly weakened, they also discover that they are more dependent than ever on standards of professional conduct and competence that govern engineering or historical scholarship in a global context. Those professional standards start to function more like laws and less like private choices, precisely because the individual depends on that professional sphere of life for the freedom and competence that redefines his or her relationship to the state.<sup>30</sup>

To be sure, the kind of law that a state creates has a coercive power that is unique, and you cannot opt out of being a resident or a citizen

---

29. See KUYPER, *supra* note 22; BONHOEFFER, *supra* note 24.

30. See WILLIAM F. MAY, *BELEAGUERED RULERS: THE PUBLIC OBLIGATION OF THE PROFESSIONAL* 7-11 (2001).

in quite the same way you can opt out of being an engineer or historian. The authority of the state is not going to go away, but it will be less important than it has been, and if we are to understand the future of government and its laws, we will need to see them in relation to the pluralism of the spheres of life, each defined by its own kind of authority and law.

Relative independence for these spheres and areas will not be difficult to sustain. Much of the practical business of any human activity is about discovering the dynamics that make it work well and creating a system of rules and institutions that work with those dynamics, rather than fighting against them. It may be more difficult to provide for the restraint and mutual interdependence that will allow these patterns of activity to work together to provide a full human life for the people who necessarily participate in many of them at the same time. Each sphere of activity needs to be shaped by a conception of its own limits, of what it cannot do and what it requires other spheres to do in order to function well. We recognize obvious failures of this self-restraint when governments try to legislate against cultural change or regulatory systems fail to keep pace with the growth of technology, but it happens in more subtle ways, perhaps, when business measures of efficiency and productivity are imposed on education or when churches are recruited to replace government as the provider of economic security.

Interdependence and mutual restraint are the keys to a pluralistic, globalized system of authority. Without them, the system either collapses in a kind of civil war between competing authorities, or it reverts to some version of the modern system of legal authority in which one kind of authority sets the terms and the rest are reduced to the status of individual preferences.

#### IV. RELIGION AND THE RULE OF LAW

We are now ready to return to Harold Berman's question with which we began: What does religion require of law?<sup>31</sup> Globalization brings about a multiplication and diversification of centers of authority that can no longer be regarded simply as private preferences. Re-

---

31. Berman, *supra* note 1, at 143. The question could perhaps also be phrased: What does the church require of the state? That formulation would acknowledge that this discussion of religion's place in a pluralistic system of authorities has been shaped by Western Christianity and by the historical experience of modernity. Much of it could be said of other religions in other cultural settings, because the process of globalization raises some of the same questions everywhere. However, many of the details would be quite different if we were to consider these questions in environments shaped by Islam, Buddhism, or even by Eastern Christianity.

ligion—and commerce, culture, education, and ethnicity as well—has its own requirements that increasingly demand recognition from government, and it makes sense to ask what those requirements are. At the same time, asking the question this way does not imply that religion and the other spheres of life simply dictate answers on their own unregulated terms. Our review of the traditions in Christian ethics suggests the development of multiple centers of authority need not result in arbitrary power or unregulated chaos.

For much of the twentieth century, the clear answer to Berman's question was that what religion requires of law is freedom. Law must leave the church free to shape its own life, form its people in the faith, and bear witness to its own understanding of ultimate reality. The church has certainly survived on less than that, but it can never accept anything less than that as normative.

Bonhoeffer expressed this idea in Germany in the 1930s by asserting that the church must take the form of a visible community. It cannot be reduced to a system of ideas. "The Body of Christ takes up space on earth," he wrote in *The Cost of Discipleship*.<sup>32</sup> "That is a consequence of the Incarnation."<sup>33</sup> The church's conflict with Hitler's reordering of German life did not spring from Christian disagreements with specific Nazi ideas, although there were many. The German church's struggle was rooted in a more fundamental claim that the church could not surrender its physical space and material resources and still be the church.<sup>34</sup> What the church requires of any system of law is, at least, respect for the material conditions that make the church's existence possible.

Somewhat later in the century, John Courtney Murray saw a similar connection between the freedom that is specific to religious life and the more general claims that religion makes on systems of law. His major contribution to Catholic social thought was the Declaration on Religious Freedom, which was adopted by the Second Vatican Council.<sup>35</sup> The Declaration was narrowly drawn for its intended purposes,

---

32. DIETRICH BONHOEFFER, *THE COST OF DISCIPLESHIP* 223 (1959).

33. *Id.*

34. Bonhoeffer apparently understood the point he was making in 1937. He speaks quite specifically of the church's claim to "living space (*Lebensraum*)" in addition to its needs for liturgy and order. *Id.* at 228. There is some conflict between this claim by Bonhoeffer and Luther's insistence that the secular ruler is to be obeyed in everything that pertains to life and goods. Bonhoeffer relates the church's claim to space to Luther's doctrine of vocation, which requires that Christians live faithfully amidst the requirements of daily life, rather than to Luther's understanding of secular authority. *Id.* at 229.

35. For a review of the Declaration on Religious Freedom and an account of Murray's role in it, see RICHARD P. MCBRIEN, *CAESAR'S COIN* 118-23 (1987).

but Murray himself believed that if one first understands the church's commitment to free exercise of religion in civil society, a larger doctrine of human rights emerges upon further reflection.<sup>36</sup> It is not primarily religious *ideas* that religious freedom protects, but the *persons* who hold them. We cannot consistently maintain our claims to religious freedom without also becoming advocates for the other freedoms that are essential to this human dignity.

