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THE WIDENING GYRES OF RELIGION AND LAW

*Martin E. Marty**

*Turning and turning in the widening gyre
The falcon cannot hear the falconer;
Things fall apart; the centre cannot hold;
Mere anarchy is loosed upon the world. . . .¹*

I. THE VISION OF WIDENING GYRES AND THE END OF THE CENTURY SCENE

The main trends of twentieth-century life have seldom been better represented in English language poetry than they were in William Butler Yeats's *The Second Coming*.² Early in the century Yeats saw and foresaw a world of lawlessness, violence and incoherence. As so often, the poet used a vocabulary of his own. It now demands explanatory footnoting for collegians who first encounter it in the classroom and even for most lovers of poetry, however familiar they may be with the sort of language in its reaches.

Specifically, teachers and expositors are often asked: "What's a gyre?" In the present instance, one might add another question: "Why introduce poetry and a poetic metaphor in an essay on the relation of two elements in human experience, law and religion? The subject is sufficiently complex even without the employment of an obscure image. Why clutter the pages of law reviews with such?"

The second question first: Experts in law and religion may see their subject with sufficient clarity that they can canonize the main themes of each and define them in legal and religious dictionaries. But most

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1. William Butler Yeats, *The Second Coming* in A. G. STOCK, W. B. YEATS: HIS POETRY AND THOUGHT 186-87 (1964).

2. For comment—relevant to the present context—on this widely published poem in general anthologies and in collections of Yeats's work, see *id.*

people do not experience them so neatly. Thus very few people who are seen as religious speak of their response to the sacred, to signals of transcendence, or to ritual dimensions of their ways of life as "religion" at all. They simply believe, and practice. Similarly, "law" can mean The Law, as represented in American colloquial talk about the traffic policeman, constitutional life, or what goes on in law school. Law can also refer to philosophical discourse on Natural Law and theological talk about divine law.

Given such sprawls, such protean usages and understandings of the two terms, we might choose the Yeatsian image of the gyre to bring to some coherence an aspect of a world that otherwise seems so chaotic. The metaphor of the gyre can help those who ponder it to approach the issue of why religion and law, with all their complementarity and collisions, have grown so complex in our time. Before detailing that issue, however, we take up the first question in a slightly more sustained way; a four-line verse does not do justice to the reality. The image of the gyre works memorably to evoke our main themes. So: "What's a gyre?"

The gyre, one of Yeats's commentators, A.G. Stock, suggests, was the poet's "true symbol for all experience."³ He liked to speak of "those whirling, interlocking gyres, 'each one living the other's death, dying the other's life.'"⁴ They help him elaborate on his own idiosyncratic but by no means irrelevant reduction of the death of civilization in what he foresaw as three phases. They were "mere anarchy," which would be followed by "the blood-dimmed tide," and, finally, they depicted a scene in which "the ceremony of innocence is drowned."⁵

In Yeats's doomsday poem, the image of the trained bird of prey reverting to its wild state served to evoke the understanding of a world turned back to violence. The falcon *should* be able to hear the falconer, just as it should be able to have clarity and perspective. A falcon can see a handkerchief 5000 feet away and can zoom toward it at speeds ranging from 100 to 275 miles per hour.

Falconers teach falcons to fly in disciplined orbits. But Yeats sees them breaking out of the spheres or gyres and, in effect, losing the plot of their flight. For us, the falcon-gyre images speak well to many elements in the late-twentieth-century American cultural scene. It is our burden and at the same time gladly accepted assignment to address but two of them, religion and law. We can notice: that which happens to the orbits and spheres of law and religion, and that which

3. *Id.* at 130.

4. *Id.*

5. *Id.* at 186.

happens to those who would like to see disciplining and definition among them, will turn out to be fateful in the lives of the majority of the human race who see the "widening gyres" intersecting. They then turn out to be ever more confusing.

For our effort to frame the discussion of the expansive and hard to define spheres of law and religion, we need one more look at the evocative *The Second Coming*. Yeats concludes his observation of the figurative falcon with no vision of a progressive outcome. Such envisionings were still common when he wrote. Instead he foretold an apocalyptic end. In other words, not sharing the view common in the West early in this century, a vision of a world giving birth to progress, peace, civility, and order, Yeats at the end of the poem asked, with his eye on the future: "What rough beast . . . [s]louches to Bethlehem to be born?"⁶

Eight decades and more after he wrote, the poet would not have to make any apologies for having written as he did. Things keep turning out as he knew they would. "Rough beasts" have been born again and again. Yeats would not have to work hard to attract a public that would observe with him that even those two forces that normally lead to restraint, religion and law, contribute more often to ever more mere anarchy. Many of the leaders and exemplars in both spheres also match what came into the poet's field of perception. He saw apathy confronting fanaticism: "The best lack all conviction, while the worst [a]re full of passionate intensity."⁷

And so it is.

In the quoted part of the poem Yeats concluded with a half line: "The centre cannot hold." When dealing with religion and law in a pluralistic society, the kind of human society that will preoccupy us, it is important for us to note that there is not and was never a simply agreed-upon centre around the globe or in any of its regions. Thus novelist Thomas Mann often spoke with empirical matter-of-factness in the face of would-be synthesizers. They were prophets who foretold that there would eventually be a gathering of the separate forces, a centering and synthesis among the world's legal systems ("The World Court") and the religions. People like Mann have instead contended that the world has many centers. There is no single organon, encyclopedia, summa, canon, legal code or synthesis available to and accepted by all the people and all the peoples. Ours turned out to be a century when science propounded "the indeterminacy principle"

6. *Id.* at 187.

7. *Id.* at 186.

and "chaos theory." Indeterminacy and chaos rule religion and law when they interact.

On such a spiritual landscape, however, one is naturally moved to ask: Why should religion and law *not* be "indeterminate" spheres? Why, when their gyres collide or coincide, should they *not* contribute to "chaos?" In the postmodern period—Yeats seems to have foreseen it—even the individual self is uncertain about identity. No single symbol system unites the arts or makes them intelligible within the culture. Each visit to a gallery forces one to confront a disarray in the form of a display of pastiches, montages, assemblages, and collages. Each act of attendance in a concert hall where music of this century is played calls one to hear dissonances and atonal experiment that sound chaotic.

