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Joel R. Cornwell

*John Marshall Law School*

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# Totem and the God of the Philosophers: How a Freudian Vocabulary Might Clarify Constitutional Discourse

JOEL R. CORNWELL

## CONFUSING TYPES OF RELIGIOUS LANGUAGE

Without appealing implicitly to a good which transcends human reason, it is not possible to make ethical judgments that have compelling emotive force. Thus, language which intends to provoke action must create idols. The skillful rhetorician of “rights” or “duty” or “morality” conceals the deities that are the power of her language; effective political speech must conceal its nonrational tropisms in a cultural ethos which purports to eschew religious sentiment. Accordingly, the Rule of Law is cast in rhetorical formulations that suggest a solid foundation in empirically verifiable facts, not in metaphysical speculation.

The resulting political-legal discourse is misleading and causes one to envision moral truth as something fixed, an indelible structure of the universe not properly affected by the subjective quirks of the fluctuating mortals who discover it. But this conception of fixed truth has been outstripped in other field discourses: epistemology, physics, modern linguistic analysis, and process theology all bear witness. And yet the illusion is perpetuated in one’s political-judicial speech because political-judicial speakers fear that abandoning it will lead to the necessity of openly founding moral judgments upon God, or openly founding moral judgments upon nothing. This essay suggests that a new language of natural morality is desirable to clarify—not eradicate—the religious quality of moral judgments. An anchoring concept for such a language can be found in the Freudian concept of *totem*. A salutary effect of such a language is a just,

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• JOEL R. CORNWELL (B.A. Duquesne University; M.Div., Yale University; J.D., Saint Louis University) is assistant professor of law at The John Marshall Law School in Chicago. His articles have appeared in the *Gonzaga Law Review* and the *Duquesne Law Review*. Special interests include law and religion and law and psychology.

functional, and historically preceded demarcation of what is "religion" for the purposes of the United States Constitution.

Truth is more something one creates than something one discovers.<sup>1</sup> The poet sings of fish dancing along the moonlit shore, while the marine biologist describes an intricate spawning procedure by which the male fish, at low tide, contorts powerfully in order to fertilize eggs the females have laid in the sand.<sup>2</sup> One mode of speech is not true and the other false, but each is valid in its own context for its own purposes. Speech finds validation not by corresponding to a fixed structure of the universe, but by being of use to those who speak and those who listen.<sup>3</sup> The poet stirs the heart, and so empowers himself and his audience with courage and wonderment. The marine biologist provides a framework against which to measure empirical phenomena, thus empowering herself and her audience with the ability to extrapolate ordered principle from random observation. Each language is its own validity. The language that will seem most "true" at any juncture is that which nourishes the psychological mode in which one most proximately feels the need of empowerment.

So it is that religious language reflects and assuages a need most elemental, like the biologic organism's necessity of water. The psalmist's thirst for God is the radical realization of the impossibility of life without purpose.<sup>4</sup> From the outset, religious language is doomed to imprecision, for space and time are not large enough to contain their own meaning.<sup>5</sup> Speech about God immediately undercuts its referent by describing that which language by definition is powerless to describe.<sup>6</sup> And yet, the psalmist cannot help but speak just as the hart cannot help but long for the water springs. Religious language cannot go away. If humans were to cease speaking religiously, one might imag-

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1. No one explains this concept more articulately than Richard Rorty in *Contingency, Irony, and Solidarity* (Cambridge, N.Y.: Cambridge University Press, 1989), 3-22.

2. This illustration is dependent upon a "Life Lifter" telespot on the VISN television network. It was presented by Bob Holmes and sponsored by the United Methodist Church. It is not able to be traced further.

3. Rorty, *Contingency*, 3-22.

4. Psalm 42:1-2.

5. Ludwig Wittgenstein, *Tractatus Logico-Philosophicus* 6.41, trans. D.F. Pears and B.F. McGuinness (New York: Humanities Press, 1961): "The sense of the world must lie outside the world. In the world everything is as it is, and everything happens as it does happen: *in* it no value exists — and if it did exist, it would have no value."

6. See Thomas Aquinas, *Summa Theologica* Q.13, Art.3.

ine that the very stones would cry out.<sup>7</sup>

Certain contradictions that appear when different religious languages are compared one to another are thus illusory in one sense. For religious language, necessarily inexact in reference to God (its primary subject), is an endeavor analogous to art instead of science, and its language thus has the quality of poetry instead of empirical recitation or mathematical calculation. If one can say meaningfully that religions compete, the game is played out on an aesthetic field.<sup>8</sup> The truth of a religious doctrine, like the truth of a poem, is measured not according to the words themselves corresponding to an indelible metaphysical structure that exists beyond language, for words, doctrinal or poetic, could have no meaning in such a realm. The truth of a poem, as already have seen, lies in its empowerment—that is, in its placating a proximate emotive need.

