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Winnifred Fallers Sullivan

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Finding a True Story of American Religion: Comments on L.H. LaRue's *Constitutional Law as Fiction: Narrative in the Rhetoric of Authority*

Winnifred Fallers Sullivan*

In our family, there was no clear line between religion and fly fishing.

— Norman Maclean, *A River Runs Through It*

I feel some reluctance to begin after reading Professor LaRue's book. Lash sets a high and austere standard. His careful and thorough exposition of the fictions that support the narrative strategies of several of the classics of the United States Reports serves as a cautionary tale for all who would write or speak persuasively about anything, but particularly about the Constitution. He warns us to be vigilant and ever skeptical of the seductive and deceptive power of legal "stories."¹ Taking the best, our heroes and masters — Chief Justice Marshall and Justices Black, Jackson, and Marshall — and subjecting them to his critical gaze, Lash invites us to be more restrained in our use of rhetoric. He does not ask us to stop telling stories. He considers that impossible, in any event. He asks us in the name of truth and humanity to resist the temptation to sweep into a grand narrative — to be aware, instead, of the casual and devastating destruction that can be caused by powerful fictions.

Grand narratives are taking a beating these days. They have provided the cover for a host of social evils from imperialism and colonialism to patriarchy and racism.² These are cautious times. Scholars across the

* Assistant Professor of Religion, Washington and Lee University, and member of the Illinois Bar. Professor Sullivan presented the substance of this essay at the *Writing Across the Margins* symposium held at Washington and Lee University School of Law on November 3, 1995. Special thanks to Barry Sullivan for reading and commenting on the first draft of this essay.

1. See L.H. LARUE, CONSTITUTIONAL LAW AS FICTION: NARRATIVE IN THE RHETORIC OF AUTHORITY (1995) (critiquing function of narrative in judicial opinions).

2. See, e.g., EDWARD W. SAID, CULTURE AND IMPERIALISM (1993) (examining

disciplines are calling for a return to the local — to the community or the family — eschewing, for the moment at least, the possibilities, if there are any, for overarching theories and universal plans.³ Recognizing, however, that we cannot do without stories because it is through stories that we are able to think and live, Lash invites us to be more careful in what we do with them and more attentive to the subtle power they wield. He gives us, by way of exemplar, Norman Maclean's tribute to the young men who died in the Mann Gulch fire and asks us to aspire both to the daring courage of those young people and to the obsessive fidelity to the truth shown by the one who tells their story.⁴ It is a worthy goal.

We have been invited here to talk about the rewards and perils of interdisciplinary study. We all share a conviction, I think, that interdisciplinary study leads to the finding of truer stories. The bringing together of law and rhetoric has clearly borne wonderful fruit in Lash's case, as the study of other branches of literary theory have for others in what is loosely described as law and literature. Lash has used methods of criticism gained from his study of rhetoric to cut across traditional readings of constitutional law and to provide a new and important level of understanding. I have been a part of a similar conversation between law and religious studies. Today, I will reflect briefly on interdisciplinary work and then talk in more depth about the stories that are told about American religion and about how we can go about finding a truer story there.

There is a danger in discussing interdisciplinary study of drawing disciplinary boundaries too tightly, particularly in this time of blurred genres. Some are calling the disciplines outdated. Much interesting work falls between disciplines. The borders are often fuzzy. Certainly they are in religion and law, as many recent studies have been at pains to point out.⁵

function of narrative fiction in Western colonialism, history of resistance to Western culture in colonized non-Western societies, and influence of cultural resistance upon subsequent liberation of colonized societies from Western domination).

3. See, e.g., CLIFFORD GEERTZ, *LOCAL KNOWLEDGE: FURTHER ESSAYS IN INTERPRETIVE ANTHROPOLOGY* 4 (1983) (arguing that social forms are inevitably local and increasingly pluralistic, and observing that "unified science . . . has never seemed further away, harder to imagine, or less certainly desirable than it does right now"); see generally BOAVENTURA DE SOUSA SANTOS, *TOWARD A NEW COMMON SENSE: LAW, SCIENCE AND POLITICS IN THE PARADIGMATIC TRANSITION* (1995) (discussing collapse of dominant socio-cultural paradigm of Western modernity and emergence of transnational legal pluralism).

