

INTERNATIONAL LEGAL THEORY

‘The Sacred Conspiracy’: Religion, Nationalism, and the Crisis of Internationalism

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‘WE ARE FEROCIOUSLY RELIGIOUS. . . . It is time to abandon the world of the civilized. . . . Existence . . . is a dance that forces one to dance with fanaticism.’

Georges Bataille, 1936¹

‘We are certainly barbarians since a certain form of civilization disgusts us. . . . Our rejection of every accepted law, our hope in new subterranean forces capable of overturning History, . . . make us turn our eyes toward Asia. . . . The modern era is over.’

‘Revolution First and Always’, Manifesto of a Surrealist/Marxist Coalition, 1925²

‘International civilization having proved a failure because there has not been constructed a fabric of law to which nations have yielded, . . . it is the purpose of the states signatory to this Convention to form a League of Nations.’

First Draft of the Covenant of the League of Nations, 1918³

Abstract

The goal of this article is to initiate an interdisciplinary and historical reflection on one of the central preoccupations of our time: the relationship of religion to international order. This current project grows out of my long-standing work on the genealogy of modern internationalism. In my past work, I have argued that internationalists constructed their own disciplines in tandem with their construction of nationalism, to such an extent that modern ‘internationalism’ and modern ‘nationalism’ must be understood in relation to each other; in the present essay, I contend that ‘internationalism’ and ‘religion’ have an equally mutually constitutive relationship. This article seeks to retell the story of international law over the past century through the lens of its relationship to religion – a lens that both overlaps with and differs from that of nationalism. Its historical narrative is rooted in the early twentieth century – a

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1 G. Bataille, ‘The Sacred Conspiracy’, in A. Stoekel (ed. and trans.), *Visions of Excess* (1985), 178, at 179.

2 G. Altman et al., ‘La Révolution d’abord et toujours’, (1925) 5 *Révolution Surréaliste* 31.

3 League of Nations Covenant (First Draft), reprinted in R. Stannard Baker, *Woodrow Wilson and World Settlement*, Vol. 3 (1923), 81–2.

period to which so many of our ‘modern’ cultural conceptions may be traced. Its methodology is broadly interdisciplinary, setting changing international legal conceptions of religion in relation to contemporaneous developments in domains such as sociology, religious studies, and historiography. This is the first piece of a series of projected studies on the construction and contestation of ‘religion’, ‘the secular’, and ‘the international’ over the past century. It is also my first publication associated with the interdisciplinary Religion and Internationalism Project, which I co-direct at Brown University.

Key words

avant-garde; international law; interwar period; nationalism; religion; secularism

I. INTRODUCTION: THE RADICAL SACRED AND MODERNIST INTERNATIONALISM

‘We are ferociously religious . . . What we are starting is a war.’ This might sound like a pronouncement from the world of the 2000s (Osama bin Laden? George W. Bush?)—a time in which the post-Cold War ‘return of religion’ seemed to reach a feverish pitch, alarming liberal and rationalist opinion everywhere. The pronouncement, however, actually comes from a 1936 manifesto of the French writer Georges Bataille, ‘The Sacred Conspiracy’.⁴ This ‘conspiracy’ of the ‘ferociously religious’ declared that ‘it is too late to be reasonable and educated’, that ‘it is time to abandon the world of the civilized and its light’. The manifesto’s desire to break with ‘civilization’ was most acutely expressed in its proclamation of the need to ‘dance with fanaticism’. In advancing the notion of a radically oppositional and destabilizing power of a certain kind of religiosity, Bataille’s ‘conspiracy’ epitomized the interwar avant-garde appropriation of Emile Durkheim’s 1912 *Elementary Forms of Religious Life*. Its opposition to ‘the world of the civilized and its light (*sa lumière*)’, evoking the French term for the Enlightenment (*les Lumières*), also gave this kind of revolt an epochal aspiration, affirmed directly in an earlier surrealist/Marxist manifesto, *Revolution First and Always*: ‘the modern era is over.’

I begin this paper with a sketch of some early twentieth-century notions of a radical sacred to set the stage for a broader study that traces to the interwar period our current disarray about the relationship between religion, nationalism, and internationalism. While Bataille and his circle, many of whom gathered in the late 1930s in the Collège de Sociologie, were a small group, they participated in a broader cultural phenomenon of their time. Across Europe in the first few decades of the twentieth century, avant-garde writers, theorists, and artists, as well as critical, mythological, existential, and revolutionary theologians, not to mention messianic anarchists, were advancing primal notions of ‘the sacred’, often in opposition to organized ‘religion’, as a response to a perceived ‘crisis of civilization’.⁵ One might

4 Bataille, *supra* note 1, at 179.

5 For an overview of some of these movements, see W. Cristaudo and W. Baker (eds.), *Messianism, Apocalypse and Redemption in 20th-Century German Thought* (2006); M. Löwy, ‘Messianisme Juif et utopies libertaires en Europe Centrale (1905–1923)’, (1981) 51 *Archives de sciences sociales des religions* 5; M. Richman, *Sacred Revolution and the College of Sociology* (2002); R. Whalen, *Sacred Spring: God and the Birth of Modernism in Fin de Siècle Vienna* (2007).

even extend the phrase 'theology of crisis', a term associated with the 1920s writings of Karl Barth, to describe this heterogeneous ensemble of responses to the collapse 'in the trenches' of the First World War of any 'harmonistic understanding of world, God and man'⁶ – and even more so of any optimistic teleology of the progress of 'civilization'. The desire for radical experiences of the sacred at times took the form of a seemingly uncritical quest for the 'primitive' – sought in such heterogeneous sources as non-European cultures, unconscious passions, or fierce, 'original' forms of Judaism and Christianity; at other times, they took that of an ironic, strategic, or dialectical deployment of images intended to defy bourgeois society and its theological 'mush'.⁷ These variegated quests for a radical sacred overlapped with other forms of early twentieth-century primitivism, but also often competed with them. For my project, the crucial overlap of such primitivist stances towards religion was with the period's stances towards nationalism, of a European separatist or anti-colonial variety, and other forms of identity-based ferment.

Moreover, the matrix within which such reflections were developed, that of the relationship between crisis, religion, and internationalism, extended far beyond avant-garde circles. On the contrary, the promotion of a destabilizing form of religiosity during this period was rivalled by those in the mainstream of Western culture and politics who were looking to religion as a socially stabilizing force, indispensable for remedying the deficiencies of modern civilization. Indeed, as Tomoko Masuzawa has argued, it was this period that saw both the diffusion *and* the crisis of the notion of an international pluralism of respectable forms of religiosity, the 'world religions'.⁸ The 'world religions' were usually said to be 11 in number, individually named, with the large number of other global phenomena that could be viewed as 'religious' grouped under a residual category of the 'primitive', 'primal', 'tribal', 'indigenate', or 'preliterate'.⁹

The 'world religions' conceptualization had developed in the late nineteenth century, part of a trend epitomized by the 1893 convening of the 'World's Parliament of Religions' in Chicago.¹⁰ The notion became widely diffused in the 1920s – though its diffusion was also accompanied by an anxiety about its potential implications for the privileged status of European Christianity.¹¹ As Masuzawa argues, the 'world religions' conceptualization thus represented an ambivalent Western embrace of

6 J. Taubes, *The Political Theology of Paul* (translated by D. Hollander) (2004), at 62.

7 I borrow the descriptor 'mush' from Taubes, *ibid.* Sometimes, these different stances can be found in the works of a single author or movement, as in the case of André Breton and the surrealists, who variously adopted primitivist, ironic, and strategic stances in their deployment of both Orientalist and religious or spiritualist imagery; sometimes a single author's stance may have changed over time, as in the case of Ernst Bloch's stance on the relation between secularity and religion. The best example of a highly self-aware dialectical exposition of the relationship between secularity and religion is, of course, Walter Benjamin.

8 See, generally, T. Masuzawa, *The Invention of World Religions: Or, How European Universalism Was Preserved in the Language of Pluralism* (2005).

9 *Ibid.*, at 42–4.