If it is asserted that William Shakespeare was a greater poet than Emily Dickinson, is that the truth?<sup>9</sup> Only from a standpoint outside of space and time could such a question be judged as absolutely true or absolutely false, for only Almighty God would know exactly what the need to hear poetry appropriately predicates of human beings, and only God could calculate the qualitative degree to which the appropriate predication is comparatively served by one poet or another. The rest of us must judge who is the better poet by measuring the feelings their words engender in us against what it is that we most long to feel. It is precisely at this point that we are prone to despair, for there is nothing that can be appealed to except feeling, and feeling validates nothing but itself.

Such despair is misplaced. Feelings do not validate themselves alone, but also ideals. Ideals are human creations insofar as they represent the highest endeavor of reason to define who human beings should be in light of what they are. This act of reason is, in other words, the human endeavor to create for ourselves an essence, a purpose, and a fulfillment of being. And yet the measure of an ideal is that its veracity is not compelled by reason alone, but by a peculiar confluence of rational speculation and emotive joy — joy engendered by a radical hope that the human ideal is in some sense a reflective measure which transcends space and time.<sup>9</sup> The language which seeks to de-

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7. Luke 19:40.

8. See Paul Weiss, *The God We Seek* (Carbondale, Ill.: Southern Illinois University Press, 1964), 136-59.

9. In other words, a person's recognition of the human origin of her individual (or

scribe this confluence is natural law.<sup>10</sup> The truth of this language, like that of any other, lies in its usefulness. But it is a usefulness that supersedes any other, and demands one's attention by shifting the context to a point where the necessity of validation is meaningless, just as the spring in the desert demands without appeal the attention of the living organism. The hart must drink.<sup>11</sup> The utility of the living water needs no justification.

The point is that any ethical discourse, any language which asserts one mode of behavior as preferable to another, implies some type of transcendent standard, even if the transcendence amounts to nothing more than an inherent claim of the moral superiority of one ego's emotive urges over another's in a struggle for a piece of meat. However mundane this observation may appear, it has been overlooked time and again in our lin-

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her society's) projected ideal, in order to have compelling emotive force, must be accompanied by an implicit faith that the ideal is not *solely* a manifestation of human imagination, but rather a genuine apprehension, however incomplete, of a more comprehensive object-based reality. If the projection is human, then the screen, so to speak, is nevertheless real. At first blush, this seems to be nothing more than a manifestation of the Freudian notion of *projection*. But Hans Küng has pointed out that projection does not preclude the concept of objective reality. In principle, it does not *preclude* God. Küng wrote:

From the psychological standpoint belief in God always exhibits the structure and content of a projection or can be under suspicion of being a mere projection. It is the same with lovers: every lover necessarily projects his own image of her onto the beloved. But does this mean that his beloved does not exist or at any rate does not exist substantially as he sees her and thinks of her? With the aid of his projections can he not even understand her more profoundly than someone who tries as a neutral observer to judge her from the outside? The mere fact of projection, therefore, does not decide the existence of nonexistence of the object to which it refers. . . . It does not follow — as some theologians have mistakenly concluded — from man's profound desire for God and eternal life that God exists and eternal life and happiness are real. But those atheists who think that what follows is the non-existence of God and the unreality of eternal life are mistaken too.

Hans Küng, *Freud and the Problem of God* (New Haven, Ct.: Yale University Press, 1979), 77-79.

10. The term "natural law" has considerable cultural baggage, much of which connotes religion. The purpose here of employing the Freudian concept of *totem* into natural law discourse is to clarify the sense in which any appeal to a "natural" moral grounding for the Rule of Law is properly characterized as "religious" and to distinguish this religious sense from another mode of religion with which ordinary language confuses it, that of "religion" for purposes of First Amendment jurisprudence. The former is properly understood as *totem*, purely and simply the reconstituted human guilt instincts which project sanctity upon a human authority in order for law (or any type of moral code) to exist. The latter is properly understood as theism in essentially a Western monotheistic mode.