On such a cultural scene, religion and law could hardly be expected to serve as restraints against "mere anarchy." Instead, they seem to promote it. As the publics respond to their surrounding worlds, whether while recognizing religious ambiguities and bewilderments, or when its members give voice to disgust with law and government, it evidences some of this "anarchy." This decentered and decentering scene demands attention.

II. THE AFFIRMATION OF LAW FROM WITHIN RELIGION, AND VICE VERSA

The stance of the observer will color something of what is said about religion and law alike. This observer begins without nostalgia but with an awareness that in the past it was often somewhat easier to restrict and define the gyres of law and religion. In earlier America, for instance, after the founders worked to separate church and state and allow for tax exemption of church properties, there did not appear to be many reasons to encounter controversies and collisions over the two spheres. It is our more complex age that has evoked so much discontent.

I have to begin by expressing appreciations of *both* gyres. Many academics stand outside the spheres of religion, viewing them as irrelevant, obsolete, and waning. But a more careful look will show that the vast majority of humans in all cultures wrestle with whatever it has been to which religion points. For most of them, the gyre of religion represents attempts by humans to hold things together conceptually and to aid them in the practice and walk of life. They want to find a centre that holds. They would like to participate in an integrating order. In the pursuits that observers call religion, people aspire to deal with the ultimate, the whole, the *unum*, the All. They are alert to

evocations of awe and wonder. Their sense of the sacred leads most of them to build community and undertake various sorts of mission. Therefore religion, when vital, is never easily contained within a defined and disciplined sphere. Religion is never self-contained, never unconnected. It always stands the potential of being "widened."

Some elements of religion, it is true, can be captured in the neat alphabetized categories of denominations as they are listed under "Churches" (between "Chiropractors" and "Cigars") in the Yellow Pages of the phone books. But in reality, the world is full of charismatic, enthusiastic, imaginative, adventurous, grasping people and phenomena.

Now, in turn face all that confusion about religion with the expanding gyre of law. Through law also people aspire to order life, to provide "-archy," to promote rule instead of anarchy. As part of government, law is imposed on all people. It is inescapable, and it works effectively, even as it "widens;" law is designed to produce regularity, order, restraint. It is true that there may be "world citizens" who in their own minds want to transcend national government and its law. But there is no place for them to hide. At another extreme, anarchists reject all law. But government of some sort and national boundaries of varying natures do encompass all humans, whether they like it or not. On second thought and despite their unease and disgruntlement, most people, having seen the jungle of lawlessness in moments and places where law breaks down, prefer law to non-law and seek protection in many laws, not few.

For all the reasons implied in those paragraphs, all religiously believing and practicing citizens relate to two sets of gyres, cycles, circles, or spheres that overlap and intersect. Disturbance in either affects the other. Disturbances in both can lead to disruptions, to "mere anarchy" being loosed upon the world. As the century ends, there is a widespread and easily documented sense that this disruption is threatening civilizations in many polities. Citizens in the United States regularly charge that law is too expansive, even as it remains too often ineffective. Religion does not capture imaginations in ways that can lead either to restraint in support of law or to alternative disciplines where and when law breaks down.

Most of what follows will imply problems that the leaders in religious and legal circles have with each other, or confusions that they experience themselves when they try to read the signs of the times. It is well to bring to mind the fact that most religions, at least those in our culture, have quite consistently included and affirmed legal elements of their own. They have canon law of their own and they com-

ment on law in the civil order. They thereupon have regularly sought and offered theological legitimation and support for the civil law that surrounds the religious bodies. Thus in the heritage of the Hebrew Scriptures, Jews live within a web of sacred law. In the New Testament world of Christians, "the powers that be are ordained of God."⁸

To begin to make sense of the relations of law and religion, it is appropriate to quote Harold Berman, the first of the DePaul Annual Lecturers, speaking in 1983. He talked of integrating law and religion:

Law is not only a body of rules; it is people legislating, adjudicating, administering, negotiating—it is a living process of allocating rights and duties and thereby resolving conflicts and creating channels of cooperation. Religion is not only a set of doctrines and exercises; it is people manifesting a collective concern for the ultimate meaning and purpose of life—it is a shared intuition of and commitment to transcendent values. Law helps to give society the structure, the gestalt, it needs to maintain inner cohesion; law fights against anarchy. Religion helps to give society the faith it needs to face the future; religion fights against decadence. These are two dimensions of social relations—as well as of human nature—which are in tension with each other: law through its stability limits the future; religion through its sense of the holy challenges all existing social structures. Yet each is also a dimension of the other. . . . Where they are divorced from each other, law tends to degenerate into legalism and religion into religiosity.⁹

Enthusiastic as he may be about the two, Berman for years has been alerting us to profound problems. The West is experiencing

an integrity crisis, . . . a deeper loss of confidence in fundamental religious and legal values and beliefs, a decline in belief in and commitment to any kind of transcendent reality that gives life meaning, and a decline of belief in and commitment to any structures and processes that provide social order and justice. Torn by doubt concerning the reality and validity of those values that sustained us in the past, we come face to face with the prospect of death itself.¹⁰

So one can affirm law and religion, as Berman does, and then find special reasons to fear that "the centre cannot hold."

III. THE SUBORDINATING OR CONTRACTING OF THE GYRES OR SPHERE

Thoughtful people who have tried to deal with the crisis often build on time-honored strategies. If there is danger that the two spheres might collide as they expand, logic suggests that citizens and believers

8. *Romans* 13.

9. HAROLD BERMAN, *THE INTERACTION OF LAW AND RELIGION* 24-25 (1974).

10. *Id.* at 23.

should entertain the idea of subordinating one gyre to the other. In such a strategy, one pictures the falconer who has trained two falcons to fly in concentric spheres, the outer one defining the inner one.

A. *Strategies of Subordination*

How do and how should law and religion interrelate? Back when the centre held or where it still to some extent holds in some of its modes, religions subordinated and subordinate law by appeal to a "higher law." Or religious leaders may promote support of the idea of law being appropriated by conscience in the inner self. At the opposite extreme, more frequently and successfully in the past than now—but think of Iran and its kind as counter examples in our time—religions have imposed patterns of ecclesiastical dominance in the form of theocracies, hierocracies, or clerocracies.