Murray and Bonhoeffer, each in his own context and his own tradition, maintained that what religion requires of law is freedom. That was an important claim in a century that bred totalitarian systems that tried either to eliminate organized religion or to incorporate it into the apparatus of the state. The claim remains important for us to remember, even in an age of globalization, when the state may seem less of a threat to human dignity than consumer-oriented materialism or environmental degradation. If the claim, however, to "take up space" that Bonhoeffer asserted and Murray's claim to religious freedom as a human right are taken simply as statements about the immunity of religious life from interference, they do not say quite all that needs to be said.

Murray perhaps implied the rest when he said religious freedom is "the first of all freedoms *in a well-organized society*, without which no other human and civil freedoms can be safe."<sup>37</sup> Religion requires freedom not merely by way of concession or perhaps even by way of sponsorship by civil authorities, but as a secure legal commitment, or a constitutional guarantee, to express it in the terms most familiar to American law. The freedom religion requires also implies a certain kind of order in civil society itself, an order that provides secure expectations about how social life will proceed, based on the rule of law.

This link between the rule of law and a well-ordered community, which Murray articulated almost incidentally in his account of religious freedom, needs more focused attention. In an age of globalization, it is the primary moral requirement that religion imposes, not only in its relations with government, but also in the emerging pluralistic systems of authority generally. The traditions of moral theology require the church to be a witness to the importance of the rule of law, exemplifying it in its own life and demanding it of other authorities in the complex network of relationships in which life must now be lived in a global context. What religion requires of law is that law must be

---

36. JOHN COURTNEY MURRAY, *RELIGIOUS LIBERTY: CATHOLIC STRUGGLES WITH PLURALISM* 229-44 (1993).

37. JOHN COURTNEY MURRAY, *BRIDGING THE SACRED AND THE SECULAR* 199 (1994) (emphasis added).



strong enough, flexible enough, and wise enough to prevail over arbitrary power, entrenched local prejudice, and particular interests.

That may sound like a strange way to formulate the requirement, because it appears at first glance that the question about what law requires has prevailed after all. That is, however, because we are used to thinking in the modern context, where law is the state's creation that religion encounters as an alien force. In an age of globalization, we might think, rather, of an earlier, pre-modern time when law was religion's creation and agent. Then the question of what religion requires of law appears more as a question about what religion needs law to do, rather than how it needs to have law restrained.

Return once more to the themes of Harold Berman's *Law and Revolution*. The church first systematized its canons, rules, and regulations into a system of law in the eleventh century. At that time, it was the only operative *system of law* in Europe.<sup>38</sup> The states that would later create the systems we know did not yet exist, and the church brought its own system of law into being for reasons that were somewhat independent of those that later prompted states to create law.

Three of those reasons seem particularly salient to our contemporary situation. First, and fundamentally, a system of law rendered judgments orderly and predictably. As the church grew in institutional diversity and geographic scope, the unity provided by a wise bishop, presiding over a small group of clergy and ordering a very local Christian community, proved insufficient. Those judgments had to be collected and codified, so the local community would know how to relate to more distant authorities, and so those who were subject to judgment could anticipate the results and formulate arguments for their positions. Law provided a common understanding of the religious system within which everyone had to live, and everyone could examine it, without recourse to the judgments of particular individuals.

The effects of this predictability were not only, perhaps not even primarily, local. Law proved an effective instrument of a first wave of "globalization." While this was confined to a small area in Western Europe, the effects for those who experienced the revival of European commerce and culture after the Dark Ages must have been at least as striking as the effects of the last half century have been for us.

Finally, law enhanced freedom and individual responsibility. It took somewhat longer for this effect to become apparent, but as peo-

---

38. BERMAN, *supra* note 13, at 85-86.

ple lived with law, they learned that it provided a framework in which to plan one's life, to make claims on others, and to limit the claims that others make on us. In social and institutional contexts, law creates the space for personal responsibility that religion requires.

## V. CONCLUSION

In a global society, states will still exist, and their coercive power will still be important. However, states will not be free to enact whatever laws they choose and enforce them by sovereign power. Their sovereignty will be limited by a variety of international tribunals, adjudication systems, and so on. In a global society, the power to make law will be limited by the need to justify those enactments in light of human goods and goals more widely shared.

These limitations on enactments by the state are usually what we think of first when we build the case for religious freedom and human rights, but the rule of law implies constraints on other entities too. If the rule of law implies a limitation on the sovereign power to make rules without reference to human goals, the rule of law also implies a limitation on the private choice of goals without reference to larger human goods. The modern distinctions between public and private, rules and goals, and deontology and teleology have allowed individuals and the institutions labeled "private" to pursue whatever goals they chose, as long as they did not break the rules. Determining how to pursue quite narrow interests without violating the rules has occupied the professional energies of innumerable lawyers, accountants, and—no doubt—quite a few corporate ethics officers. The economic power of the nineteenth century trusts and the more recent exaggeration of assets and expectations in the dot-com world are just two examples of where this rigorous implementation of the modern separation of rules and goals may lead.

The solution lies not only in the application of tighter public laws to limit private purposes. It also requires an application of the rule of law *within* corporations—and within churches and universities. It requires that institutions, whose purposes society has treated as choices defined by self-interest and limited only by external rules, must now begin to define their purposes in terms of larger human goods. They must also create internal systems of rules that reflect those goods, and are not merely instrumental to self-chosen interests. The weakening of the modern system of sovereign states allows religion to make a more effective demand for freedom and human rights in the systems of law nations create. Unless the rule of law as Thomas Aquinas and John Courtney Murray understood it can be extended to those

spheres of life that Abraham Kuyper and Dietrich Bonhoeffer have identified as equally important for human freedom and flourishing, we may find ourselves subject to new kinds of totalitarianism, springing from institutions the modern world has too easily defined as private. Corporations, cultures, and religions are bearers of more than “preferences,” and their power must also be subjected to the rule of law if globalization is to have anything to do with freedom and a human future.