11. Rorty, *Contingency*, 3-22.

guistic entanglements which have failed adequately to distinguish between "law and morality," and which, in turn, have entangled our thinking about "morality and religion," and, perforce, about "law and religion." The resulting confusion has had a paralyzing effect. Our jurisprudents can no longer speak of "natural law" because it implicitly appeals to something like deity. Our courts can no longer utilize the concept of deity as a determinative characteristic of "religion" because the concept implicitly discriminates against persons whom it seems undemocratic to regard as "irreligious." And none of us may speak of morality. To do so is simply to express an emotive preference having no claim outside of our own guts.

Although jurisprudents have endeavored to break out of this solipsistic dungeon, the fact remains that their attempts have proved essentially ineffective in that linguistic arena where struggles constitute law in the ordinary sense: the gymnasium of court speech, the game of opinion writing. The rather simple thesis of this essay is that the solution has already been made clear by thinkers who have, for presumably personal reasons, been unable to follow the path out of the cave to its most wondrous destination. The practical solution to untangling the knots in our understanding of law and morality is a reconstituted language of natural law which employs both a descriptive account of human psychological structures (i.e., nature) *and* a critical account of desirable human ends (i.e., morality) without apology for either the animalistic urges which entail determinism or for the idealistic urges which entail choice. Once people are free to admit that they make an implicit appeal to something which transcends human reason by positing their ideals, they are also free to view religion in a clearer light, according to terms which have only a tangential connection with their implicit ideals. That is, people are free to speak of God in a way that is meaningful. Even courts might be free to do this. But the first step is to untangle the judicially knotted language which identifies transcendence with deity, and this presupposes a language which rationally appropriates the interconnectedness of law and morality.

#### DISTINGUISHING THE RELIGIOUS LANGUAGE OF RATIONAL ETHICS: TOTEM

Sympathetic to attempts by classic liberal thinkers such as

Owen Fiss<sup>12</sup> to avoid the nihilism of the deconstructionists by asserting a public morality which binds judges to objective interpretive norms, Robin West is nevertheless critical of Fiss and other "rights-based" thinkers who would ground fidelity to the Rule of Law on an intuitive basis. In a brilliant article,<sup>13</sup> Professor West argues that an objective basis can be found in a "naturalistic" account of human nature provided by Freud's concept of *totem*.<sup>14</sup> Although Freud's totemic model reveals the Rule of

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12. See Owen Fiss, "Objectivity and Interpretation," *Stanford Law Review* 34 (1982): 739-53. Professor Fiss finds objective constraints on judicial decisions in two forms. The first is in *disciplining rules*, a "professional grammar" to which a judge adheres by virtue of her membership in the community of judicial discourse. The language by which the judge is empowered *as a judge* specifies, to one degree or another, "the relevance and weight to be assigned to the material (e.g., words history, intention, consequence), as well as . . . basic concepts and . . . procedural circumstances under which the interpretation must occur" (at 744). The second form of constraint is in effect the attitude which grants authority to the grammatical rules, i.e., the *interpretive community* of judges, which is qualitatively different from the communities which interpret other forms of literature. These others are bound together by a choice of common values, and so can change over time the "correct" interpretation of a text. According to Fiss, "Judges do not belong to an interpretive community as a result of shared views about particular issues or interpretation, but belong by virtue of a commitment to uphold and advance the rule of law itself . . . . Judges know that if they relinquish their membership in the interpretive community, or deny its authority, they lose their right to speak with the authority of law" (ibid. at 746-47).

This argument resembles the theological assertion that religious truth is not discerned through idiosyncratic vision, but rather through the witness and profession of the entire church. Like the theological argument, Professor Fiss's hermeneutic fails without a religious faith in a textual meaning which supersedes individual reactions. The problem is that grammatical constraints on discourse do not constrain in a corresponding fashion the actions that such discourse can engender, for language has multiple functions evoking powerful nuances unfettered by grammatical laws. Professor Fiss's *disciplinary rules* allow us to predict a judicial outcome because we can predict the relative grammatical skills of the speaker, not because the grammar itself will allow no other outcome. In the end, the "correct" interpretation of a text, for a community of judges as well as for a community of literary critics or theologians, is dictated by feelings, not by language. The grammar of feelings is psychoanalysis. Constraints do not work on unconscious urges.

13. Robin West, "Law, Rights, and Other Totemic Illusions: Legal Liberalism and Freud's Theory of the Rule of Law," *University of Pennsylvania Law Review* 134 (1986): 817, 818.