Free societies such as true republics do allow for the inner spiritual transcendence of law—how could they not? But they reject the patterns of religious dominance that were characteristic of pre-republican or anti-republican times and situations. That is, they allow for opinions about and appeals to "higher law" but they do exact penalties when people follow and act upon such appeals. Martin Luther King, Jr., typically was caught between such honoring of higher law and such exactions and penalties when he had to disobey ordinary laws.

In authoritarian atheistic societies the state tries to repress religion, but ordinarily fails. Religion, despite efforts to put it down by law, survives and prospers. This was evident in the greatest twentieth-century example, the Soviet Union and its aftermath. In most of the world, religions are expanding in numbers and complexity. We who live in what I call "the spiritual ice belt" that extends from west of Poland through Western Europe, the British Isles, Canada and the northern United States to Japan, may not always experience or notice this expansion with all of its intensities. But no view of the global situation can overlook the burgeoning of religious movements, and the affective response to these, whatever "the law" thinks of them. They can spell more confusion and clash ahead.

In the free societies, most republics, it has to be noted that in the formal senses—though not necessarily the moral, intellectual, or spiritual ones—a constitutional society allows for the law to subordinate religion or religious institutions. Thus the conservative legal scholar Walter Berns notices and effectively argues:

The origin of free government in the modern sense coincides with and can *only* coincide with, the solution of the religious problem, and the solution of the religious problem consists in the subordina-

tion of religion One can say that the natural rights philosophers spent so much time on the religious question in order to make it possible for the politicians who followed them to ignore it.¹¹

In such cases, the sweep of law is by definition coercive. It is in practice protean, but not limitless. The gyre of law is widening; we speak of the growth of law. In the formal sense it is law, not religion, that "constitutes," orders, organizes, and puts boundaries around life, including the life of the spirit. But this can be true *only* in the formal sense. Meanwhile, most accounts of modernity agree, "the centre did not hold." The spheres are no longer concentric; there are two separate spheres. As law's gyre widens, if religion's also does, there is a prospect of further and greater confusion and clash.

B. *Strategies of Contraction or Constriction of Gyres*

If one realm cannot satisfyingly subordinate the other, citizens can still make efforts to improve their understanding by carefully defining the two spheres. But it is precisely this that is done with most difficulty in late modern and postmodern times. In Yeats's terms, there are situations in which still "the falcon *can* hear the falconer," but cannot thereupon accept the signals. The grounds for these signals have become unacceptable.

To move from metaphor: because of free religion's boundlessness, there is a temptation for legal boundary-setters to try to constrict it. In the United States, the First Amendment to the constitution, through its "Free Exercise" clause, intends to proscribe such a strategy. But in many twentieth-century polities, be they Nazi, Fascist, Communist or Maoist, leadership set out to constrict, penalize, or abolish religion in all its traditional modes, but without success. Meanwhile, neither establishing nor prohibiting religion, a "free exercise" society neither encourages nor discourages religion in the formal sense.

On the other hand, the "falcon *can* hear the falconer" in polities in which a single integral religion dominates. On occasion, religions still "fight back" against what they see to be secularizing forces and attempt to constrict and contract the sphere of law. Of course, individuals at any time can restrict law within the blurred bounds of their own perception. They may do this through what turn out to be personally satisfying but civilly unrecognized theological definitions and actions. In the spirit of figures like Henry David Thoreau, others may favor personal or communal gestures of defiance of conventional law. Or, so

11. WALTER BERNS, *THE FIRST AMENDMENT AND THE FUTURE OF AMERICAN DEMOCRACY* 26 (1985).

far as possible, others may simply ignore law for the sake of their own spiritual freedom. Still further, sometimes through legal or revolutionary activity, as in some fundamentalist Islamic activities that are typified by the Iranian revolution, believers set out to reestablish the dominance of religion.

The American constitutional pattern naturally interests us most. In setting forth the First Amendment's two clauses about religion, the founders and the courts that have interpreted and applied their workings have rejected such strategies. Thomas Jefferson conceived of this resolution as taking the form of the erecting of a "wall of separation between church and state." More accurate and more appropriate, in respect to the gyre-imagery and the actual legal situation, is James Madison's conception, expressed in one of his letters. Note how he introduces the concept of collisions between the gyres, a concept that will remain with us for the rest of the way:

It may not be easy, in every possible case, to trace the line of separation between the rights of religion and the Civil authority with such distinctness as to avoid collisions & doubts on unessential points. The tendency to a usurpation on one side or the other, or to a corrupting coalition or alliance between them, will be best guarded against by an entire abstinence [sic] of the Government from interference in any way whatever, beyond the necessity of preserving public order, & protecting each sect against trespasses on its legal rights by others.¹²

Madison was giving expression to an ideal. But in our story of late-twentieth-century life when we speak of "widening gyres," it seems clear that the "collisions" of which he spoke are ever more frequent and disruptive.

IV. THE RESORT TO HISTORY: WHEN, IT WAS BELIEVED THAT "THE FALCON COULD HEAR THE FALCONER" AND THERE WAS COHERENCE

What I have said so far implies that once upon the time the falcon could hear the falconer, that there was then more coherence and centering, less falling apart and anarchy than there is now. To gain perspective, we can look at three spheres in the recent and longer pasts alike.

First, though it is not our present subject, on the *world* scene there have been aspirations toward establishing global empires or, more humanely in our own recent past, world courts and with them the world

12. Letter from James Madison to the Rev. Jasper Adams, in *CHURCH AND STATE IN AMERICAN HISTORY* 77-78 (John F. Wilson ed., 1965).

rule of law. Efforts like the United Nations Declaration on Human Rights in 1948 demonstrate such moves. But the mid-twentieth-century organizations like the United Nations, while surviving and on occasion exerting some effective influence, are just as often seen as agents of confusion, generating their own "widening gyres." Witness the difficulties experienced by those who seek to promote intelligible discourse in recent United Nations-sponsored conferences on the environment, population and development, and the rights of women. There is general concurrence in respect to the notion that today the pluralist world would not be capable of writing and agreeing upon a new "declaration of human rights." Religions such as militant Islam and resurgent "tribalisms" are among the forces that resist efforts at finding consensus based on concepts of law that the religious leaders regard as alien and profane. The gyres have widened, but coherence is not apparent.