4. See LARUE, *supra* note 1, at 129-53 (discussing NORMAN MACLEAN, *YOUNG MEN AND FIRE* (1992)). Maclean attempts a painstaking and often painful reconstruction of the circumstances of the Mann Gulch fire, of the physical conditions of the fire, and of the group of young men who "jumped in" to fight the fire.

5. See, e.g., FRANK S. ALEXANDER & JOHN WITTE, JR., *THE WEIGHTIER MATTERS*

Bearing in mind the dangers, distinguishing disciplines is useful for this discussion, so I will continue to speak as if religion and law can be separately defined and understood.

My own experience in interdisciplinary study has been, as I have said, in the intersection between the study of law and the study of religion. It has been an interesting and not altogether comfortable journey. David Tracy, a prominent systematic theologian, in his small book discussing interreligious dialogue (and there is a sense in which the law-religion discussion is an interreligious dialogue), suggests that three elements are necessary for fruitful dialogue: "a self-respect (which includes, of course, a respect for, even reverence for, one's own tradition or way); a self exposure to the other as other; and a willingness to risk all in the questioning and inquiry that constitutes the dialogue itself."⁶ Tracy goes on to describe his own lengthy experience as a participant in Buddhist-Christian dialogue, detailing both the enlightening and the frustrating results of that dialogue. He is most eloquent about the encounter between the prophetic and the mystic, and about the possibilities for cross-fertilization between Christian and Buddhist ideas of transience — of changing notions of self and no-self — as helpful in critiquing what has come to be known as possessive individualism.⁷

I would like to adapt Tracy's conditions for interreligious dialogue to interdisciplinary study. One immediate and obvious difference is that, in interdisciplinary study, the proposed dialogue takes place within one person. While this seems appropriate in some ways for postmodern inquiry, it results, in my experience, in interdisciplinary study requiring great physical stamina. One must attempt to simultaneously inhabit two different cultures — sometimes it seems to be two different places. Further, one cannot rely on the other to present the other tradition. One always has the responsibility of faithfulness to both.

But on the assumption that such an othering within oneself is possible, let us return to Tracy's conditions. First, he asks that each party to a dialogue respect her own tradition. Interreligious dialogue only works when each tradition is reverently and respectfully represented. This requires a real commitment in interdisciplinary study — a commitment to both disciplines

OF THE LAW: ESSAYS ON LAW AND RELIGION (1988) (discussing historical interaction of law and religion, and analyzing religious perspectives on law); HAROLD J. BERMAN, FAITH AND ORDER: THE RECONCILIATION OF LAW AND RELIGION (1993) (discussing legal dimension of religion and religious dimension of law, and exploring dynamic interaction between law and religion).

6. DAVID TRACY, *DIALOGUE WITH THE OTHER: THE INTER-RELIGIOUS DIALOGUE* 73 (1990).

7. *See id.* at 74-110.

to represent them fully and fairly as serious and complete but internally contested attempts at imagining reality. This is a tremendous challenge in interdisciplinary study, as it is in interreligious dialogue. It is always tempting to throw in the towel on one side or the other, to conclude that one or the other has all, or at least most of, the answers.

Second, Tracy asks each partner to really open herself fully to the other, not just to borrow the parts that are useful, while refusing to listen to other more threatening aspects of the other tradition. Raiding other religions in the guise of interreligious dialogue is rampant in New Age religion among self-styled religious seekers and is widely criticized, particularly by Native Americans.⁸ In legal studies generally, I think that other disciplines have mostly been ransacked for solutions to various problems perceived to exist in legal thought and culture. There is often no real acknowledgment of the other discipline in its wholeness. Thus, economics, literature, philosophy, anthropology, sociology, psychology, and even theology are made use of in an effort to save law, but some notion of law occupies the center in these studies. The other disciplines are peripheral and instrumental. You cannot just have market theory without also responding to other parts of economics — those that critique market theory or those that pose a real threat to your idea of the dominance of law as an interpretive lens. The other discipline, with all its exotic weirdness and its own history, must be listened to.