14. *Totem* refers to an object the psychological power of which compels an individual to renounce his or her antisocial emotive urges, thus allowing the possibility of civilization. Freud viewed totemic authority as having a historical basis in patricide. According to Freud's primal model, the tyrannical father, whose protective strength was necessary for the survival of his children, incited with this same strength a murderous rage in his adolescent sons. The sons united in order to overcome the father's superior strength, but experienced remorse in the wake of their victory. This remorse was in part a survival mechanism by which the sons unconsciously realized that their continued survival was radically contingent upon each

Law as being unquestionably human in origin, totemic authority thus manifested attains a moral claim over and above the claims of any individual, since totem is the essential operative mechanism of the collective life-instinct against the individual death-instinct. The Rule of Law accordingly finds its impetus in community and its justification in life.<sup>15</sup>

But even West does not go far enough in demythologizing the totemic idol which is the psychological precondition of the Rule of Law. One is left asking why indeed the life-instinct is inherently preferable to the death-instinct, and, moreover, whether she has actually succeeded in predicating fidelity to law on an empirical, rather than on a transcendental basis. Has she not simply substituted the life-instinct for other forms of intuitive good feeling which she finds inadequate? Her curious inability to grasp the religious/transcendent character of her own reconstituted totem (the life-instinct) is exemplified in her claim that recognizing the human origin of totemic authority undermines religious belief (which appeals to non-human origins), but actually strengthens the moral authority of law.

Law can only find moral validity by being measured against some standard which transcends ordinary human instinct. The belief that life is its own justification (or that the instinct to live is preferable to the instinct to die) is necessarily religious in the sense that it exalts as a transcendent standard an intuitive good

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individual suppressing against his siblings the murderous rage unleashed against their father. The suppression was facilitated by positing an authority figure to take the father's place. Before this idolatrous figure all brothers stood in an essentially equal posture, and each owed an obligation transcending his own instinct for gratification. This paternal authority reconstituted as *totem* is thus the essential mechanism which facilitates *Eros*, the life-instinct of civilization which parallels the instinct of the individual. Without viable totemic authority, a society will die, just as an individual whose psyche can no longer withstand the instinctive death-wish (*Thanatos*) will not only succumb to the forces of death, but hasten them. For Freud's essential account of patricide, see James Strachey, trans., *Totem and Taboo* (London: Routledge and Paul, 1989), 174-79; For additional comments and sources, see West, "Law, Rights, and Other Totemic Illusions," 822-28. Freud's essential explication of the interplay of the life and death instinct instincts is set out in *Beyond the Pleasure Principle* (trans. James Strachey) (New York: Liveright Publishing Corp., 1989), but the theory is given particular lucidity and power by Karl Menninger's classic work on suicide, *Man Against Himself* (New York: Harcourt, Brace and Co., 1938).

15. West, "Law, Rights, and Other Totemic Illusions," 820: "Legal liberal arguments for the morality and autonomy of law rest not on any particular description of our personality, but instead on intuitively grasped and noncontingent moral truths . . . The coherence of Freud's argument suggests the wisdom of grounding a jurisprudential defense of Rule-of-Law virtues in claims about essential human nature, rather than in appeals to our intuitive sense of right and wrong."

feeling. We are still at the level of feeling. So what is gained? And what practical difference is made by placing the obligation to obey law on an "empirical" ground?

In a Europe filled with Nazis, an empirical basis for fidelity to law might be of limited utility, while a religious basis for civil disobedience might count for much in functional terms.<sup>16</sup> "What protects us against Nazism," wrote Joseph William Singer, "is not the belief that reason can prove it wrong. What protects us is outrage."<sup>17</sup>

The practical difference is clarity of thought and clarity of faith. A truly functional moral language might employ reconstituted totemic authority as an operative construct and yield the conclusion that Naziism is unreasonable. But it could only do so if the language were structured to account not only for actual psychological origins, but for projected psychological ends. A language deriving "natural law" from posited ideal constructs of who human beings should be (what we ordinarily deem "value judgments") in juxtaposition with methodical observations of what we are (what we ordinarily deem "empirical facts") is a possibility left open by Freud himself, albeit cryptically, and is ultimately the only hope for validating a human life-instinct at all. Elucidating the various characteristics of civilization, Freud wrote:

No feature . . . seems better to characterize civilization than its esteem and encouragement of man's higher mental activities—his intellectual, scientific and artistic achievements—and the leading role that it assigns to ideas in human life. Foremost among those ideas are the religious systems, on whose complicated structure I have endeavored to throw light elsewhere. Next come the speculations of philosophy; and finally what might be called man's "ideals"—his ideas of possible perfection of individuals, or of peoples or of the whole of humanity, and the demands he sets up on the basis of such ideas. *The fact that these creations are not independent of one another, but are on the contrary closely interwoven, increases the difficulty not only of describing them but of tracing their psychological derivation.*<sup>18</sup>

The realization that fact and value, art and science, religious speculation and philosophical ideals cannot comprise isolated categories for purposes of psychoanalysis or of everyday functioning is *not* an implicit acknowledgment of God. It is rather

16. Peter L. Berger, *A Rumor of Angels* (Garden City, N.Y.: Doubleday, 1969), 23: "In a world full of Nazis one can be forgiven for being a Barthian."