10 See, e.g., R. Seager, *The World's Parliament of Religions: The East/West Encounter* (2009), 1893.

11 Masuzawa, *supra* note 8, at 37–46, 309–23.

religious pluralism, overtly departing from traditional assertions of European Christian superiority while implicitly reaffirming them.¹²

The interwar ambivalence about those ‘world religions’ that had been so recently embraced by Western thinkers forms a series with other early twentieth-century ambivalences – most importantly, for my purposes, with those about nationalism. The notion that reconstructing the international map, or at least the map of Europe, on the basis of a plurality of different, though mutually complementary, nations, had been advanced by a minority of international lawyers in the nineteenth century. When the international legal significance of national identity finally achieved wider acceptance after the First World War, however, it was in the mode of acute ambivalence – a recognition of forces viewed as both indispensable and yet dangerous for world order.¹³ An ambivalent embrace of a potentially indefinite plurality of forces thus characterized mainstream attitudes to both nationalism and religion.

In the language of the Durkheim school, projects such as the ‘world religions’ conceptualization sought to define and defend the ‘right sacred’ (religion as a force promoting social stability) as opposed to the ‘left sacred’ (those destabilizing forces that the promoters of a radical religiosity so ardently desired).¹⁴ The avant-garde often sought this left sacred precisely in the kind of ‘primitive’ or ‘tribal’ cultures excluded from the status of named ‘world religions’; alternatively, they pursued its covert or devalued manifestations in their own, Western societies, seeking out the kind of ritual, mythic, and magical practices conventionally thought to exist only in exotic climes.¹⁵ The destabilization sought by such writers thus often was directed at some of the key boundary notions of mainstream Western self-conceptions. I caution that the adjectives, ‘left’ and ‘right’, should not be taken in their conventional political sense, for the political engagements of advocates of radical religiosity were varied and unpredictable, and sometimes shocking.

The array of figures who urgently debated the relationship between religion, nationalism, and international crisis during this period ranged from cultural radicals like Georges Bataille, to leaders of established religions like Pope Pius XI,¹⁶ to mainstream internationalists and academics. They also included legal theorists, most notably participants in the debates about ‘political theology’ polarized by Hans

12 Ibid., at 37–46, 309–23. While a detailed presentation of Masuzawa’s argument goes beyond the scope of this paper, I note that she argues that this superiority took a variety of forms in the period from the late nineteenth century through the 1930s and beyond. At times, it took the form of assertions of Christian superiority, the notion that Christianity was both one among many religions and the only truly universal one: *ibid.*, at 12–13, 81. At other times, it took the form of the assertion that Europe, paradoxically by virtue of the development of its Christianity, was developing beyond religion and that religion was the province of underdeveloped ‘others’: *ibid.*, at 12–13, 19–20. At still other times, it took the form of a more relativist assertion about the unique relationship of particular religions and particular peoples, most eminently that of Europe to Christianity: *ibid.*, at 317–24.

13 See, generally, N. Berman, *Passions et ambivalences: Le colonialisme, le nationalisme et le droit international* (2008).

14 E. Durkheim, *The Elementary Forms of Religious Life* (translated by K. E. Fields) (1995), at 412–17; R. Hertz, ‘La prééminence de la main droite’ (1909), in R. Hertz, *Sociologie religieuse et folklore* (1970); see also G. Bataille, ‘Attraction and Repulsion II: Social Structure’ (1938), reprinted in D. Hollier (ed.), *The College of Sociology*, 1937–39 (translated by B. Wing) (1988), at 113, 121–2.

15 R. Caillois, ‘Introduction’ (1937), reprinted in *College of Sociology*, *supra* note 14, at 9–11.

16 Pope Pius XI discussed the relationship between religion and nationalism in his first encyclical. See Encyclical from Pope Pius XI, *On the Peace of Christ in His Kingdom* (1922), available online at www.papalencyclicals.net/Pius11/P11ARCAN.HTM.

Kelsen and Carl Schmitt.¹⁷ Moreover, the vicissitudes of the relationship of religion, nationalism, and international order in both the European and colonial contexts were also debated in the Permanent Court of International Justice and in League of Nations forums charged with overseeing the minority protection and Mandate Systems. Albeit in dramatically different ways, these rather heterogeneous discourses all elaborated the notion of grave dangers putatively posed by perverse forms of the intertwining of religion and nationalism, proposed ways to reorder their relationship that aspired to be true to the essence of each as well as beneficent for humanity, and emphasized the high stakes for internationalism in this quest.

The interwar prominence of 'religion', in all its heterogeneous senses, as a response to the 'crisis of civilization', points to one genealogical strand leading to today's global political and legal scene, so crucially marked by competing visions of the role of religion in relation to nationalism and internationalism. Even more so than in the interwar period, we live in a world in which proponents of religion as a vehicle for stabilizing and sanctifying existing state and international legal orders compete with proponents of religion as a vehicle for destabilizing those orders – as well as one marked by fierce controversy about what kind of religious forces play which roles. It is also a world in which echoes of the imagined division between 'world religions' and residual 'primitive' groups persist in divisions between true 'religions' and mere 'cults' and 'sects'¹⁸ – and, perhaps even more so, between the 'essence' of established religions and their 'perversions' by 'fanatics'; a world in which a human rights court can uphold restrictive governmental acts based on state legislation limiting religion to a 'respectable place';¹⁹ a world in which the intertwining and indeterminate relationship between religion and nationalism vexes a wide range of publicists. It is, in short, a world in which the role of religion as a response to a perceived crisis of a supposedly newly globalized civilization forms the heart of urgent international debate.

I contend that this genealogical inquiry promises to shed more light on our current conundrums than more familiar inquiries in the subfield, 'religion and international law'. Writings in this subfield generally approach religion in one of three ways: with the historian's attention to religion as the 'precursor to modern international law' (or in its multiculturalist variant of 'multiple precursors'), whose vital role is viewed as substantially ending in the mid-seventeenth century; with the theorist's interest in religion as the source of 'inspirational principles' for international society; or with the human rights activist's concern for endangered 'minorities'. While these inquiries are all valuable, they share a portrayal of religion as marginal to contemporary internationalism. In my view, this portrait is seriously flawed. The historian's,

17 See, generally, S. Baume, 'On Political Theology: A Controversy between Hans Kelsen and Carl Schmitt', (2009) 35 *History of European Ideas* 369. The year 1922 saw the publication both of Kelsen's article 'God and the State' and Schmitt's book *Political Theology*.

18 See, e.g., N. Stinnett, 'Defining away Religious Freedom in Europe: How Four Democracies Get away with Discriminating against Minority Religions', (2005) 28 Boston C. ICLR 429.

19 See the decision of the European Court of Human Rights in *Leyla Sahin v. Turkey*, Decision of 29 June 2004, (2006) 45 ILM 436. The Turkish Constitutional Court's comment about religion's 'respectable place' is quoted in *ibid*, at 442, para. 39.

theorist's, and activist's portrayal of religion's relationship to internationalism can hardly begin to account for the disarray, often verging on panic, evoked in international debate by the challenges posed by religion in the 2000s – ranging from fundamentalisms with global ambitions, whether emanating from Washington or Waziristan, to more localized challenges, whether emerging in the West Bank or Kashmir.

Rejecting views that relegate religion to the margins, I maintain that religion has played a recurrent and highly fraught role in the internationalist imagination, with which it has maintained complex relations both of rivalry and of complicity. At the broadest level, the marginalizing constructions of religion, whether on the historical, ideological, or sociological planes, have been made possible only by complex historical shifts that have reconfigured political and cultural structures both within particular societies and internationally. Moreover, at crucial moments over the past century, though perhaps less visibly than in earlier eras, constructions of religious difference have served as the fulcrum around which the legitimation of international authority and the construction of new ideas of sovereignty have turned.²⁰ This assertion becomes particularly persuasive upon consideration of periods of flux in the imperial and colonial contexts that have played a key role in the way religion has been framed in international law and internationalist debate generally. Moreover, as I have already suggested, even within the West, early twentieth-century discourse about the role of the sacred, in both its stabilizing and its destabilizing versions, discloses the fraught cultural stakes in an arena that some had imagined to be safely compartmentalized historically, ideologically, and socially.

It is the goal of my project, of which the present essay is a prolegomenon, to understand how the recent obsession in international debate with religion is only the latest instantiation of a recurrent struggle – rather than a pragmatic response to specific challenges, and still less a necessary worldwide mobilization against an implacable monster risen up from nowhere to challenge the liberal international order. Whether in confrontation with First World advocates of a radical sacred or Third World avatars of religious difference, the recurrent engagement with religion goes to the very heart of internationalism's identity. It is also a goal of the project to reflect on why this recurrent struggle has appeared to many as an unanticipated intrusion on the international scene, a disruption of the steady evolution of rational internationalism – regardless of whether this intrusion is considered to be of a catastrophic or salvific nature. This project, though undertaken from a rather specific optic, thus also seeks to intervene in more general debates about religion and secularism raging across and beyond the academy in our time.