Finally, Tracy says that dialogue only works if all is risked: "It cannot be overemphasized that, if genuine dialogue is to occur, we must be willing to put *everything* at risk."⁹ You cannot privilege a part of your tradition and reserve it as outside the exchange. Law as a conversation partner places into doubt its own good faith by its failure to risk in a way that resembles the posture of dialogue partners from certain religious traditions — particularly evangelizing religious traditions such as Christianity and Islam — which reserve as sacrosanct certain core doctrines and thereby remain suspect to non-Christians or non-Muslims. There must be parity, and the dialogue must be a two-way street. Each partner must be open to change.

These conditions are demanding ones. Law and Religion are proud disciplines. Each makes broad claims as locations for a complete understanding of the human condition. Each is also very different in personality. I had a teacher in graduate school — one who is something of an *enfant terrible* in the arcane world of religious studies — who was fond of using law as an example of a proper discipline, one that knew how to define the boundaries

8. See, e.g., SWEATING INDIAN STYLE: CONFLICTS OVER NATIVE AMERICAN RITUAL (Susan Smith 1994) (interviewing Native American scholars and religious leaders).

9. TRACY, *supra* note 6, at 95 (emphasis added).

of its subject and that knew what questions to ask. In contrast to law, he depicted the study of religion as a messy and undisciplined area of study, perhaps a nondiscipline, a discipline certainly in which there was little agreement about either the object or the method of study. It was hard to convince him that his view of the law was a caricature, although he could see that the Supreme Court's view of religion was quite inadequate.

I think that fruitful interdisciplinary work will only occur if we hazard Tracy's conditions. The dialogue must go both ways or it is no true dialogue, and the conversation partners must meet as equals, risking all.

What does all of this mean for the dialogue between law and religious studies? This dialogue is a particularly poignant one in the United States because of the explicit constitutional framework in which the conversation takes place. The very conversation is legally bounded and defined. Because of the First Amendment, all of American religion takes place in a location explicitly constructed by American law. A greater effort is perhaps necessary then to see the parties as distinct and to insist on their parity and on the need for having both parties faithfully represented. Powerful stories are told within and about all religious traditions. Law tells lots of stories about religion. Lash refers to some of the stories told by American law in the first chapter of his book. Scholars of religion need to listen to the stories lawyers tell and lawyers need to listen to the stories that scholars of religion tell. Both perhaps need to look more carefully for what Maclean calls the "strange or wonderful" as a priority to formulating rules or theories.¹⁰

Speaking first as a scholar of religion, I will briefly review the historiography of American religion and suggest the importance of the legal in understanding that story. Then, I will turn to the Supreme Court and look at the stories about religion that it tells, critiquing them from the point of view of religious studies. A continuing hope of mine is that the stories of American religion told in these two places will come to bear some resemblance to each other.

I would like to start by recalling for you two recent news accounts about religion and law in America. First, in May 1995, the *Washington Post* reported that a group of four American lawyers, including both a member of the First Amendment Committee of the ABA Section on Individual Rights and Responsibilities (IR&R) and a scholar who has published a fair amount on "cults," had traveled to Japan at the expense of Aum Shinrikyo, the Japanese religious group whose leader has been prosecuted for the poison gas attack in the Tokyo subway. The American lawyers held two news confer-

10. NORMAN MACLEAN, *YOUNG MEN AND FIRE* 102 (1992); see also LARUE, *supra* note 1, at 150-53 (discussing Maclean's search for understanding and for "the strange and wonderful" of Mann Gulch fire story).

ences to announce their finding, based on a few days investigation, that Aum Shinrikyo could not have been responsible for the attack and to rebuke the Japanese police who, they said, should "resist the temptation . . . to crush a religion and deny freedom."¹¹ In July 1995, National Public Radio International's Morning Edition reported that churches near the federal building in Oklahoma City were denied federal disaster relief — although several are seriously damaged — simply because they are churches.¹²

These two recent news stories illustrate two of the ways in which American law meets religion and acts in a way that people outside the legal community find presumptuous and nonsensical. The extreme naivete of the first group of lawyers and the legalistic approach of the second are products of a history of misunderstanding and mistrust between American law and American religion. Why does this situation exist? I will return to these two stories at the end of my essay.