17. Joseph William Singer, "The Player and the Cards: Nihilism and Legal Theory," *Yale Law Journal* 94 (1984): 1, 55.

18. Sigmund Freud, *Civilization and Its Discontents*, trans. James Strachey (New York: W.W. Norton, 1989), 47-48 (emphasis added).

an acknowledgment that rational thought alone cannot provide a satisfactory reason for living in the midst of anguish, despair, and the manifest cruelty which forms the integral structure of human experience.<sup>19</sup> Not only does reason alone not save us from the Nazis, it does not save us even from ourselves.

The religion implicit in a natural law discourse predicated on a totemic model is thus revealed as a radical hope that the projected totemic ideals are ultimately justified by something which transcends humanity, space, and time. Life cannot be its own justification. We can assert that it is nonsense to speak of the "meaning" of life in order to avoid making apparently religious statements, but our assertion does nothing to quell our empirically verifiable psychological needs to live with a sense of ultimate purpose.

It is *not* a mistake to designate as "religious" the non-rational impetus which hopes for ultimate validation to human existence, for hope is religious insofar as it aspires beyond verifiable fact. But it *is* a mistake to identify this non-rational impetus with "religious" experience in the ordinary sense. This is where the designation of *totem* can clarify our thinking by distinguishing the two senses of religion: the first, which is a necessary psychological anchor to the Rule of Law (or, for that matter, any rational ethics), from the second, which necessarily connotes deity.

Totem is necessary for human survival. Without totem in at least a primitive form, there is no functional power by which to compel socialization. Without totem in an abstracted form of ideals, there is no possibility of rational ethics and no justification for the Rule of Law. The scientific study of morality (what is ordinarily designated as "natural law") is in essence an examination of the various modes in which totemic authority is manifest in human consciousness, but this is not its empowering

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19. Alfred North Whitehead, *The Function of Reason* (Boston: Beacon Press, 1958), 65: "The speculative Reason is in its essence untrammelled by method. Its function is to pierce into the general reasons beyond limited reasons, to understand all methods as coordinated in a nature of things only to be grasped by transcending all method. This infinite ideal is never to be attained by the bounded intelligence of mankind. But what distinguishes men from animals, some humans from other humans, is the inclusion in their natures, waveringly and dimly, of a disturbing element, which is the flight after the unattainable. This element is that touch of infinity which has goaded races onward, sometimes to their destruction. It is a tropism to the beckoning light — to the sun passing toward the finality of things, and to the sun arising from their origin. The speculative Reason turns east and west, to the source and to the end, alike hidden below the rim of the world."

aspect. Natural law discourse, by presupposing the psychological necessity of the mind positing, however darkly, an ultimate meaning to life, inherently *hopes* for such a meaning. To speak of natural law *is* to hope for ultimate meaning. But people cannot speak until they distinguish the religion upon which this hope is predicated (totem) from the religion that is the prediction of the First Amendment to the United States Constitution. It is, ironically, the act of hoping implicit in any totemic assertion which causes us to *feel* that there is no useful distinction between "religion" in the form of totem and religion in the ordinary sense that is presupposed in constitutional jurisprudence.

#### DISTINGUISHING THE RELIGIOUS LANGUAGE OF CONSTITUTIONAL JURISPRUDENCE: THEISM

The mistake of identifying this nonrational impetus of the life-instinct (what this author has called *totemic* religion) with religious experience in the ordinary sense is the root of the linguistic quagmire which prevents jurists from speaking meaningfully of natural law at the same time that it prevents judges from speaking meaningfully about religion. For the definitive characteristic of religion is implicitly misdefined as "non-rationality." Thus, the imposition of speculative rational ideals upon nonrational human animalism is viewed as "religious," and hence unscientific, while any nonrational appeal to an order "higher" than reason is viewed as some manner of religious faith, and hence entitled to First Amendment protections. This is nonsense. Freud knew that the definitive characteristic of religion was not generic nonrational ideation, but an appeal to deity. This is the definitive characteristic that must be restored to judicial formulations if courts are to cease being at the mercy of mismatched analogies, and begin to talk sense about religion.