Second, on the *ecclesiastical* scene, "the falcon could hear the falconer." It is often presumed, at least by the more nostalgic souls, that at certain moments—e.g., for the West, in medieval Christendom or, for America, in certain colonial situations of religious establishment, there was coherence because the legal sphere was coextensive with the religious. Such ordering is not possible now, thanks to the "separation" of spheres or the drawing of a "line of distinction" in a republic, and specifically in the United States.

Third, in the *American* past, after legal disestablishment of religion (ending finally in Massachusetts in 1833) there developed, for a time, a pattern of informal covenanting and legal aspiration by the dominant Protestant churches who would—and did, in a way—"run America." The common school textbook tradition stressed religious homogeneity. While the gyres of religion and law could at least *seem* to be contracted or restricted, one set of people were privileged to tell the story in ways that favored their own special status. There were in that past some rare Supreme Court rulings that even spoke of Americans as "a Christian people."¹³ But the law never underscored this Protestant establishment as much as did the ethos. Thus the American founder John Jay, though he had Dutch and French Huguenot ancestors, in *Federalist* No. 2, argued that Americans were "a people descended from the same ancestors, speaking the same language, professing the same religion, attached to the same principles of government, . . . Similar sentiments have hitherto prevailed among all orders

13. *United States v. Macintosh*, 283 U.S. 605, 625 (1930).

and denominations of men among us. To all general purposes we have uniformly been one people."¹⁴

One picture trying to sell such a white male New English Protestant concept for the basis of a *consensus juris* in today's "multiculturalist" America. In truth, John Jay's observations and contentions were not accurate or fair even back when Jay wrote.

It is clear that the global scene, the ecclesiastical past, and the colonial American situation offer no credible models for interpreting the widening gyres of religion and law today—except to underscore the widening and the "things fall apart" theme from Yeats.

V. THE TWO "WIDENING GYRES"

So the gyres widened and widen. We must examine the current American situation. The eighteenth-century framers of constitutionalism gave little evidence that they foresaw a widening gyre for religion as we have experienced it for two centuries. They made clear during three decades of argument, centering around 1787, that they did understand religion's potential for defining and "binding" a people, just as it had the potential for unsettling them and being disruptive of their civil life. Many of the founders, partisans of the Enlightenment and no friends of "revealed religion" or "priestcraft," seemed to picture that particularized religion (as opposed to Natural Law or Natural Reason or Nature's God outlooks) would not expand and that they might even wither. Religious awakeners and revivalists may have had other ideas, but at the birth of the Republic, there seemed to be a sense that religion and law both had boundaries and knew their spheres.

Instead of what legal and religious leaders foresaw, we have seen an inevitable enlargement and widening of both spheres. One thinks, for example, of the need for growth in legislation of a sort that necessarily involved religious interests. It was these religious interests that have reacted most vehemently to the legal consequences of technologies through which birth control and abortion possibilities changed, along with legal policies in respect to marriage, sexual expression, and the like. Here was more inevitable "widening."

Around the world this widening trend remains especially visible in the public role of religion as evidenced in the aspirations of Islamic-Jewish-Christian-Buddhist-Hindu-Sikh fundamentalist militancies. It is similarly evident both in religious ethnonationalist and tribal movements on the right and theologies of liberation and world transforma-

14. THE FEDERALIST NO. 2, at 5 (John Jay) (Max Beloff ed., 2d ed. 1987).

tion on the left. Here as elsewhere, the gyre of religion widens, as the daily news stories prove.

Of course, as already suggested in the reference to the consequences of medical technology, the gyre of law also widens in an ever more complex society. We can leave to others a detailed accounting of this, while simply noting that the growth of law must have many bearings on religion. I resist temptations at this point to indulge in comment in the form of a "supply-side" analysis in the growth of the numbers of lawyers. In the present context, one must be content to say that if one wanted to dwell on statistics, they would have to deal with the clerical contributions to the "widening gyre," since the number of clergy also grows. Our agenda does not call us to dwell on the subject, rich in consequences for "widening" though it may be.

VI. THE CONTRIBUTION OF PLURALISM

In American society, the one that remains our focus, the fundamental agent contributing to the widening gyres and "collisions" is realized pluralism in a free society. Given its potential for creating "mere anarchy," it is no wonder that the late Jesuit theologian John Courtney Murray pronounced that "religious pluralism is against the will of God."¹⁵ He said this even as he averred that such pluralism was the "human condition" and would never "marvelously cease to trouble the City."¹⁶ While not all religious thinkers and not even all Catholic theorists, go so far as Murray, he did alert them and all of us to consider how religious pluralism is itself "inherently disintegrative of *all* consensus and community."¹⁷

Pluralism, it has to be recognized, cannot be overcome in a free society. The Soviet experience from 1917 to 1989 and post-Soviet experience since then reveals that religion cannot even be successfully suppressed in an unfree one. Indeed, the sudden implosion of Soviet Communism along with its Marxist and Leninist ideology, left a philosophical and spiritual desert, a barren landscape to be filled, with, among other things, insurgent religion(s).

It is futile for anyone to yearn for the end of pluralism so there can be some measure of coherence. In the eyes and practices of the religious public, pluralism cannot be overcome because so many of them conceive their faith to be based on specific and differing divine revelations to them. The contradictory magisteria of religious bodies; the

15. JOHN C. MURRAY, S.J., *WE HOLD THESE TRUTHS: CATHOLIC REFLECTIONS ON THE AMERICAN PROPOSITION* 23 (1960).

16. *Id.*

17. *Id.* at 73.

contribution differing religions make to the *consensus juris* in any pluralist republic; the rhetoric and enterprise of competitive religious leaders, and the free and spontaneous conversions and consents of citizens as believers, all militate against uniformity and conformity, whether these be coerced or voluntary. Today, instead, resort to religion grows, especially as other frameworks for life (e.g., Communist ideology, pure eighteenth-century Enlightenment rationalism), appear exhausted. Hence, again, the “widening gyre of religion.”

There have been many efforts within pluralist societies to restrain the religious gyres. In the modern period, religion was supposed to have been restricted to private life. But the religious have always, and especially recently, broken the covenant: Catholic, Jewish, mainstream and African-American Protestants, Mormons and Muslims, other “others,” and, now most dynamically, latter-day evangelicalism/fundamentalism/conservatism are taking boundary-crossing public action. Some of these moves to the public style, especially on the Christian Right, were born as a “politics of resentment” by people who were or who felt themselves to have been demeaned, overlooked, or inhibited. But their revenging movements quickly became expressive of a politics of “will to power.” In such cases, the agents of the religions in question collide with others who aspire to the same kinds of power. Hence anarchy, if not always of a “mere” sort, is loosed upon the world in the recent past from within the United States.