2. SACRED SOCIOLOGY AND CONTESTED LEGITIMACIES

I begin with Durkheim for several reasons. First, as I have noted, Durkheim's writings on the sacred played a direct role in the articulation of some of the key avant-garde

20 On this phenomenon in the sixteenth century, see A. Anghie, 'Francisco de Vittoria and the Colonial Origins of International Law' (1996) 5 *Social and Legal Studies* 321.

responses to the generally perceived crisis of civilization. Second, as I shall show, his concepts, particularly those of the heterogeneity of the sacred and the profane and that of the two kinds of sacred forces, provide a key for understanding a number of other writings on religion, nationalism, and internationalism in both the interwar period and our own. Third, his understanding of the relationship between the sacred and profane helps illuminate a key ambiguity in the Western understanding of the relationship between the religious and the secular, specifically the concept of 'secularization' – an ambiguity explicated most clearly in the Löwith–Blumenberg controversies.²¹ This concept has oscillated between referring to (i) a separation between the secular and the religious domains and the 'retreat of religion as the dominant sphere' of society, and (ii) the translation and 'transfer' of religious contents into secular form on both the ideological and institutional planes.²² This oscillation between 'secularization-retreat' and 'secularization-transfer' still covertly inflects much of current debate about the role of religion.

For Durkheim, the dichotomy between the sacred and the profane, as well as between two radically different forms of the sacred, was fundamental to social analysis.²³ The sacred was a realm of persons and things that were 'absolutely

21 See, generally, J.-C. Monod, *La querelle de la sécularisation: Théologie politique et philosophies de l'histoire de Hegel à Blumenberg* (2002).

22 See, generally, *ibid.* The quotes in this sentence are from page 22, where Monod summarizes the analysis of Hans Blumenberg, who most sharply distinguished between the two senses of 'secularization'. I believe that it is less a question of a choice between the two senses than of a variety of discursive relationships between them, including ambiguity, dialectic, and supplementarity.

23 Readers of Agamben will immediately notice that I am about to engage in an elaboration of themes in early twentieth-century thought that serve as the target of vigorous disapprobation in G. Agamben, *Homo Sacer: Sovereignty, Power and Bare Life* (1988), 49–51, 67–8. At this point in my exposition, however, the theoretical merits of this negative stance are not necessarily relevant – I am, after all, engaged in a historical analysis of conceptual structures of early twentieth-century thought, rather than a theoretical inquiry into their merits. To this extent, my analysis is quite compatible with Agamben's claim that the tradition of thinking about the sacred – particularly the notion of the 'ambivalence of the sacred' – that characterizes the Durkheim school, as adopted from W. Robertson Smith, is a widely shared 'mythologeme' of this era, as indeed of our own; *ibid.*, at 49. I hasten to add, however, that I am in broad agreement with some of the insightful recent critiques of Agamben. See, e.g., J. Librett, 'From the Sacrifice of the Letter to the Voice of Testimony: Giorgio Agamben's Fulfillment of Metaphysics', (Summer–Fall 2007) *Diacritics* 11; P. Fitzpatrick, 'Bare Sovereignty: Homo Sacer and the Insistence of Law', (2001) 5 *Theory & Event*, available online at http://muse.jhu.edu/journals/theory_and_event/v005/5.2fitzpatrick.html; R. Chow, 'Sacrifice, Mimesis, and the Theorizing of Victimhood (A Speculative Essay)', (2006) 94 *Representations* 131. While these critiques are not always completely consistent with each other, discrepancies attributable to either misunderstandings of Agamben or tensions and contradictions within his work, or both, I retain two points pertinent to this paper. First, the critics tend to highlight the ways in which Agamben's exposition is caught within a dynamic of ambivalence closely related to that found in the Durkheim tradition. Second, Agamben attributes the appeal of the notion of the ambivalence of the sacred to a 'psychologization' of religious experience in the early twentieth century, which he associates with the contemporaneous European 'disgust' and 'horror' at the 'religious fact'; Agamben, *supra* this note, at 50. Aside from the perhaps overly obvious note that this description only includes one side of the 'ambivalence', the term 'psychologization' accounts neither for the deep structural presence of this 'mythologeme' in European thought and practice nor for the quite explicit ways in which it is used by a writer like Bataille in an anti-subjectivist fashion (I leave aside the nuanced distinction between psychological and subjectivist accounts, as well as their complex relationship with various forms of structuralist accounts that seem most suited to the word 'mythologeme'). Agamben associates his recoil from the notion of the 'ambivalence of the sacred' with his contempt for 'a theology that had lost all experience of the revealed word' – and, to this extent, his difference with the Durkheim tradition is, precisely, a theological rather than a 'juridicopolitical' one. See Librett, *supra* this note. On a quite different note, he simultaneously associates this recoil with his disdain for 'a philosophy that had abandoned all sobriety in the face of feeling'; Agamben, *supra* this note, at 50. The notion that identifying a 'loss of sobriety'

heterogeneous²⁴ in relation to the profane. By contrast, the profane was the everyday world, which Durkheim generally described as that of work and utilitarian considerations.²⁵ The absolute heterogeneity of the two made the sacred a potential fulcrum for social opposition and upheaval, for the ‘two worlds’ were not only separate, but ‘hostile and jealous rivals’ whose relations could ‘degenerate into real antagonism’.²⁶ This latent antagonism offered possibilities for imagining social transformation that would later be exploited to the fullest by Bataille’s circle, but had already been famously articulated by Durkheim himself: ‘[T]he former gods are growing old or dying, and others have not yet been born A day will come when our societies once again will know hours of creative effervescence, during which new ideals will again spring forth.’²⁷

For Bataille and his fellow ‘sacred sociologists’, Durkheim’s portrayal demanded that one seek ‘the roots and conditions of social life’ in the realm of the sacred.²⁸ The sacred was the foundational, if often buried, energy at the core of any society: ‘*le fait spécifique du mouvement communiel de la société*.’²⁹ Moreover, its radical opposition to the profane made it a potential source not only of transformation, but also of revolution. Indeed, Bataille drew on, while radicalizing, Durkheim’s ‘effervescence’ with his call to completely overwhelm existing social forms, to ‘abandon the world of the civilized’ and ‘dance with fanaticism’.³⁰

Nevertheless, for Durkheim, the opposition between the sacred and profane was only one facet of their complex and unstable relationship. Despite his assertion of the ‘absolute heterogeneity’ between the two domains, Durkheim also portrayed their intimate contact and protean dynamics – above all, the dynamics of ‘contagion’:

By a sort of contradiction, the sacred world is as though inclined by its very nature to spread into the same profane world that it otherwise excludes. . . . What . . . extraordinary contagiousness sacredness has. . . . [C]ontagion is not a kind of secondary process by

constitutes a critique suggests that Agamben’s difference from a writer like Bataille may covertly begin on the plane of aesthetics, even if it extends more globally to the political–theological planes. Indeed, it is precisely an emphatic valorization of, and a quest for, a ‘loss of sobriety’ in a variety of forms that explicitly animates Bataille’s work and his desire for the ‘left sacred’. Finally, I note that one of Agamben’s concerns seems to be his view of an inappropriate combination of the religious and the political in the Durkheim tradition’s notion of the sacred – the inability of its notion of the sacred to explain a ‘juridicopolitical phenomenon’ and the consequent need for ‘an attentive and unprejudiced delimitation of the respective fields of the political and the religious’; Agamben, *supra* this note, at 51. Yet, anxiety about the distressing tendency of the encroachment by the religious on the terrain of the political is a central symptom of the very notion of the sacred that animates the Durkheim tradition as well as the broader structures of European thought analysed in this paper. For me, the bottom line of these critiques is the continued pertinence of the Durkheim tradition in the analysis of Western discourse and practice, and, indeed, as I shall suggest in my conclusion, the ways in which it continues to retain a powerful hold on all of us writing and working within their globalized reach.

24 Durkheim, *supra* note 14, at 36.

25 *Ibid.*, at 311.