The United States Supreme Court has never explicitly defined "religion" for purposes of the Establishment Clause and the Free Exercise Clause of the First Amendment. As with all undefined terms, the meaning of *religion* for constitutional purposes has depended upon the implicit, often unreflective apprehensions by judicial minds of the term's identity within a cultural context. Thus, the U.S. Supreme Court initially utilized the term in a manner identifying religion with Judaeo-Christian theism,<sup>20</sup> gradually relaxing the term's cultural strictures to in-

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20. In *Davis v. Beason*, 133 U.S. 333 (1890) at 342 in which the federal territorial prohibition of polygamy was upheld, the Court noted: "The term 'religion' has

clude nontheistic beliefs which display a transcendent character,<sup>21</sup> and ultimately admitting as religion the absence of any theistic belief.<sup>22</sup> Even the noble attempt of Judge Arlin Adams to restore meaning to *religion* in light of the Court's overly expansive use of the term has served to illustrate the necessarily arbitrary character of the label *religion* once the theistic element has been abandoned.

In the first of two celebrated cases<sup>23</sup> where Judge Adams applied the idicia quite logically extrapolated from certain analogous characteristics discussed in various U.S. Supreme Court opinions, he felt compelled to conclude that, for purposes of the Establishment Clause, Transcendental Meditation constituted a religion by virtue of its ultimate questions apparently addressed within a comprehensive framework that resembled a "belief-system," notwithstanding the fact that TM's adherents made no reference to God or any deity in the ordinary understanding of

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reference to one's views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will."

21. In *Torcaso v. Watkins*, 367 U.S. 488 (1961) at 495 where the Court struck down a provision of the Maryland Constitution requiring public officials to profess a belief in God, it was held that "Neither a State nor the Federal Government can constitutionally . . . pass laws or impose requirements which aid all religions as against non-believers, and neither can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs."

22. *United States v. Seeger*, 380 U.S. 163 (1965) at 176 the Court struck down a congressional statutory draft exemption for conscientious objectors who believed "in a relation to a Supreme Being involving duties superior to those arising from any human relation, but not [including] essentially political, sociological, or philosophical views of a merely personal moral code": "The [appropriate] test might be stated in these words: A sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption comes within the statutory definition."

23. *Malnak v. Yogi*, 592 F.2d 197 (3rd Cir. 1979) at 200. In a special concurring opinion, Judge Adams traces the tortuous history of the Supreme Court's definitions, explicated certain implicit contradictions contained therein, and proposed three practical indicia for determining whether particular concepts or groups are religious. First, "the 'ultimate' nature of the ideas presented is the most important and convincing evidence that they should be treated as religious;" *ibid.* at 208. Second, the alleged religion must not be "confined to one question or moral teaching," but rather must be such that it "lays claim to an ultimate and comprehensive 'truth';" *ibid.* at 209. Third, a court should consider "any formal, external, or surface signs that may be analogized to accepted religions. Such signs might include formal services, ceremonial functions, the existence of clergy . . . and other similar manifestations associated with the traditional religions." For a discussion and critique of Judge Adams's indicia, see Derek Davis, "The Courts and the Constitutional Definition of Religion: A History and Critique," in *The Role of Government in Monitoring and Regulating Religion in Public Life*, ed. James E. Wood, Jr. and Derek Davis (Waco, Tx.: J.M. Dawson Institute of Church-State Studies, 1993), 89-119.

the term, and denied that TM constituted a religion.<sup>24</sup> In the second case,<sup>25</sup> Judge Adams, for purposes of the Free Exercise Clause, passed judgment on a movement describing itself as "revolutionary" and "absolutely opposed to all that is wrong," constituting "one member, one family, one body," pursuing goals "to bring about absolute peace" and "to put a stop to all that is corrupt," and whose members embraced a "religious diet . . . common and uncomplicated because our diet is provided by *God* and already *done*."<sup>26</sup> Judge Adams declared that the movement lacked both the "fundamental and ultimate questions" requisite of a religion (though he acknowledged this as a close call,<sup>27</sup> as well as the requisite "claim to an ultimate and comprehensive truth . . . concerning the nature both of world and man, the underlying sustaining force of the universe, and the way to unlimited happiness."<sup>28</sup>