Around the world, religions set out to reclaim regimes entirely. This is the case in Shi’ite fundamentalist Islam, the Jewish Gush Emunim, or American Christian Reconstructionism or Theonomy. More modestly than do the Theonomists, other evangelical forces in the United States set out to claim a significant element in politics through the use of coalition and caucus strategies. Since these religions represent rival claims, their expressiveness adds to the “widening gyre” vision and threatens the “falling apart” of the social fabric. Law also sees the development of a widening gyre and contributes to religious and legal pluralism. By definition law sets boundaries and is capable of self-limitation, but it is expansive and expanding as well. Law today seldom appeals to divine revelation, except as in Islamic resort to shari’a, the sacred body of law. What we might call the legal magisterium is defined in republican cases by a single society-wide constitution. Any *consensus juris* is arrived at through experiment and pragmatic—and hence, ever more complex—resolution. The professors, writers, and schools of law also gain clout through the use of competitive forms of rhetoric and enterprise. The gyre widens, again for often good and usually natural reasons.

VII. THE PERCEPTIONS BY THE RELIGIOUS OF LAW'S WIDENING GYRES

With religious pluralism inevitable, and with an increasing number of collisions between law or government and expressive religion occurring, many agents of religion resort more and more frequently to law as they seek to sustain their rights, or to ward off threats. In a conventional catalog of grievances, they blame the following, among others, for the collisions:

First, the general litigiousness of society—not realizing that they are often promoters of such litigating activity.

Second, the professional interests of lawyers seeking clients—not recognizing that often proselytizing clergy also pursue professional efforts to expand their interests.

Third, governmental intrusion, in a welfare society where laws restrict hiring policies, set safety standards, demand licensing, or “invade” realms formerly under ecclesial control—e.g., sex education. Meanwhile such religious agents seem not to be aware that through everything from appeals to zoning laws through lobbying in Washington, they are also seen as “intruding” on the public space of others.

Fourth, the postmodern situation of instability and relativization of laws and the legal framework, in which “everything is permitted” on one level, or in which there is an unintegrated skein of laws that intend to restrict everything, on the other, includes religion. Yet religious leaders often overlook the postmodern approach in organized religion, where the chaos of the marketplace and the “picking and choosing” of religions have prevailed, adding to chaos.

Fifth, ideology is a factor. Here come into play formal attempts in the academy, government, law, and media, to ignore, exclude, misrepresent, or disdain religion. But often unnoticed by religious leaders are the assertions of integral religion of a sort that is not at all attentive to the civil order, on ideological (“prophetic”) grounds. The result is anarchy.

Sixth, many religious critics charge that court villainy and folly is at fault. One set of them faults the U. S. Supreme Court’s practice since 1940 and 1947 of “incorporating” the rights of “free exercise” and the prohibitions against “establishment of religion” in the practice of the states. Over the protest of such religionists, this is done on the federal level by the use of the Fourteenth Amendment to the Constitution to adjudicate religion cases which rise from the several states. Not so readily acknowledged by the religious is the development of aggres-

sive policies of their own, policies which preempt the space that had conventionally been filled by law.

Seventh, there is an attack on legal positivism, which leaves law “unmoored,” dependent upon experience, and thus appearing to be protean and limitless. But this is matched by religious celebrations of pluralism, contributions to the breakdown of authority, and pragmatic appeals in most religious bodies, which are just as protean and sprawling as is the legal sphere.

Eighth, modernity, with its accompanying differentiation, the “separating” of church and state and also the sundering of religion from ethnicity, fact from value, politics from economy, one profession from another profession, one discipline from another discipline, this specialization from that specialization, also within the gyres of religion and law, adds to complexity, pluralism, and relativization.

Ninth, one should add that the category of “ecclesiastical crime” comprises one of the fastest-growing sectors in religious reckoning. This calls forth more involvement by law and government. Were there less crime—abuse, embezzlement, scamming, deceptive practice—in religion, the gyre of law would not widen so much in respect to religion.¹⁸

In the face of such observations and complaints, it is hard to see any trends that suggest a future narrowing of the gyres of law and religion.

VIII. PERCEPTIONS BY THE LEGAL PROFESSION AND GENERAL PUBLIC OF NEW “WIDENINGS” OCCASIONED WITHIN THE RELIGIOUS SPHERE

While some religious agents will be content with the list of charges just offered, there are reasons to reach beyond them. Most notable, from religion’s side, has been the widening of its sphere thanks to the broadening of the definition of religion. Religion may once have referred to that which is housed in boundaried institutions, or in the private opinion of the individual, where Madison located it. But increasingly anthropologists, historians of religion, and eventually jurists, came to define religion so broadly that it is either so encompassing or so diffuse that it may appear to many to be almost meaningless.

18. World-wide, says the *World Christian Encyclopedia* statistician, ecclesiastical crime is a growth industry; it amounted to five million dollars in 1970, is estimated at 1.4 billion dollars today, projected to reach two billion dollars in 2000 and eighteen billion dollars in 2025. David Barrett, *INT’L BULL. RES.*, Jan. 1995, at 25.

Thus the Court negatively addressed the tradition that saw religion dealing always with a Supreme Being in *Torcaso v. Watkins*,¹⁹ and thinned out more in conscientious objection cases like *United States v. Seeger*²⁰ and *United States v. Welsh*.²¹ In *Seeger*, the court took up Paul Tillich's definition of religion as "ultimate concern"²² and pushed it further, letting it refer to a belief which occupies "the same place in the life of an objector as an orthodox belief in God."²³ Religion was functionally defined in respect to the individual objector. Such a belief, it was argued, functioned as a religion in his life.²⁴

When the court made this observation, it was clear that it had become difficult to define or to escape the boundaries, grasp, or potential of religion. The gyre of religion had now been widened almost immeasurably, giving it more reasons than before to "collide" or lead to anarchy. One must ask: Is anyone eager to restrict the definition of religion or to show how this can be done to the satisfaction of lexicographers and legal scholars alike? Who will do the deciding of what is in and what is out?