26 *Ibid.*, at 37.

27 *Ibid.*, at 429.

28 S. Falasca-Zamponi, ‘A Left Sacred or a Sacred Left? The Collège de Sociologie, Fascism, and Political Culture in Interwar France’, (2006) 23 *South Central Review* 40.

29 G. Bataille, *La Sociologie sacrée et les rapports entre ‘société,’ ‘organisme,’ et ‘être’* (1937), reprinted in D. Hollier (ed.), *Le Collège de Sociologie, 1937–1939* (1995), 36, at 53. I have left this phrase in French as it defies translation into English, but will convey its meaning to most readers of this journal.

30 Bataille, *supra* note 1.

which sacredness propagates, once acquired, but is instead the very process by which sacredness is acquired.³¹

Paradoxically, while religious systems of separation, prohibition, and purification constructed the realm of the sacred, this sacred then inexorably tended to spread into the profane. Durkheim explained this 'eminently contagious' quality of sacredness with the notion that sacredness embodied 'transfigured collective forces', particularly socially constructed emotions, not 'rooted' or localized in any particular person or thing. Sacred forces thus were characterized by an extreme degree of 'mobility', tended towards 'diffusion', and possessed the ability to 'bring about the mingling and fusion of things, despite the natural difference of those things'.³²

The paradoxical combination of 'absolute heterogeneity' and 'eminent contagiousness' meant that the systems of separation between the sacred and the profane must become increasingly strict: for if contagiousness implied that any contact with the sacred made a person subject to its powers, the 'antagonism' between the sacred and the profane also made such contact dangerous:

A profane being cannot violate a prohibition [of contact] without having the religious force that he has improperly approached extend to him and take him over. But since there is antagonism between himself and this force, he finds himself subject to a hostile power, the hostility of which is inevitably manifested in violent reactions that tend to destroy him.³³

The danger in such contagiousness was infinitely compounded when dealing with the proliferating forces of the 'left sacred' that were, by nature, threatening and destabilizing. As I suggested above, in the Durkheim tradition, particularly in its more radical offshoots, the 'pure' or 'right' sacred was associated with the consecration of 'social cohesion' and the 'preservation of rules and taboos';³⁴ by contrast, the 'impure' or 'left' sacred was associated with 'dynamic ferment', with the 'explosive violation of life's rules', with 'collective ecstasy', and with the 'rejection of all authority'.³⁵ Though both forms of the sacred were characterized by the paradoxical combination of heterogeneity and contagiousness, the contagiousness of the 'left sacred' posed exceptional dangers for society, as Roger Caillois, another key member of the Collège de Sociologie, stated: 'The impurity of these diverse beings endangers the community in a way that threatens it in its entirety, for nothing is more contagious than mystical pollution.'³⁶

The fact that much of religious ritual seemed designed alternatively either to separate these two sacred forces or to convert the impure into the pure, the left into the right, suggested to these writers the dangerous intimacy of these implacable antagonists. Indeed, the 'entire book of Leviticus', obsessed as it is with ritual purification, 'can be interpreted from this point of view: in each verse, one remarks the

31 Durkheim, *supra* note 14, at 322, 328.

32 *Ibid.*, at 327–9.

33 *Ibid.*, at 324–5.

34 R. Caillois, 'Brotherhoods, Orders, Secret Societies, Churches' (1938), in *College of Sociology*, *supra* note 14, at 145, 152 (translation modified).

35 *Ibid.*

36 R. Caillois, 'L'ambiguïté du sacré' (1938), in *Le Collège de Sociologie*, *supra* note 29, 365, at 377.

intimate connection of the pure and impure'.³⁷ For Bataille, the 'transmutation' of the impure to the pure sacred, the 'left' to the 'right', constituted the 'very goal of religious acts'.³⁸

In the 1930s, Bataille was looking precisely to the 'fanaticism' of the 'impure sacred' for its potential to combat fascism with 'words that touch not the reason but the passions of the masses'.³⁹ In particular, Bataille was looking for something with which to oppose fascism other than law – a mode of discourse associated with the 'right sacred', that 'preserver of rules and taboos', that represented the very opposite of the kinds of transgressive experiences with which Bataille was fascinated. Law, specifically international law, was indeed one of the main and wholly futile discursive tools relied on during the 1930s to oppose the depredations of the fascists and Nazis. Writing in 1938 immediately after the *Anschluss*, Bataille found 'something miserable, something odious, in only opposing the reality which today threatens human existence with mere discourse and assertions of law'.⁴⁰ Unlike many anti-fascists, Bataille contended that the correct response to fascism was not the reaffirmation of rationalism, and still less of patriotism or other forms of nationalism. On the contrary, the urgent task was to defeat the 'nationalist stupidity' prevailing in the world – a task that could only be accomplished by a 'virulent religious organization, new and totally incongruous, supported by a spirit incapable of servile compromise'.⁴¹

To be sure, this kind of oppositional force offered by religion to nationalism could only come from its destabilizing, 'impure', or 'left' form. Bataille declared that, by contrast, established religion was on the side of the 'right sacred', for it generally merely 'betrays the needs that it was not only supposed to regulate, but satisfy'⁴² – becoming a means of social control through appropriating, disciplining, and channelling the potentially limitless and destabilizing human passion for the sacred.⁴³ Bataille's 1938 call for a 'virulent religious organization' and his 1936 'sacred conspiracy' of the 'ferociously religious' were thus both attempts to awaken the oppositional forces of the 'left sacred'. They were also, paradoxically, virtually identical to his call for an 'antireligious and asocial organization' in 1930.⁴⁴ For the 1930 Bataille, such 'antireligious' organizations would practise a hostility to established religion only possible for those deeply intimate with it, those capable of 'embracing the Cross – in hand-to-hand combat'.⁴⁵ This homology between the roles of the 'ferociously religious' and the 'antireligious' in Bataille's writing in the 1930s underscores the highly variable use of such terms during this period. Hope

37 Ibid., at 385.

38 Bataille, *supra* note 14.

39 G. Bataille, 'Popular Front in the Street' (1936), reprinted in Stoekel, *supra* note 1, at 162, 167.

40 G. Bataille, introduction to Caillois, *supra* note 34, at 145, 147 (translation modified).

41 Ibid., at 149 (translation modified).

42 G. Bataille, 'The Use Value of D.A.F. de Sade' (1930), reprinted in Stoekel, *supra* note 1, at 90, 97.

43 See, e.g., G. Bataille, 'Sade et la morale' (1948), reprinted in (1976) 7 *Oeuvres complètes* 445, at 448. This view of 'religion' conforms to an old theme in the Durkheim school. Thus, Caillois quotes a 1904 dictum of Henri Hubert: '[R]eligion is the administration of the sacred', R. Caillois, *L'homme et le sacré* (1939), 2.

44 Bataille, *supra* note 42, at 101.

45 G. Bataille, 'Sacrifices', reprinted in Stoekel, *supra* note 1, at 130, 133–4.

was placed not in 'religion' in its conventional, institutionalized form, but rather in a set of 'virulent', 'left sacred' forces. This kind of 'religion' – or 'antireligion' – was opposed to law, just as, for Bataille, 'human life' generally, 'distinct from its legal existence . . . cannot be limited to the closed systems which reasonable conceptions assign to it'.⁴⁶ Or, in the 1918 words of another advocate of a radical sacred, Ernst Bloch, 'religion' was 'the storm' that 'prevails from what is inordinate in human nature . . . constantly undermining everything shaped'.⁴⁷

It is instructive to compare Bataille's 1938 turn to religion in its 'virulent' form with a very different call in the late 1930s for a turn to religion, not as a radical alternative to law, but as its indispensable supplement, capable of providing it with a new legitimacy. In October 1939, with the Second World War already under way, the American professor of international law Clyde Eagleton denounced US neutrality legislation because 'religion and ethics teach that one should stand up for the right against the wrong'.⁴⁸ Eagleton's resort to 'religion', associated closely, or even identified, with 'ethics', was designed to resolve tensions among legal doctrines: particularly the tension between the doctrine of neutrality, on the one hand, and collective security, on the other, a common preoccupation during this period.⁴⁹ By the fall of 1939, the tension between these doctrines had emerged into outright contradiction, for 'neutrality' meant 'surrender to the lawbreaker' and enabled the international community to shirk its responsibility for 'upholding the law of nations'.⁵⁰ For Eagleton, religion/ethics operated as a superordinate set of principles, heterogeneous to law yet capable of bringing order to the internal incoherence of the body of legal rules, thus endowing law with a new legitimacy.