Although Judge Adams might in all fairness be defended as making the best of an impossible situation inherited from the Supreme Court, the result is nevertheless a reductionistic haze. The term *religion* is emptied of meaning because the courts are afraid of fostering injustice by failing to include all possible candidates while simultaneously realizing that some must be excluded in order to avoid chaos. But chaos is not avoided. It is merely disguised. The disguise itself would seem to evince a subtle contempt for Western monotheism, which clearly identifies religion with deity. The denial of this identity is ultimately an offense to theist and atheist alike, for each is placed against her will into a muddled no-man's land between ultimate concern and comprehensive truth, with no firm notion even of what these terms mean. This attitude is not new, for the cultured despisers of religion have asserted it in all generations. Always it hides an emotive temerity of which Freud was quite aware, and which, in a different context, he soundly criticized: Where questions of religion are concerned, people are guilty of every sort of dishonesty and intellectual misdemeanor. Philosophers stretch the meanings of words until they retain scarcely anything of their original sense. They give the name of "god" to some vague abstraction which they have created for themselves; having done so they can pose before all the world as deists, as believers in God, and they can even boast that they have recognized a higher purer concept of God, notwithstanding that

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24. *Ibid.* at 214.

25. *Africa v. Commonwealth of Pennsylvania*, 662 F.2d 1025 (3rd Cir. 1981).

26. *Ibid.* at 1028.

27. *Ibid.* at 1033.

28. *Ibid.* at 1035.

their God is now nothing more than an insubstantial shadow and no longer the mighty personality of religious doctrines. Critics persist in describing as "deeply religious" anyone who admits to a sense of man's insignificance or impotence in the face of the universe, although what constitutes the essence of the religious attitude is not this feeling but only the next step after it, the reaction to it which seeks a remedy to it. The man who goes no further . . . is, on the contrary, irreligious in the truest sense of the word.<sup>29</sup>

Both religion and the idealistic projections which form the basis of human morality—and fidelity to the Rule of Law—have their origin in nonrational dimensions of the unconscious which are the stuff of totem. In the end, religion, morality, and law must postulate the nonrational to justify themselves. But these nonrational elements to which the mind appeals are not coextensive one with another, and the emotive needs which engender the postulates are qualitatively distinct. The fact that religious ideation, speculative philosophical constructs, and ideal visions born through an inscrutable juxtaposition of rational projection and raw infantile terror "are not independent of one another, but are on the contrary closely interwoven"<sup>30</sup> does not justify a cross-contextual classification which fails to apprehend and quantify each of these phenomena on its own ground. In other words, it is manifestly irrational to equate religious sentiment with each possible manifestation of mystical emotive sensibilities which urge human consciousness to rationalize some justification for living under conditions in which the act of living is agonizingly and irrefutably irrational.

Let all such nonrational postulates, explicit and implicit in our rhetorical formulations, find laud in our hearts and in our law. But do not call them "religion" when they make no pretense to an appeal to God, and particularly when they explicitly deny any such appeal. Call them "totem." Let the U.S. Constitution be guaranteed to protect these nonrational emotive postulates, for freedom of conscience and speech demand no less, but let the constitutional guarantee that government neither establish religion nor prevent its free exercise maintain as its essential referent that which was intended by the framers of the Constitution, and that which the logic even of psychoanalysis dictates can be the only referent which satisfies the proximate emotive need to which religious speech in the ordinary sense cries out: belief in God.

29. Sigmund Freud, *The Future of an Illusion*, trans. James Strachey (New York: Norton, 1989), 41-42.

30. Freud, *Civilization and the Discontents*, 47-48.

The benefit would be quite enough if it extended no further than the means by which to elucidate a clear demarcation of what *is* religion for purposes of the establishment and free exercise clauses. But already the imprecision of our language has engendered an imprecise analogous reasoning which threatens, in irony most hysterical, to undermine the constitutional safeguard of the free exercise of religion. Its logic has not yet given rise to a vivid government imposition of religion by some other name, though a creative imagination would construct such a scenario with comparatively little effort (and possibly, through expression in a book or movie, comparatively significant commercial success).

Justice Antonin Scalia's assertion, in the case of *Oregon v. Smith*,<sup>31</sup> that a law which has the effect of inhibiting religious practices is constitutionally valid so long as it serves a legitimate state objective that is *not specifically directed* against a religious group has been vociferously criticized as a radical departure from traditional free exercise doctrine.<sup>32</sup> And yet the apparent shock of Justice Scalia's assertion among so many of the liberal critics is itself a source of wonderment. There is a sense in which Justice Scalia has merely extended existing free exercise jurisprudence to its inevitable next step.