Now, to get back to history, historians have worried much about the best way to tell the story of religion in America. The mistakes that have been made, the grand themes that have been attempted — of limits, of growth, and of equality, to use Lash's terms — are instructive in understanding the story of American religion and its relationship to law.

It used to be that the story of religion in America was told as the story of the Protestant Church in America, and it was told by people who called themselves church historians — Philip Schaff and William Warren Sweet, among others.¹³ That story began with the Puritans of New England. It continued with a meticulous sorting out of the theological differences between and among Calvinists — Presbyterians and Congregationalists, mostly. It starred such luminaries as Anne Hutchinson and Cotton Mather, and included doctrinal debates such as the antinomian controversy and the halfway covenant.¹⁴ By starting here, the political and religious order of the New England colonies was given a place of honor in developing an American way, both religious and political. The New England Puritans set the standard.

11. T.R. Reid, *U.S. Visitors Boost Cause of Japanese Cult; Lawyer Says Police Imperil Religious Rights of Sect*, WASH. POST, May 9, 1995, at A8.

12. *Church Seeks Federal Funds from Oklahoma City Bombing*, 1995 WL 2,958,736 (NPR Morning Edition radio broadcast, July 7, 1995).

13. This story was told most recently in Sydney Ahlstrom's magisterial *A Religious History of the American People*. The outline of the story that follows can be seen in his book. Their journal is still called *Church History* and their professional association is still the American Church History Association.

14. See SYDNEY E. AHLSTROM, *A RELIGIOUS HISTORY OF THE AMERICAN PEOPLE* 151-65 (1972).

In this story, the middle states, when they appeared, were supporting characters, early experiments in tolerance and diversity, but the tolerance and diversity were primarily among Protestants. The small communities of Jews and Catholics in Philadelphia and Maryland did not fit into the story and were largely ignored. The southern states had an even more passive role. They featured the transplanted Anglicans — a weak establishment with Tory priests that would give way to enlightenment deism and pietistic evangelization in the Great Awakening beginning with George Whitefield, the Grand Itinerant.¹⁵

The story of the Protestant Church in America continued after the Revolution with the flourishing of Methodists and Baptists as the West was won. The hero was the circuit preacher, braving the weather to make his rounds and to bring religion to the backwoods and the frontier. Beginning with the Cane Ridge Revival in Kentucky, Protestant Christianity was shown to adapt successfully and creatively to the new conditions, tailoring its theology and culture to fit new people and places.¹⁶ It reached its crescendo in the postbellum Righteous Empire, as Martin Marty calls it.¹⁷

This is a story of growth and of American expansion, of a distinctively American triumphalist-style social integration and assimilation. It is also a story of limits. Religion in America meant denominational Protestantism. This is the story of a young country inventing new religious forms, as the Mann Gulch fire smokejumpers' story was the story of young firefighters engaged in a new form of firefighting, and while it has some of the same engaging "can do" spirit, it also smacks of the same inexperience and overconfidence. The story of the smokejumpers is one of untimely death. The story of the mainline Protestant churches is one of declension.

The story of the Protestant Church in America changes in the twentieth century and becomes somewhat confused. It is hard to hold the plot line unless you are a confirmed optimist and keep your focus very tight. After the turn of the century, the story is one of division and decline. Perhaps that is one of the reasons that the story is no longer told this way. The split between liberal and conservative Protestants combined with the coming of age of immigrant communities resulted in an inconclusive ending. In Lash's terms, this story is bad because the fictions it uses are false — it leaves out many people — but it is also sad because the growth did not continue. The sad ending, moreover, did not seem to fit with the continuing

15. *See id.* at 261-384.