A sharper contrast with Bataille's nearly contemporaneous usage of the term 'religion' could not be found. In Durkheimian terms, though, one may see these two uses as corresponding to the two kinds of 'sacred' – both heterogeneous to the profane order. Where the 'left sacred', embodied in Bataille's 'virulent religious organization', operated against the established legal and social order, the 'right sacred', embodied in Eagleton's 'religion-and-ethics', operated to bolster that order.

I conclude this section by noting the homology between, on the one hand, the two key features of the relationship of the sacred to the profane in the Durkheim tradition (heterogeneity and contagiousness) and, on the other hand, the two key senses I outlined earlier of secularization in the history of debates about religion in the modern world (secularization-retreat and secularization-transfer). Whereas secularization-retreat emphasizes the heterogeneity of the religious and the secular, secularization-transfer posits the persistent, pervasive, even if covert, ways in which religion informs seemingly secular cultural ideas and forms. This homology is close enough to suggest that the two sets of dichotomies may be viewed, respectively, as

46 G. Bataille, *La part maudite* (1967), 43.

47 E. Bloch, *The Spirit of Utopia* (2000), 228.

48 'Neutrality Law Termed Immoral: Religion Teaches that One Should Stand Up for the Right, says Prof. Clyde Eagleton', *New York Times*, 4 October 1939, A13.

49 See N. Berman, 'Between Alliance and Localization: Nationalism and the New Oscillationism', (1994) 26 *New York University Journal of International Law and Politics* 449.

50 *Ibid.*

anthropologized and historicized versions of very similar notions. For both Bataille and Eagleton, law and religion were, or had become, heterogeneous to each other, either due to their timeless essence or through a historical process of secularization-retreat. Eagleton's proposal can be interpreted as an attempt to reinform the secular sphere with religion – a process, to be sure, that he presented in rather rationalist terms. Bataille, by contrast, appeared resigned in 1938 to abandon law to its lifeless secularity and instead to reinvigorate society as a whole through reimbuing it with contagious, 'virulent' religious forces – though, in much of the rest of his work, law, particularly in the guise of the 'prohibition', functions as the precondition for the 'transgressions' so crucial to him. Further along in this paper, we shall also see examples of 'secularization-transfer' in direct relation to law, in which law was viewed as performing recognizably 'religious' tasks, though in a secularized guise.

3. THE RADICAL SACRED AS A FORM OF PRIMITIVISM

The condemnation of existing 'civilization' in 'The Sacred Conspiracy' was very much of a piece with a wide variety of radical early twentieth-century discourses across the cultural and political spectrum. And, across the board, such condemnations were often accompanied by proposals for reconfiguring the relationship between the terms I have already broached – internationalism, nationalism, religion, law. They were, however, proposals that stood in as much antagonism to each other as to the 'civilization' they opposed.

Writers on the far right, most notably Oswald Spengler, diagnosed the post-First World War condition through the lens of radicalized forms of the old opposition between *Kultur*, celebrated for its organicist, *völkische* connotations, and *Zivilisation*, denigrated for its bourgeois, liberal, mercantile connotations – each with its corresponding forms of religiosity. Another far-right diagnosis of the crisis of civilization, rather better known in our own time, was embodied in the work of Carl Schmitt. Schmitt's work at this time can be understood as an argument for the inextricable connection among critiques of liberal legalism, liberal theology, liberal nationalism, and liberal internationalism.⁵¹

On the far left, Bataille's denunciation of civilization in the 'Sacred Conspiracy' emerged against the background of a more general French avant-garde stance. Thus, 'Revolution First and Always', a 1925 anti-colonial manifesto published by a provisional alliance between Marxist and surrealist writers, declared: 'We are certainly barbarians since a certain form of civilization disgusts us. . . . Our rejection of every accepted law, our hope in new subterranean forces capable of overturning History, . . . make us turn our eyes toward Asia.'⁵²

This manifesto belongs to cultural and political avant-garde circles intimately related to Bataille's 'sacred sociologists' of the 1930s, even if that intimacy was often

51 The key works of Schmitt for this argument are *The Concept of the Political* (1927); *The Crisis of Parliamentary Democracy* (1923); *Political Theology* (1920); see also R. Wolin, 'Carl Schmitt: The Conservative Revolutionary Habitus and the Aesthetics of Horror', (1992) 20 *Political Theory* 424. It would, of course, take me too far from my central arguments in this paper to engage in an extended demonstration of this point.

52 Altman, *supra* note 2.

very fraught. It is important to note the homology between the role occupied in Bataille's declaration by the 'ferociously religious', as the fulcrum of opposition to Western civilization, and the role played by the 'barbarians' and 'Asia' in the 1925 manifesto – one expression of the way in which the figure of the religious radical formed a part of the series of 'primitives', those 'subterranean forces' so crucial to the avant-garde fantasy of overhauling the West in the early twentieth century.⁵³

Moreover, as in Bataille's text, the 1925 manifesto's opposition to Western civilization, in the name of the 'barbarians', was also an opposition to nationalism. In the words of the 1925 manifesto, 'patriotism is a form of hysteria, though more hollow and more deadly than others'. Indeed, this 'barbarianist' opposition to patriotism was not solely targeted against fidelity to the European *patries*. On the contrary, its disapproval of nationalism at times extended from condemnation of French nationalism to irony about anti-colonial nationalism, paternalistically referred to as the '*amour-propre* of long-dominated peoples'. This avant-garde, as Louis Aragon declared in 1925, had no use for 'nationalist language' of whatever provenance, particularly in its legal form, that of 'independence, national sovereignty, inalienable right of peoples to self-determination'.⁵⁴

I conclude this section by noting that Bataille himself emphasized these connections between the primitivism of the avant-garde and its quest for the primal sacred. In a 1948 essay, entitled 'The Surrealist Religion', he wrote that 'the quest for primitive culture represents the principal, decisive, and most vital aspect of the meaning of Surrealism'.⁵⁵ The essay then proceeded to associate this quest with surrealism's interest in the sacred, myth, and ritual – interests usually associated with 'religion' in the more conventional sense. Indeed, Bataille claimed that surrealism and other forms of the avant-garde quest were, in their essence, radical quests for the sacred, by contrast with which institutionalized religion was a compromised form.⁵⁶ In a dictum that could serve as a slogan for all avant-garde proponents of a radical sacred, Bataille reversed the usual hierarchy between established religion and its radical rivals: 'Christianity itself . . . follows in the wake of Surrealism.'⁵⁷ This sort of dictum turns conventional understandings of secularization on their head, both temporally and normatively: for Bataille, religion itself, at least in some of its key institutionalized forms, is a kind of fall, a secularization of the primal sacred. To be sure, an understanding of organized religion as secularization in the sense of movement into the world would be consistent with the views of a number of other thinkers ranging from Hegel (who viewed it positively) to Karl Barth (who viewed it negatively).⁵⁸

53 See F. Keck, 'Le primitif et le mystique chez Lévy-Bruhl, Bergson et Bataille', (2003) 3 *Methodos*, available online at <http://methodos.revues.org/document1111.html>.

54 L. Aragon, 'Réponse de M. Louis Aragon' (1925) 76 *Clarté* 24. This rejection of nationalism, especially as defined by legal terms, did not prevent passionate support on the part of many surrealists for the 1925 anti-colonial revolt in Morocco. See my discussion in N. Berman, "'The Appeals of the Orient": Colonized Desire and the War of the Rif', in K. Knop (ed.), *Gender and Human Rights* (2004), 195.

55 G. Bataille, 'The Surrealist Religion' (1948), in M. Richardson (trans.), *The Absence of Myth* (2006), 71.

56 *Ibid.*, at 73.

57 *Ibid.*, at 76.