Meanwhile, once again, from the legal side, constitutional interpretation and governmental involvement with religion have grown, thanks to factors in both religion and law. A reckoning of the total of U. S. Supreme Court cases illustrates this.

The gyre was indeed narrow between 1789 and 1924. *Meyer v. Nebraska*²⁵ and *Pierce v. Society of Sisters*²⁶ in the 1920s were still not argued on First Amendment grounds and they did not lead to constitutional precedent-making.²⁷ It takes only two pages in legal histories to list the religion cases in those first one hundred and thirty three years of decisions. But it takes fourteen pages to list those in the more recent seventy two. I count only twenty one cases in those first one

19. See 367 U.S. 488 (1961) (holding that it is unconstitutional to require a declaration of religious belief in the existence of God to hold public office).

20. See 380 U.S. 163 (1965) (holding that one can gain conscientious objector status from military service without belief in God or conventional religion so long his or her belief was profound and meaningful and if it occupied a place in the objector's life comparable to that filled by faith in the case of theists or other religious believers).

21. See 398 U.S. 333 (1970) (holding that an objector who held to non-religious beliefs with the strength with which believers held to their faith could achieve legal objector status).

22. *Seeger*, 380 U.S. at 187.

23. *Id.* at 184.

24. *Id.* at 187.

25. See 262 U.S. 390 (1923) (ruling that statutes which forbid teaching foreign languages in public schools were unconstitutional).

26. See 268 U.S. 510 (1925) (rendering state law invalid that forced children to attend public (as opposed to private and parochial) schools).

27. See *Meyer*, 262 U.S. at 399 (arguing that statutes forbidding teaching foreign language in public schools were unconstitutional under the Fourteenth Amendment).

hundred and thirty three years. Only two or three of these were religiously interesting in the "widening gyre" sense.

Nine cases simply dealt with property, and might as well have been regarded as secular. More complicated were four that dealt with Mormon polygamy, but national consensus was so strong against this form of marital expression in the Mormon case, that decisions in respect to these cases did not stretch the boundaries of legal definition. The interesting instances instead included the second of all, *Vidal v. Girard*,²⁸ which allowed for a testamentary bequest to go to a school even though the provisions of the will in question derogated Christianity. A later property case, *Watson v. Jones*,²⁹ ruled that secular courts dare not interfere with matters of church doctrine, discipline, or polity, as they did not constitute "widening gyre" issues.

Even these just-mentioned school cases of the 1920s, *Meyer* and *Pierce*, were quite constricted, and had little widening effect. As noted, it was the later introduction of Incorporation that changed so much. After Incorporation came to have a bearing on religious activities in the states, First Amendment rights had to be assured in the states, thanks to the employment of the Fourteenth Amendment for the first time in the "free exercise" clause in *Cantwell v. Connecticut*.³⁰ Then came the application of the "no establishment" clause in *Everson v. Board of Education*,³¹ the case that introduced the "wall of separation" argument and set the terms that many of the religious regard as too restrictive of religion. Henceforth, property cases declined in number, at least in proportion to the whole roster, and the confinement of the legal gyre with respect to religion, easier to work with in property cases, no longer counted. There have been four main kinds of "widening" cases in the period since 1940.

First, the "widening gyre" cases of conflict over public *space*. These took the form of legal disputes over religious representations and propagation rights in airports, on courthouse lawns, on Native American reservations, automobile license plates, parks, and front doors.³²

28. See 43 U.S. (2 How.) 127 (1844) (holding that a will including provisions inimical to Christian claims was valid in the case of a school for orphans made possible by that will).

29. 80 U.S. (13 Wall.) 679, 733 (1872).

30. See 310 U.S. 296, 303 (1940) (employing the Fourteenth Amendment to apply the Free Exercise Clause to a state case; the state was not permitted to suppress the communication of religious opinions for the sake of keeping public peace and quiet; it was a ruling that favored Jehovah's Witnesses' efforts).

31. See 330 U.S. 1 (1947) (supporting a state law that allowed for reimbursement to parents for costs they bore for having their children transported to parochial schools).

32. For a comprehensive list of United States Supreme Court decisions relating to religious liberty, see Carl H. Esbeck, *1993 Survey of Trends and Developments on Religious Liberty in the Courts*, 10 J.L. & RELIGION 543, 573 (1993-94).

Second, public *time*, especially the time children spend in public schools. There have been a score of such Supreme Court cases since 1940.³³ There is also legal dispute over issues relating to exemption from public uses of time for religious exercises, at private and parochial schools. Here again, there were more than a score of such cases in those years.³⁴

Third, public *service* collisions came wherever citizens were expected to be, even against their will, as in the case of public schools. This was also true of the military, which showed up in two cases in the period of 1789 to 1940, before *Cantwell*, and in about ten cases since, culminating in the "widening" *United States v. Seeger* and *Welch v. United States*.

Call the fourth, using a term that is growing obsolete and disfavored though it once was in place: *marginal* religions and the law. These cases, for example, involved Mormon polygamy or Christian Scientists' resistance to medical care for their children. Such cases usually dealt with what Leo Pfeffer has called "disfavored" religions, or in metaphors appropriate for our poem about gyres, as just mentioned, "*marginal*:" Hasidic Jews, Church of Scientology, ISKCON, Native American Church, Adventists, Amish, Jehovah's Witnesses and the Church of Lukumi Babalu Aye were involved.

It is the public space, public time, and public service areas where collisions most occur, prompting many with religious outlooks to complain of government "intervention" or even the "take over" or, most stridently, to use a book title by lawyer John Whitehead, *The Stealing of America*.³⁵ Many organizations on the religious right picture these—especially the decisions on school prayer, *Engel v. Vitale*³⁶ and *Abington Township School District v. Schempp*³⁷—as evidences that a "secular humanist" conspiracy operates in the law and especially in the Supreme Court.

However, more moderate sorts also protest such intrusion; Dean M. Kelley edited a book, *Government Intervention in Religious Affairs* (1982) in which any number of religious leaders complained at essay length about government with topics such as "Big Brother to Reli-

33. *Id.*

34. *Id.*

35. See JOHN WHITEHEAD, *THE STEALING OF AMERICA* (1983) (arguing that the government has asserted undue control over areas such as "human life, the family, the church, the school, and private property" and that this trend must be reversed).