When the term "*religion*" has been rendered meaningless in overzealous attempts to avoid cultural chauvinism and unfair results to draft resisters, its meaning cannot be restored in other select contexts, no matter how unjust the result. It is true that Justice Scalia's interpretation of leading case law was questionable insofar as he argued that prior Court decisions invalidating laws inhibiting religious practices involved such practices *only* in conjunction with other constitutionally guaranteed freedoms. Nevertheless, the increasingly expansive definition of religion in the various range of Free Exercise *and* Establishment Clause cases has made such a conjunction an inevitable judicial construct. Without it, the state faces potential chaos. When virtually any activity can qualify as religious practice, there is no question but what the state must be given a comparatively broad power to regulate religious practice, lest the rule of law be undermined by idiosyncratic mystical apprehensions.

Justice Scalia's monster is thus the unintended creation of the rhetorical formulations devised by those very persons whose

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31. *Employment Division of Oregon v. Smith*, 494 U.S. 872 (1990) at 881.

32. *Ibid.* at 891 (O'Connor, J., dissenting).

professed purpose has been to guard religious freedom. This ironic state of affairs may be taken as evidence that the professed supporters of religious freedom have from the beginning misapprehended the emotive significance of religion as a psychological phenomenon and they themselves experienced little in the way of religious feeling. Freud, the critic of religion, never failed to appreciate its power. He never would have devalued it, in the manner of twentieth century American jurists, by obliterating its most definitive characteristic (deity) in a spirit of egalitarianism. It is again ironic that it is Freud's language of cultural totem which can restore meaning to the concept of religion for purposes of the Constitution; at the same time it provides a clarification and descriptive accounting of the basis of the Rule of Law, even to the point of reconstituting meaning to the term "natural law." Totemic authority may take many functional forms in a democratic society, and the foundation for law itself may properly appeal to nonrational ideals quite distinct from deity. But religion, for its own self-distinction as well as its identity before the legal system, must either appeal to God or die like the proverbial phantasm at sunrise.

#### CONCLUSION

The story is told of Blaise Pascal's crying tears of joy upon awakening from a dream in which he was told that the God of the philosophers was not the God of Abraham, Isaac, and Jacob. Our present culture presupposes moral relativism not only in its works of literature and philosophy, but in its ordinary speech. In a world in which philosophers, let alone politicians and judges, can no longer speak of "the good," but only of competing "values," moral language (which of necessity is the language of law) becomes increasingly imprecise. One consequence of this imprecision is that any postulate over and above the empirical realm—that is, any standard that speculative reason might envision as a base measurement of goodness—is identified with religious ideation. The consequences for jurisprudence are arguably neutral to those who view religion in purely functional terms, for it entails a broadening of constitutional concepts to a point where the term "*religion*" is coterminous with any systematic moral discourse. The resulting First Amendment constructs might be cumbersome, but such discourse nevertheless finds protection from the state, while the state is forbidden from transgressing artificial boundaries where the state's own admissions appears to resemble the moral "*religion*" it protects.

To others, the stakes are higher than this. Not only is the confusion between legal, moral, and religious concepts frustrating in its arbitrariness, but the very confusion erodes a cherished emotive assertion: a belief in a God who exists independently of human language and speculation. A highly useful tool both for dispelling the conceptual confusion of law, morality, and religion, as well as for preserving the integrity of religious speech in its own context is a reconstituted language of natural law. Professor West has demonstrated the utility of founding the Rule of Law on a "naturalistic" account of human psychology in Freudian terms. While a concept of natural law employing a foundation of reconstituted totemic authority might seem unconventional, it would provide a most effective means of identifying empirical-emotive-psychological human structures which can sensibly be characterized as "natural." "Natural law" would thus be determined by the appropriate realization of these structures as they are juxtaposed with the higher cognitive projections of admittedly speculative "ideals," that is to say, *totem*.

The First Amendment jurisprudence facilitated by this natural law discourse would have the significant benefit of positing a scientific basis for fidelity to the Rule of Law without appealing to apprehensions which could meaningfully be characterized as "religious" simply because they are speculative. At the same time, it would allow the term "religion" to predicate theism. This is consistent with the intention of the constitution's framers,<sup>33</sup> and accords with the emotive sentiments of those who acknowledge not only the scientific-totemic-speculative ground of moral behavior, but who also believe in God.

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33. This is not to say that the framers' intent regarding this or any other passage in the Constitution can be completely understood in its cultural context, or that such an understanding, if it were possible, should be determinative in our own culture. It is to say that the intent of an author must be understood insofar as possible in order to make an informed judgment about what the text should say to us. This is, after all, why we employ form criticism in reading Scripture.