58 Monod, *supra* note 21, at 47–63, 176–9.

4. NATIONALISM, RELIGION, AND LAW: ALLIES, RIVALS, OR TEMPTATIONS?

The sense of the failure of Western civilization that had been developing in Romantic, Marxist, and Nietzschean thought for decades was not limited to the cultural and political extremes in the post-First World War era. Rather, the war had brought this sensibility into the very heart of the Western mainstream, even into the halls of Western power. Paul Fussell has famously demonstrated the depth of the rupture in Western sensibility caused by the war, the introduction of an irremediable sense of irony and dislocation in relation to Western ideals.⁵⁹ Nonetheless, it is still surprising to discover that the first draft of the Covenant of the League of Nations, written by Colonel House, Woodrow Wilson's chief adviser, began with the words '*International civilization having proved a failure*'.⁶⁰ Rather than viewing the League of Nations as embodying a smooth flowering of civilization, as the telos to which it had long been tending, as may have been suggested by Kant a century and a third earlier,⁶¹ House portrayed it as a rupture in the history of that civilization.

Of course, House's diagnosis of the reasons for this failure was diametrically opposed to that of the radicals of left and right. For House, this failure was due to the fact that 'there has not been constructed a fabric of law to which nations have yielded with the same obedience and deference as individuals submit to intranational laws'.⁶² If the absence of effective international law was the cause of the failure, a legally based institution was the remedy: 'civilization having proved a failure . . . it is the purpose of the states signatory to this Convention to form a League of Nations.'⁶³ For House, internationalist supremacy under law was the antidote to the crisis of civilization and the exorbitance of sovereign prerogatives.

In 1933, Colonel House's 1918 preamble could still be cited as evidence that, while 'there is no mention of religion or the Church in the Preamble' of the League Covenant, a quasi-religious 'moral consciousness' was one of its key inspirations.⁶⁴ This assertion was made by Norman Bentwich, a prominent interwar international lawyer and first Attorney General of the British Mandatory government in Palestine, in his inaugural lectures as the holder of the Chair of International Law and Peace at the Hebrew University in Jerusalem. Like other writers I have introduced, though with dramatically different intent, Bentwich insisted upon the connection between civilizational failure and the need to turn to religion as the basis for a new beginning.

Bentwich's lectures argued, however, that this inspirational role could only be achieved as a result of an epochal shift in 'religion' itself. He devoted much of the lectures to portraying the history of the failure of religion to play its proper role – a failure he attributed above all to the pernicious vicissitudes of the historical

59 P. Fussell, *The Great War and Modern Memory* (1975).

60 League of Nations Covenant (First Draft), *supra* note 3 (emphasis added).

61 See I. Kant, *Idea for a Universal History from a Cosmopolitan Point of View* (1784). To be sure, given Kant's critique of teleology in his critical philosophy, one must be cautious in interpreting its seeming evocation in his less technical writings.

62 *Ibid.*, at 81–2.

63 *Ibid.*

64 N. Bentwich, *The Religious Foundations of Internationalism* (1933), 246.

relationship between religion and nationalism. Bentwich's primary concern was with the ill effects that ensued when either of these forces acquired the characteristics of the other. Thus, he asserted that, during the heyday of statism, it was the case both that 'nationalism informed and dominated religion and made it narrow' *and* that 'nationalism was itself advanced to the authority of religion'.⁶⁵ Bentwich was thereby claiming both that religion was corrupted by the dark side of nationalism and that nationalism was corrupted by the dark side of religion: religion was 'narrowed' – that is, it became particularistic and promoted an 'exclusive limited loyalty',⁶⁶ while nationalism became improperly absolutist by virtue of having been 'advanced to the authority of religion'.

Indeed, although one strand in the lectures can be read as a linear story of the historical progress made by religion – from its beginnings as an ideology of nation-building and conquest to its gradual maturation toward its true, universalist vocation – the central problem that seems to have preoccupied Bentwich was the perennial recurrence of destructively perverse entanglements between religion and nationalism. Bentwich argued that such lethal contaminations of each of these spheres by the other have taken a wide variety of forms in thoroughly disparate historical periods. For example, during the Roman Empire, it occurred when 'religion became nationality', while, in Bentwich's time, the problem was that 'nationalism has become dogma and religion'.⁶⁷ Indeed, Bentwich's thesis led him to dramatically depart from the conventional international legal portrayal of the 1648 Peace of Westphalia, with its celebration of the Peace's putatively secularizing break towards sovereign equality. In opposition to that stance, Bentwich maintained that the collapse of the 'more or less unified society of Western Christendom' resulted in the emergence of the 'demon of national sovereignty', the 'idolatry of nationalism',⁶⁸ and the 'worship of the God-State'.⁶⁹ Paradoxically, it was precisely the 'transfer' of 'the prerogatives of the mediaeval Church' to 'each of the national societies', the very paradigm of secularization in conventional international legal historiography, that produced this newly, albeit demonically, sacralized world. This epochal 'transfer', although often celebrated as a 'secularization-retreat', the retreat of religion in favour of worldly politics, was in fact precisely a 'secularization-transfer', the transfer of religious veneration from Church to state.

Bentwich's portrayal of this reciprocal contamination of religion and nationalism bears a strong affinity with the kind of 'contagion' depicted in the writings of the Durkheim school. Both the facility with which such contagion seemed to occur and the mortal dangers it posed were shared concerns of the French 'sacred sociologists' and the British international lawyer. Moreover, both religion and nationalism seemed apt candidates, in their portrayal by Bentwich, to play the role of sacred forces spreading by contagion across society. Indeed, both seemed capable, depending on the circumstances, of playing the role of either a 'left' or a 'right' sacred.

65 *Ibid.*, at 279.

66 *Ibid.*, at 267.

67 *Ibid.*, at 256.

68 *Ibid.*, at 255.

69 *Ibid.*, at 256.

This vision of a perennial threat of mutual contamination between religion and nationalism – a threat Bentwich saw as all too often realized – stands in sharp contrast to the linear progress narrative that often framed his historical exposition.⁷⁰ As I have noted, one of the characteristic features of Bentwich’s discourse was his use of the language of critics of religion to denounce corrupted nationalism (words like ‘demon’, ‘idolatry’, and ‘dogma’) and his use of the language of critics of nationalism to denounce corrupted religion (words like ‘narrow’ and ‘exclusive limited loyalty’). Bentwich’s historical narrative can be described as an implicit ‘dialectic of secularization’, in which moves towards the separation of the political from the religious sphere lead to each taking on the characteristics of the other. Like the Frankfurt School theorists’ ‘dialectic of enlightenment’, it problematizes any narrative of linear progress – in Bentwich’s case, progress towards a separation between the religious and secular spheres, or, more specifically, between a reasonably limited secular nationalism, on the one hand, and a peaceful universalist religion, on the other.⁷¹ Or, to put it in the terms of the secularization debate: attempts to secularize in the sense of the separation of religion and the state, of ‘secularization-retreat’, yielded a malignant form of ‘secularization-transfer’, due to the ‘contagion’ phenomenon.

Nevertheless, Bentwich, unlike Adorno and Horkheimer, saw a way out of the dialectical labyrinth. Despite the dangers posed by the contagious proclivities of religion and nationalism, he wished to preserve both, or, more precisely, declared that both are irreducible ‘permanent instincts’⁷² – a formulation reminiscent of Durkheim’s assertion that religiosity is a ‘fundamental and permanent aspect of humanity’,⁷³ a notion also crucial to the ‘world religions’ concept.⁷⁴ An attempt to subordinate either one to the other was, therefore, no more likely ultimately to succeed than to be beneficial. Citing the examples of the initially universalist religions of Christianity and Islam, Bentwich argued that their suppression of national identities led to the construction of militarized empires whose ‘rival religious missions’ to establish ‘a universal theocracy’ were to ‘inflare’ the ‘warlike instincts of Western and Eastern peoples’ for many centuries⁷⁵ – before modern times eventually saw such paradoxical universalist/imperialist religious colossuses give way before the centrifugal forces of nationalism. Rather than wishing to do away with either religion or nationalism, therefore, Bentwich was primarily troubled by their maleficent

70 As in his statement that the ‘tendency to world unity in the political and economic spheres is accompanied by the tendency to union in the cultural and political spheres’; *ibid.*, at 262. Written in 1932, published in 1933, this frame seems something of an overcompensation in the face of the ominous signs of Europe’s immediate future, as well as standing in sharp contrast to many of Bentwich’s actual historical analyses.