36. See 370 U.S. 421 (1962) (forbidding a New York state program stipulating classroom prayer).

37. See 374 U.S. 203 (1963) (expanding the principal further than the previous case by disallowing all forms of daily prayer in the public school classrooms).

gious Bodies,” or asked “Who Owns the Churches?” or reported on how “The IRS Cracks Down on Coalitions,” “Concordia College Challenges the IRS.”³⁸ Others dealt with “resisting,” “surveillance,” “regulation,” and the like.

So aggressive, ecumenical, and united was this protest that one essayist in Kelley’s book, William Lee Miller, felt called to argue that “Responsible Government, Not Religion, Is the Endangered Species” on the “intervention” front.³⁹ He had just read a list of seventeen alleged governmental threats to religion. Only one of these “threats” did Miller see as a clear-cut danger: the use of clergy as informants for intelligence operations. Miller’s conclusion instead was that “‘government,’ not religion, is the endangered species in the United States—and American religion helped make it so.” I would identify at least with his closing words:

In part just because of the modern totalitarian perversions, we need to show how ordered liberty—government in a free society—can work, under modern conditions. We respond much more favorably to the word “law” than to the word “government.” A great accomplishment of the societies that have shaped us is to bring these two words together, with liberty. The democracies have grounded the sovereign decision about law in the people. The role of high religion, Reinhold Niebuhr said, is to contribute depth to human life. The American political argument needs it. I put it to you that the religious community in the contemporary United States should not add to the superficial anti-government theme that surrounds us everywhere.⁴⁰

Miller was alone in expressing such sentiments, at the symposium and in the anthology by Kelley. As valid as some of the concerns may have been and may be, he argued, they do contribute to what we have been calling the “widening gyres” and adding to the collisions of religion and law against which the religious complain. A second symposium and book, *Government Intervention in Religious Affairs II*, in 1986, followed with thirteen more essays in the other-than-Millerian mode. In the religious community it is the kind of voice that dominates discussion.

Now, to these two large areas, I would add a third: the breakdown of authority within religious bodies and within religion as a whole. It is easier for a legal tradition to deal with a *the church*, as when establishment prevails, or simpler to reckon with a small number of well-

38. William L. Miller, *Responsible Government, Not Religion, Is the Endangered Species*, in *GOVERNMENT INTERVENTION IN RELIGIOUS AFFAIRS* (Dean M. Kelley ed., 1982).

39. *Id.* at 41-56.

40. *Id.* at 56.

organized authorities than with the pluralist melange. Thus the United States Supreme Court oversimplifies decisions in questions of polity. It prefers to reduce the many polities to two: simple hierarchical or simple congregational polities. The courts are generally at a loss, not knowing how to act, when dealing with connectional or ad hoc versions of polity. All the way from the Amish enclaves to the huge operations of the Vatican, late modern religious authority—and there *is* still some authority—moves more effectively by persuasion than by coercion. But this trend renders canon and church-law and discipline less effective and leads the religious to resort more frequently to secular courts, even to try to settle their internal affairs.

IX. A CAUTIONARY WORD IN PRAISE OF CHAOS AND ANARCHY IN A DIALECTIC WITH ORDER AND -ARCHY

One can regret some loss of coherence without showing an impulse to return to the constrictive ways. So I will at this point introduce some sort of “consider the alternative” comment. Religion, through its prophetic and imaginative functions, can help assure freedom and, while it would introduce order to the individual or subcommunity, it normally also effects some measure of chaos. Thus in the biblical tradition, the movement of God is seen as always creating cosmos out of chaos. Nietzsche says somewhere that one must always have some chaos in one’s soul to give birth to a dancing star, and the religious impulse at its most profound also possesses something of this character. The expansion or widening of the religious sphere is often a reflexive attempt to constrict the reach of law and as such can have a creative side.

Philosopher George Santayana once described a dialectic concerning the ways in which Americans get their freedoms. First there appear those we might call the “law-less” religionists: “Liberty, for all these pensive or rabid apostles of liberty, meant liberty for themselves to be just so, and to remain just so for ever, together with the most vehement defiance of anybody who might ask them, for the sake of harmony, to be a little different.”⁴¹

Santayana then balanced this phenomenon with a spirit he attributed to or blamed on the English, the Anglo-Saxons. He made little mention of law, but it is inferred in his constant reference to the Anglo-Saxon’s “co-operative” and compromising character. Such a character “calls only for a partial and shifting unanimity among living men,

41. GEORGE SANTAYANA, CHARACTER AND OPINION IN THE UNITED STATES 135 (1956).

. . . and can enlist every reasonable man and nation in its service."⁴² English liberty, the philosopher went on, "moves by a series of checks, mutual concessions, and limited satisfactions," which are not the characteristics of passionate religion.⁴³

The most opposite systems of religion and education could look smilingly upon one another's prosperity, because the country could afford these superficial luxuries, having a constitutional religion and education of its own, which everybody drank in unconsciously and which assured the moral cohesion of the people.⁴⁴

Thus, it evidently was believed in his time, "the centre could hold" and society would not suffer the pain of disruption.

X. CONCLUSION: A BRIEF FOUR-PART SERMON ON COUNTERING THE TRENDS TOWARD "MERE ANARCHY" IN RELIGION AND LAW

Without taking away from the force of the analyses that precede this little homily, I believe one can make affirmations and point to creative ways to live with the "widening gyres of religion and law." Here are four examples, organized around the four lines of Yeats's poem.

A. *The Public Can Make New Efforts to Define the Gyres of Religion and Law*

The opposite of the "widening" of gyres need not be "narrowing" or "constricting" but "contraction" through creative acts of observing, monitoring, deliberating, and defining. This activity can be pursued in theological and legal circles, in schools, institutes and centers, through conferences, individual research and study, and exemplary activity. The acts of "naming" can be clarifying. They may not by themselves solve problems, but they make it possible for people to save energies for addressing them, and to marshal their intellectual and moral resources.

Thus, in the United States today the DePaul Center for Church/State Studies, Hamline University's *The Journal of Law and Religion*, and the Law and Religion Program at Emory University represent pioneering efforts. These offer influential programs and materials that are useful in law schools and in religious institutions. They have contributed to *Verstehung*, to understanding. If the thoroughness of their chronicling and imparting of information sometimes creates the ap-

42. *Id.* at 144.