16. *See id.* at 429-54.

17. MARTIN E. MARTY, *RIGHTEOUS EMPIRE: THE PROTESTANT EXPERIENCE IN AMERICA* (1970) (discussing history and growth of American Protestantism).

reports of polls that Americans are among the most religious people in the industrialized world.

During the religious revival of the 1950s, Will Herberg, a sociologist, tried another way of telling the story to account for the fact that "America seems to be at once the most religious and the most secular of nations."¹⁸ He built on Sidney Mead's trenchant analysis of American Protestantism in *The Lively Experiment*¹⁹ to conclude that the principal religion in America was, in fact, a distinctively new and American religion which he called the "American Way of Life."²⁰ It came in three flavors — Protestant, Catholic, and Jewish — but Herberg insisted that the similarities were more important than the differences.²¹

While he made important corrections to the telling of the story, Herberg's contribution to the consensus history of the fifties also left out part of the story, of course. Most seriously, he left out the black churches; their story seriously challenges his integrationist thesis. He left out the Native Americans. He left out the complexity of the story even within the mainline denominations and there is a sense that for all the telling shrewdness of his analysis, he seems to leave out religion. There is a flatness to the story that is belied by the richness of the evidence.

Now the field is wide open. The story of American religion is now about everybody. It begins at a different point and it has a different plot or maybe many plots. I hope that this new religious history is moving toward a more mature story — one that does not privilege one theology or one community, but that still seeks the kind of unity of truth and art that Lash admires in Norman Maclean and that depends, as Maclean does, on the work of many disciplines.

Now we begin with the Indian traditions, and we linger over them, partly in a gesture of recompense and reconciliation, but also because we have something to learn from them about what American religion is. Persistent American themes of man and nature, of immigration, of diversity, of cultural encounter, and of historical adaptation and change begin here. The first Europeans are now Spanish conquistadors, Franciscan missionaries, French trappers, and Jesuit priests, not English Puritans with their godly ministers.

18. WILL HERBERG, *PROTESTANT, CATHOLIC, JEW* 3 (University of Chicago Press 1983) (1963).

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

20. See HERBERG, *supra* note 18, at 256-59 (discussing principal American religion).

21. See *id.* at 210-30 (comparing and contrasting American Protestantism, Catholicism, and Judaism).

This different starting point makes very real differences. Where you start sets a standard for what follows later; it sets a benchmark. If you start with the Puritans, then it is their religious life which defines religion. If you start with the Navajo and the Iroquois or the Spanish and the French, religion suddenly looks very different. Religion is about symbol and myth, ritual and violence, sacred space and sacred time, rather than being about baptism and conversion and the work of the spirit. Religion is public, communal, and acted out, rather than private, individual, and believed. If you start with everybody, American religious historians can look back with a skeptical but searching eye at the confusion of American religious history as Maclean sorted through the confusion of the aftermath of the Mann Gulch fire. You see different things. Among others, you can identify those people and communities of genius who, like Dodge with his escape fire in Maclean's story, invented new religious forms in response to new social and political situations — new religious forms that became important new religious communities.²²

If everyone is included, then certain previous assumptions are questioned. One that has been challenged recently is the assumption that the African slaves were religious blank slates when they arrived because their cultures had been terrorized out of them. This was a necessary assumption for the story of American Protestantism as a story of growth and expansion. Proceeding from that assumption, the religious life of the slaves only began after the Civil War with the public creation of the Black denominations. Al Raboteau went back and looked at slave religion, and found continuities from West African religion in slave life that continued in African-American Christianity, as well as in syncretistic fusions of the two.²³ In his account, the slaves and their descendants suddenly spring to life as creative agents of their own religious life, not simply as the passive recipients of white missionary activity.