71 See, e.g., M. Horkheimer and T. Adorno, *The Dialectic of Enlightenment* (1972), xvii: ‘[M]yth is already enlightenment; and enlightenment reverts to mythology.’ My use of the term ‘dialectic of secularization’, which stays close to the Frankfurt School meaning of dialectic, is very different from its use as a designation of a complementary relationship between the secular and the religious in the book of the same name co-authored by Jürgen Habermas and then-Cardinal Ratzinger. See J. Ratzinger and J. Habermas, *The Dialectics of Secularization: On Reason and Religion* (2007).

72 Bentwich, *supra* note 64, at 282.

73 Durkheim, *supra* note 14, at 1.

74 Masuzawa, *supra* note 8, at 315–17.

75 Bentwich, *supra* note 64, at 279.

combinations, the contamination of each by the defects of the other. When properly configured, both nationalism and religion could be forces for good, and, in any case, neither could be ignored without great peril.

The establishment of the proper relationship between nationalism and religion, and their recruitment for the cause of internationalism, thus demanded both a disentangling and a reordering of their relationship. To move towards both goals, Bentwich proposed an institutional solution: the establishment of a 'League of Religions' to parallel the 'League of Nations'. The 'League of Religions' would provide a forum for the religions of the world to assemble and to discover and purify their universalist vocation. And it would be its very separation from the League of Nations that would allow the League of Religions to serve in a benevolent inspirational role in relation to it, to serve as 'the soul of the international society of states'.⁷⁶

This proposal amounts to a kind of permanent institutionalization of the World Parliament of Religions and places Bentwich squarely within the period discourse of 'world religions' – though in the context of a historical analysis of the dialectical difficulties that often make religions unsuitable for their universalist role. The institutional separation between the 'Leagues' would itself play a crucial role in the substantive production of such forms of religion, as well as of the state. This salutary transformation of both religion and state would thus be, at least in part, the *product* of the advanced internationalists who would establish the two leagues. In a Durkheimian perspective, these internationalists, in purifying religion from its contamination with nationalism, would thereby be performing a quintessentially religious task, acting as 'secularized' priests (in the sense of 'secularization-transfer') charged with purification and separation rituals, the 'very goal of religious acts'.

Bentwich strove, in short, to achieve the simultaneous vindication of law, internationalism, nationalism, and religion, each in its proper conceptual and institutional place. The arduous work of the structural reconfiguration of their relationship, a reconfiguration to be achieved by the 'secularized' priests of internationalism (in the sense of secularization-transfer), was necessary to achieve a key element of the secularization-retreat essential to the liberal order, the assignment of religion to a separate social sphere.⁷⁷ Bentwich thus implicitly provided the genealogy of one of the current uses of religion in international law – that of inspirational principles – showing the reconfiguration of power and ideology needed to construct the kind of 'religion' suitable for such a role.

Although Bentwich often leaned towards an essentialist view of religion, implicit in his notion that its essentially universalist vocation had been perverted by its entanglement with nationalism, his historical narrative seems far more suited to a genealogical approach, the portrayal of the contingent acts of power that construct 'religion' in its various historical forms.⁷⁸ Moreover, in keeping with the contingency of any genealogy, his historical narrative also showed that any move towards

76 Ibid., at 274.

77 Even if, to be sure, he did not seek two of the other key elements: religion's privatization and its diminished significance. See J. Casanova, 'Secularization Revisited: A Reply to Talal Asad', in D. Scott and C. Hirschkind (eds.), *Powers of the Secular Modern: Talal Asad and His Interlocutors* (2006), 12.

78 See, e.g., T. Asad, *Genealogies of Religion* (1993), 27–54.

achieving this disentanglement was precarious, always at the mercy of the powerful tendency towards the dangerous intertwining of the two forces. This precariousness was epitomized in his argument that the establishment of sovereign states at the expense of medieval Christendom, that paradigm of secularization for conventional legal historiography, was simultaneously a re-entanglement between religion and nationalism in the form of the idolatry of the state. Bentwich's lectures thus implicitly constituted a powerful argument against the conventional 'supersessionist' account of the relationship between a definitively secularized international law and its medieval religious predecessors (as well as its early modern precursors) – in favour of a complex set of dialectical processes among secularization-retreat, re-entanglement through contagion, and secularization-transfer.

Bentwich's lectures thus adopted a radically different standpoint and arrived at a radically different set of proposals than the avant-garde 'sacred conspirators'. Nevertheless, the lectures worked with the same set of elements as did Bataille and the avant-garde – indeed even posed some of the very same conundrums about the interrelationship of those elements. Both highlighted the tendency of religion to transgress the boundaries that divide it from other spheres of life; both viewed this transgression as destructive of the bases of the liberal order; both rejected the kind of religion that would reinforce uncritical worship of the state; both looked to a particular kind of religiosity as a response to key failures of Western civilization, while rejecting other kinds of religiosity. Of course, in polar opposition to Bentwich, Bataille celebrated religion's transgressive variant, the 'left sacred', indeed precisely when it was at its most destructive of the established order – while Bentwich sought to consecrate religion as an inspiration for the established order, a stabilizing 'right sacred' that would have been anathema for Bataille.

I conclude this section by noting that the matrix within which Bentwich wrote was by no means atypical of mainstream writers, though seldom deployed with the same dialectical flair. Thus, the American historian Carleton Hayes, in his influential 1923 'Essays on Nationalism', framed his vigorous condemnation of nationalism most powerfully in a chapter entitled 'Nationalism as a Religion'.⁷⁹ Hayes argued that nationalism had become not only a 'veritable religion',⁸⁰ but 'a religion now common to the great majority of mankind'.⁸¹ Most of the essay was devoted to setting forth in detail the many ways in which nationalism may be viewed as similar to religion, possessed of dogmas, scriptures, rituals, mythologies, and so on. This portrayal was highly ironic, even patronizing, in tone: for example, Hayes declared that nationalism's 'apostles' are 'characterized by a missionary zeal that is fiery . . . its multitudinous disciples are possessed of a love that is consuming'.⁸² Indeed, although Hayes defined religion as a 'mysterious faith', this passionate intensity of 'fiery zeal' and 'consuming love' seemed to be equally important criteria that led him to portray

79 C. Hayes, *Essays on Nationalism* (1926), 93–125.

80 *Ibid.*, at 95.

81 *Ibid.*, at 118.

82 *Ibid.*, at 93–4.

nationalism as religion. Hayes's essay may be read as an elaborate demonstration of secularization-transfer in the relationship of religion to nationalism.⁸³

Despite his ironic tone, though, Hayes insisted that it was not nationalism's religious character as such that led him to condemn it. On the contrary, in keeping with the period affirmations of religion as a 'permanent instinct', he declared himself to be too much of 'a believer in the inherently religious character of man to make light of religion'.⁸⁴ Rather, it was the distinctive characteristics of nationalist 'religion' that troubled him, for 'some forms of religion are superior to others' and 'religious emotion, like any other instinctive emotion, is always susceptible and often needful of conscious direction and control'.⁸⁵ Specifically, he was repelled by the particularistic, mean-spirited, and violent quality of nationalist 'religion'. Hayes declared, moreover, that nationalism is a 'reaction against historic Christianity' – a reaction that he associated with a regression to a 'tribal' religiosity and, even more precisely, with Judaism: nationalism, like the Jews, 'repudiates the revolutionary message of St. Paul'.⁸⁶ Hayes thus implicitly saw modern nationalism as an instance of 'secularization-transfer', though, lamentably, it was exclusively the 'inferior' dimensions of religion that had been transferred. Some agency of 'direction and control' was therefore needed to separate the inferior from the superior forms of religion. Hayes located such an agency of purification, able to separate impure and pure forms of religiosity, in the 'message of St. Paul' – a message whose Christian specificity he both denied, since it was its universality that was its virtue, and yet implicitly affirmed, in his deployment of the most stereotypical tropes of historical Judaeo-Christian polemics.

A somewhat different version of such reflections may be found in a 1928 book by the American international lawyer Philip Marshall Brown, member of the Institut du Droit International and the editorial board of the *American Journal of International Law*. Brown's book was largely devoted to a complex analysis of the various sources of international conflict. His attitude towards nationalism was marked by a characteristically interwar internationalist ambivalence.⁸⁷ On the one hand, he highlighted its 'inordinate claims' and 'brutal egotism';⁸⁸ on the other hand, 'a devoted enlightened nationalism is the necessary basis of a sound internationalism'.⁸⁹ However, unlike many other interwar legal writers, he did not portray law as capable of treating the ultimate sources of conflict, specifically of separating the bad sides of various social phenomena from their good sides, such as the 'perversion' of nationalism from its 'true spirit'.⁹⁰ Law was unable to render this service because it was just

83 See a related usage by Bentwich, discussing Soviet Communism: '[A] new universal dogma which, while it disclaims the character of a religion, is in essence religious, inculcated in all citizens by the secular power'; Bentwich, *supra* note 64, at 281.