43. *Id.* at 133.

44. *Id.* at 122.

pearance of adding to "the widening of gyres," overall they have helped responsible citizens make sense of trends in religion and law and thus have contributed to action.

Let it also be said here that it is easy to exaggerate the pluralism in American life and thus to see the gyres as more widened than they actually are. Elements of tradition, consensus, common good experience, widely approved propositions, and coalescences and coalitions survive and regularly make their force felt within pluralism. On many decisions, one does not have to reckon with the 200 denominations or 1200 religions that one finds in encyclopedias. Nor does a person have to deal with an infinite number of legal alternatives. The computer can turn up myriad options, but the public usually lines up around two poles or variations. That lining up does not resolve religious or legal disputes, but it does make the understandings of power and the address to them intelligible. "Mere" multiculturalism which deals with myriad conflicting partisans for varying views represents an inaccurate expression of the realities of national life, though it is to be reckoned with politically.

B. The Public Can Help Increase Communication Within and Between the Gyres of Religion and Law

We have pictured a scene in which "mere anarchy" resulted when the necessarily separate yet also necessarily interinfluential gyres of religion and law collided. Then government, as an expression of law, comes to be seen as an agent of "intervention" in religious life and religion is seen as "intrusive" or "invasive" when it moves in the public realm.

Given the sad record of human, including Western, experience, it would be folly to yearn for, ask for, or work for return to a single gyre, whether it would combine religion and law institutionally, or whether it subordinated religious *meanings* to law and government or subordinated legal and governmental *powers* to religious organizations.

But lines of distinction between the two spheres need not mean that there can be no "hearing" at all. The lives of citizens are indeed organized around and within circles of religion (for most) and law (for all). The embodiments and expressions of both religion and law prosper through argument, which need not be confusing and can be defining. The search for religious truth and legal validity is pursued when people are, to use John Courtney Murray's words for describing a re-

public, "locked together in argument."⁴⁵ But they might prosper more through "conversation," in which the question, not the answer, sets the terms.

Argument or conversation between agents of religion and law in late-modern culture in academic settings had long been characteristically disdained, ignored, or muffled. As a result, the leadership in the two widening gyres knew no consistent pattern of communication or understanding. They usually dealt with each other uncomprehendingly and only in situations of crisis. Better communication does not remove anarchy—it may only mean better reporting and comprehension—but it can be the first step toward restoring some measure of definition.

C. The Public Can Bring Together Some Elements of Religion and Law That "Fell Apart" and Make Pursue Moves to Recover Concepts of "The Centre"

Such a goal calls for citizens to make intentional and conscious efforts to address "the common good." Religion and law, at their best, serve a public that is not a mere victim of mere anarchy. This public shares some common propositions ("We hold these truths. . ."); common constitutionalism ("We the people . . ."); common space ("O beautiful for spacious skies. . ."); common time with its implicit calls for stewardship ("The earth belongs to the living"); common suffering (natural disasters, fiscal depressions, wars)' common narrative ("four-score and seven years ago"); common myth ("Wee shall be as a City upon a Hill,") and common affection ("the binding tie of cohesive sentiment"). These make it possible for communication across spheres.

Here we lift up from among these commons only "common constitutionalism." Most can recall the bicentennial of the Constitution. Historians feared it would go ignored. Instead, televised debates over the appointment of Robert Bork to the Supreme Court and the Iran-Contra hearings gave publicity to it. Debates raged over who properly interprets the Constitution and the legal tradition, but never over the issue of whether to reject or "desacralize" them.

Divided religious forces and contentious legal ones often obscure the "common good" basis and potential within pluralistic national life. It is possible to make too much of the fact that citizens inhabit what are sometimes called incommensurable universes of discourse. There remain potentials for retrieval of elements that help people to find

45. MURRAY, *supra* note 15, at 62 (quoting THOMAS GILBY, O.P., *BETWEEN COMMUNITY AND SOCIETY*) (1953).

commensurability, to aspire to some never-to-be-fully-attained "centre" of common life.

It is not likely that the common constitutionalism, within a pluralist society, will be grounded in an easily accessible and partly religious *consensus juris*. John Courtney Murray made one last effort at grounding law by trying to show how a natural law basis would bring "theological coherence" to a "theologically incoherent" scene than he did at attracting converts or even holding the believers to his specific version. Murray argued that, absent such natural law philosophy, America had seen

a transition from a religious to a moral pluralism, a transition from a community consisting of a plurality of churches and faiths divided by religious questions but united in their adherence to a common set of substantive moral principles to a community united only by geographical proximity and the acceptance of a common set of political and legal procedures.⁴⁶

The absence of such a basis does not necessarily rule out the value of conversation or even argument, however difficult it may be to pursue these.

*D. The Public Has Responsibility to Reverse the Trends Toward
"Mere Anarchy" and Set Up the Processes in Which
Measures of "-Archy," Ordered and Clarified
Existence Are in Reach*

Reinhold Niebuhr has commented on *Psalm 2:4* and its bearing on human society. A God who sits in the heavens and scorns the pride and folly of human pretension gone awry, is also "a divine judge who laughs at human pretensions without being hostile to human aspirations."⁴⁷

Whether they are believers or not—though believers have special motivations—citizens are irresponsible if they surrender to "merely anarchic" trends, to hopelessness or passivity. The alternative to "mere anarchy" need not take the form of "autarchy," but can be represented in human endeavors to bring order and clarity to human social existence.

Acts of will may not be sufficient to accomplish civil purposes. Luck, providence, grace, intelligence, and moral rigor may all play their part in reconstructing civil conversation. But our century has seen theologians, lawyers, philosophers, politicians, humanists, and or-

46. JOHN COURTNEY MURRAY AND THE AMERICAN CONVERSATION 100 (Robert P. Hunt & Kenneth L. Grasso eds. 1992).

47. REINHOLD NIEBUHR, THE IRONY OF AMERICAN HISTORY 155 (1952).

dinary people, who have undertaken missions of clarity and definition. They have not reined in the figurative falcons or narrowed the widening gyres, but they have shown how to observe them, relate to them, and live creatively even where full coherences not to be found. Such individuals and the movements of which they were a part are exemplars for those of us who try to make some sense of the inevitably widening gyres that come with freedom in law and religion.