If everyone is in the story, the homegrown sects and the hundreds of transplanted religious groups from around the world get included. This new story of American religion has moved away from church history. It has also moved away from history as a discipline. It now locates itself in religious studies and in the new discipline invented with the other social sciences in the Enlightenment. American religious experience is understood theoretically in a global and comparative context. American religious historians now read Weber, Geertz, and Foucault, not just William Warren Sweet and Perry

22. For example, the Mormons and the Christian Scientists.

23. See ALBERT RABOTEAU, *SLAVE RELIGION: THE "INVISIBLE INSTITUTION" IN THE ANTEBELLUM SOUTH* 4-42 (1978) (discussing survival and transformation of African religious tradition in New World).

Miller. The question of what is American about American religion gets a different answer and the context for understanding the First Amendment also looks different.

This new story has its own problems. For one thing, it is not really a story yet. It is too easy just to celebrate the diversity of the works of the spirit in a mindless way. Religion in America sometimes looks now as if it is uniformly positive in its contribution to life. American historians, in their enthusiasm for the colorful panoply of multi-ethnic diversity, sometimes forget to ask hard questions about the distinctiveness and the destructiveness of American religion. They also often forget that all this religion happens in a place essentially defined by American law. Zoning laws, criminal laws, Sunday closing laws, tax laws, narcotics laws, building codes, licensing laws, and labor laws all have profound and sometimes almost invisible structuring effects on peoples' religious lives. Those effects can be seen if new immigrant communities are looked at, particularly the burgeoning Hindu and Muslim communities. The location of their places of worship and the times of their religious services, the structuring of their finances, the public behavior and education of their children, and the words which they use to describe religious reality are all substantially determined by American law. You can see before your eyes the creation of new "denominations" that conform to the American religious world described by Mead and Herberg. It is a world in which a bewildering variety of transplanted religious traditions are transformed into voluntary associations that look like American Protestant churches, themselves the product of a new experiment in religious liberty and disestablishment.

The enormous influence of legal structures on religious experience can be seen more clearly from the point of view of legal studies, although many First Amendment lawyers resist seeing it, but the importance of law is not something that I have to argue to this audience.

Lawyers and judges, like historians, have also told stories about American religion. The stories they tell are told largely in Enlightenment and Protestant religious categories in which religion is understood to be private rather than public, a matter of belief rather than action, and individual rather than communal. There have been three different stories told about American religion in American courts. They all have debts to certain grand narratives, including the one that the church historians used to tell. I have laid out those three stories at length in another place.²⁴ I will briefly summarize that argument here.

24. WINNIFRED FALLERS SULLIVAN, *PAYING THE WORDS EXTRA: RELIGIOUS DISCOURSE IN THE SUPREME COURT OF THE UNITED STATES* (1994).

The first story that is told is a story in which a triumphal and broadly Protestant cultural understanding of religion defines and limits the possibilities for American religion. It can be seen at work in *Reynolds v. United States*,²⁵ in which the Court unapologetically measures Mormon conduct against that of Victorian religious mores and values, but it reappears a century later in *Wisconsin v. Yoder*,²⁶ in which Chief Justice Burger gives his imprimatur to the illegal social practices of the Amish because they are good, clean-living people. An unprecedented exception to laws of general application is permitted because the Amish conform to the American Way of Life as defined by mainstream Protestant Christianity.

The second is the story of neutrality and equality. In this story, law has replaced religion as the central character in the American story. It is one that infuriates many self-consciously religious Americans. Mark DeWolfe Howe has shown beautifully how the development of the interpretation of the First Amendment Establishment Clause and that of the interpretation of the Fourteenth Amendment were closely and inextricably linked.²⁷ The Court's First Amendment jurisprudence really begins in the 1940s and finds its inspiration, Howe argues, in the Court's then emerging commitment to political equality later expressed in the decision in *Brown v. Board of Education*.²⁸ Justice Black's equation of religion and nonreligion in *Everson v. Board of Education*²⁹ — the neutrality with respect to religion later expressed in a fuller way in Philip Kurland's book on the First Amendment³⁰ — is thus arguably born of his political commitments with respect to the Fourteenth Amendment and his religious faith in the Bill of Rights.³¹ Religion itself has no real interest for Black or for his current successor, Justice O'Connor. Their commitment is to equal access to the political process. Law has

25. 98 U.S. 244 (1879).

26. 406 U.S. 205 (1972).

27. See MARK DEWOLFE HOWE, *THE GARDEN AND THE WILDERNESS: RELIGION AND GOVERNMENT IN AMERICAN CONSTITUTIONAL HISTORY* 31 (1965) (discussing Supreme Court's incorporation of Fourteenth Amendment guarantees into prohibitions of First Amendment Religion Clauses).

28. 347 U.S. 483 (1954); see also HOWE, *supra* note 27, at 135 (stating that judicial sensitivity to value of political freedoms revealed in 1940s free-speech decisions affected condition of religious liberty).

29. 330 U.S. 1 (1947).

30. See PHILIP KURLAND, *RELIGION AND THE LAW: OF CHURCH AND STATE AND THE SUPREME COURT* 96 (1961) (arguing that "government cannot utilize religion as a standard for action or inaction because these clauses, read together as they should be, prohibit classification in terms of religion, either to confer a benefit or to impose a burden").

31. See SULLIVAN, *supra* note 24, at 114-18 (discussing Justice Black's First Amendment jurisprudence and his avowed unconditional faith in U.S. Constitution).

replaced religion for them as an explanatory and motivating factor. This story, the story of equality and neutrality, is strongly indebted to the secularization thesis, in which an inevitable and irreversible secularization is said to accompany progress and industrialization through increasing rationalization. It also resembles the story told by Herberg, a story that focuses on the exceptionalism of American society.

The third story told in American courts is the story of religious particularity — the religious particularity of nonmainline Protestant groups. It has been told largely in dissent. Justices Brennan and Blackmun, for example, in *Lynch v. Donnelly*,³² *Employment Division v. Smith*,³³ and *Lyng v. Northwest Indian Cemetery Protective Ass'n*,³⁴ insist on telling the particular stories of religious communities and on representing the intensity and irreducible aspects of their religious experience, a religious experience embodied in a life of sacramental ritual and sacred space. But both these Justices and others who take this line tend to resist the full implications of accommodating this kind of religious pluralism and continue to believe that a traditional separationist reading of the First Amendment could provide enough space for the needs of these communities.

Judges, lawyers, and law professors largely speak out of their own religious experience or that of their own confessional communities, with little real interest in or understanding of modern scholarship on religion; while in popular discourse the public displays little faith in the law's reading of religion. A few lawyers have a real ideological commitment to an evangelical Protestant providential reading of American history and law. Most lawyers and judges, however, profess a real desire to accommodate the religious pluralism of Americans. A rereading of the First Amendment, a project into which an enormous amount of energy is going right now, is an exercise in futility if serious attention is not given to understanding the nature of religion and its structural relationship to law.

On both the right and the left, privileged public theologies are being allowed to pass in legal studies for scholarly interpretations of religion.³⁵ In religious studies, meanwhile, religion is more and more coming to be understood as constantly changing and remarkably various: as an extremely complex mix of myth and ritual; as closely bound up with culture and social

32. 465 U.S. 668 (1984).

33. 494 U.S. 872 (1990).

34. 485 U.S. 439 (1988).

35. All First Amendment scholarship can be understood to presuppose a public theology. Usually, that theology is unstated. For an analysis of the opinions in *Lynch v. Donnelly* that shows how each opinion is dependent upon a different public theology, see SULLIVAN, *supra* note 24.

structures; as a resource for group identity as well as individual choice; as intimately tied to notions of the body and of activity in the world; as deeply compromised by violence and venality; and as inevitably public, inseparable from the rest of human activity. In law, the influence of these ideas is limited.

I think a new public discourse about religion and law can result if lawyers take religion and religious studies seriously, and if religious studies scholars take law and legal studies seriously. I do not know if that can be done, however, without a new grand narrative. American religious history is criticized right now for being fragmentary and ahistorical and for resisting synthesis. No one is writing a one-volume history of American religion. American society generally is characterized in similar ways.

Lash is a bit ambivalent about the possibilities for grand narratives. He seems to wish that we could do without fictions. I think this possibility is contradicted by his own work. But some religious historians are calling for a new synthesis, even if it is bound to be revised. Catherine Albanese, in her Presidential Address at the 1994 Annual Meeting of the American Academy of Religion, asks us "to sin boldly and tell large stories again."³⁶ For all of Lash's admiration for Maclean's obsessive concern with getting the details right, *Young Men and Fire*, like Maclean's other work, is deeply religious and informed by a particular and intensely Calvinist understanding of the world, an understanding that is strongly indebted to his Montana Presbyterian heritage. It is that grand narrative — that theology and the story that undergirds it — that give Maclean's stories meaning and coherence. It is a theology and a story that has produced much suffering while it has also inspired much that is heroic.

Religion both unites and divides us. Religion unites us in the indivisibility of mystical experience, in the omnipresence of archetypal symbols, in classic texts that transcend cultures, and in certain forms of solidarity for social justice. Religion divides us in its attention to and celebration of the histories of particular peoples, in the myths and rituals of religious traditions that sacralize a particular place and a particular time — in the particularity of religious experience.

To return to the two news accounts I mentioned at the beginning: Maybe the problem with these two accounts is that American law, in the person of the lawyers in each situation, is confused about what religion is. It is telling the wrong story. It is mislocating the unifying and the divisive aspects of

36. Catherine L. Albanese, *Refusing the Wild Pomegranate Seed: America, Religious History, and the Life of the Academy*, 1994 Presidential Address at the Annual Meeting of the American Academy of Religion (Nov. 19, 1994), in 63 J. AM. ACAD. RELIGION 205, 223 (1995).

religion. The American lawyers visiting Japan had a fixed notion that religion unites us and that that is a good thing — so that maximum religious freedom is always and everywhere appropriate. The lawyers in Oklahoma City approached their decision with the fixed notion that religion divides us so that religion ought everywhere to be held separate. Both of these notions can be traced to stories that have been told about American religion. Perhaps we need to send the IR&R lawyers to Oklahoma City to point out that the suffering produced there was a unifying and universal human experience to which the appropriate response is one of universal relief, while the lawyers from the Federal Disaster Relief Agency could go to Tokyo and agree with the Japanese law enforcement officials that religion was indeed at times to be regarded with suspicion.

These two aspects of religion always go hand in hand. There seems to be a tendency in the United States to feel that religion can be fit into one of two boxes: Either it is a good thing that ought to be promoted or it is a bad thing that ought to be put down. Religion is not that simple. Dealing with religion is a messy business. And it is not going away. A single purist approach will not serve. We need to stop thinking up new, clever, law school solutions to the First Amendment and instead have some real conversation about the complexity of religion and religious pluralism.

Americans are pressing the courts to take account of their religious world views. It will not be easy to find a story which includes all the players. We must be willing to risk everything in "acts of hope."³⁷ I conclude with another quote from Tracy:

If we are to hear one another once again, then dialogue and the solidarity amidst the differences and conflicts which dialogue may demand is our best present hope. There is no escape from the insight which modernity most feared: there is no innocent tradition (including modernity), no innocent classic (including the scriptures) and no innocent reading (including this one). My hope is in genuinely dialogical thought accompanied by real solidarity in action. Otherwise we are back where we began: with officially exorcised but practically dominant programs of Western and modern stories of progress; with monological forms of rationality and increasingly brittle notions of a self seemingly coherent but actually possessive and consumerist; with "others" present, if at all, only as projections of our modern selves, our desires, wants and needs.³⁸

37. JAMES BOYD WHITE, *ACTS OF HOPE: CREATING AUTHORITY IN LITERATURE, LAW, AND POLITICS* (1994).

38. TRACY, *supra* note 6, at 5-6.