84 *Ibid.*, at 123.

85 *Ibid.*, at 123.

86 *Ibid.*, at 124–5.

87 I have elaborated on this in detail in my studies on interwar attitudes on nationalism; see Berman, *supra* note 13.

88 P. Marshall Brown, *International Society* (1923), 3.

89 *Ibid.*, at 151.

90 *Ibid.*, at 3.

as much a site of contestation as the conflicts it would resolve – a contestation that extended even beyond positive law, for ‘no real law of nature . . . receiving general assent and respect has ever existed, even among Christians’.⁹¹ Law was thus not, for Brown, a secularized priestly agency (in the sense of secularization-transfer) capable of performing the requisite purifying function, the separation of the good and bad sides of ambivalent phenomena.

On the contrary, such an agency would have to be sought in a domain ‘neither rationalistic in the strict sense, nor even ethical’; rather, it ‘would seem to consist in a consciousness among men of all races – primitive as well as refined – that there are spiritual laws’.⁹² In short, only religion could ‘enable men to understand each other and realize their common brotherhood’.⁹³ Brown’s position recalls that of Eagleton: only religion, precisely due to its heterogeneity in relation to law, could provide law with a coherence it would otherwise lack. Yet, Brown’s notion of ‘religion’ was far more heterogeneous to law than Eagleton’s unitary notion of ‘religion/ethics’: for Brown, ‘religion’ must depart from both ‘rationalism’ and ‘ethics’ in order precisely to serve its stabilizing function. I note also that, like Hayes and the general ‘world religions’ discourse, Brown both denied and affirmed the identification of his notion of universal religion with Christianity. On the one hand, it was not the religion ‘of the Buddhists, of the Moslems, of the Hebrews, or of the Christians. It is to be a synthesis’; on the other hand, that ‘synthesis’ was to be ‘a fusion, a merging of all in that religious consciousness which Paul expressed so sublimely on Mars Hill among the Greek intellectuals and aesthetes’.⁹⁴

If we read their (by no means identical) discourses together, Hayes and Brown yield much of the same vision as Bentwich – good and bad versions of nationalism, good and bad versions of religion, with some outside instance necessary to separate the good from the bad. For what follows, Hayes is particularly important for his implicit division between nationalism – that covertly ‘religious’ phenomenon of Western provenance, a phenomenon in the process of nearly global diffusion – and the traditional – overtly religious forms still prevalent in the non-West, forms in the process of subordinating themselves to the new global ‘religion’ of nationalism. This usage – in which religion in the more literal sense was associated with the non-West and more metaphorical ‘religions’, such as nationalism, fascism, and communism, were associated with the West – conforms to other mainstream usages of the time.⁹⁵ I also note Hayes’s assertion of the need for the disciplining of religion, for the ‘conscious direction’ of ‘religious emotion’ – or what Bataille and his group would call the transformation of ‘left sacred’ phenomena into those of the ‘right sacred’. Brown, by contrast, seemed more univocally affirmative in the hopes he placed in ‘religion’

91 Ibid., at 166.

92 Ibid., at 166.

93 Ibid., at 167.

94 Ibid., at 167.

95 My review of the *New York Times* of the period, for example, finds the term ‘religious fanaticism’ commonly applied to phenomena outside the United States and Western Europe, with the term ‘religion’ applied, in ironic tones, to communism and fascism. See, e.g., E. Lengyel, ‘Four World Ideas Vie for Domination’, *New York Times*, 24 June 1934, A4.

as the instance that could resolve the ambivalences and controversies besetting both nationalism and law. Nonetheless, he, too, posited a distinction between particularist faiths and the universal religion, even as he then identified the latter with what he saw as the essential message of Christianity. It is interesting to note, finally, that Brown's optimistic faith in 'religion' is linked to a notion of religion as heterogeneous to reason and ethics, as well as to law – a view of religion Brown shared with more radical contemporaries such as Bataille and Barth. Somewhat paradoxically, it is only once the heterogeneity of religion to society is accomplished, a form of 'secularization-retreat', that it can then be looked to as the heterogeneous instance that can stabilize law (for Brown) or destabilize law (for Bataille).

5. DISCIPLINE AND RELIGIOUS EXORBITANCE, OR, THE INTERNATIONAL INSTITUTION, THE SOVEREIGN, AND THE 'FANATIC'

Writers such as House, Bentwich, Hayes, and Brown all urged the need for some form of internationalist moulding of potentially dangerous forces. This urgency took different forms in the four writers: the need for state 'obedience' to international law in House, the need for an institutional cure for the 'idolatry' of nationalism and the 'exclusivity' of religion in Bentwich, the need for 'conscious direction and control' of religion in Hayes, and the need for the recognition of universal religious principles to pacify otherwise irreducible discord in Brown. In this section, I will focus on key aspects of early twentieth-century internationalism that were concerned with creating concrete legal and political regimes to effect this moulding of religion.

Of course, concern about the intertwining of religion and other social spheres was hardly a novelty by the time the twentieth century arrived. Epochal conflicts over the relationship of religion to the state had already been taking place for a very long time and had taken a variety of forms. I note, however, that the preceding discussion, in line with the work of recent scholars in a variety of disciplines,⁹⁶ has shown the need for caution about essentializing and dehistoricizing such terms as 'religion' and 'secularization'. Such caution is particularly necessary in the international legal context, due to the variety of 'secular' and 'religious' levels involved: both international and domestic law, as well as local and transnational religious forces. This multi-levelled dimension is rendered even more complex by the way Western internationalist thought, both in law and in other discourses, has been heavily inflected by the dichotomy between Europe and its Others. In this paper, I do not seek to resolve these complexities with a view to determining what was 'really new' in the twentieth century in the relations between the religious and the secular. Rather, I will analyse a sampling of interwar texts concerned with the role of international law and Western internationalism more generally as agencies of 'discipline' in

96 See, e.g., Asad, *supra* note 78; Monod, *supra* note 21; D. Boyarin, *Border Lines: The Partition of Judaeo-Christianity* (2006).

relation to religion, with a view to gleaning some of their characteristic features. This role is constructed quite differently depending on whether the texts are discussing European or colonial issues. In each context, I will also give a sense of the historical legacy that these texts perceived themselves to be working with and more or less consciously transforming.

I have already broached some of the distinctive features of twentieth-century constructions of religion, an important feature of which was precisely the use of the concept in a historicized, non-essentialist fashion. Thus, Bentwich, despite some essentialist tendencies, implicitly demonstrated the protean nature of 'religion' in terms of the shifting configurations it formed in relation to internationalism, nationalism, and the state. Even more explicitly, I have noted the way the primitivist fascinations of the avant-garde led to a bifurcation in the conception of religiosity, with the elaboration of the notion of a 'left' sacred that was not, unlike the 'right' sacred, an aspirant for political and social governance, but an oppositional, even anarchic, force. Unlike established religion, this kind of religious force should not be compared with existing states nor its adherents with patriotic citizens, but rather with destabilizing, anti-state nationalism, of a separatist, irredentist, anti-colonial, or fascist variety (i.e., in their pre-accession-to-power incarnations) and its adherents with the 'fanatics' of avant-garde dreams and bourgeois nightmares. A rather different form of this bifurcation may be found in writers who sought to stabilize international order, most explicitly in Hayes's comments about the need for discipline, for 'direction and control', of certain kinds of 'inferior' religious forces. All of these diverse tendencies, albeit in distinct ways, share the notion of the malleability of 'religion', both in general and in its particular manifestations.

It is the malleability of religion by internationalism, specifically by international legal and political institutions, that I will focus on in this section. Such texts are the basis of the suggestion I made above that one finds in this period reconfigurations of the relationship of religion and the state as key to the legitimation (or delegitimation) of reformed notions of sovereignty and colonialism. Such discursive reconfigurations may be found particularly in relation to territories viewed as undergoing transition, such as the new and enlarged states of Eastern and Central Europe recently subjected to minority protection obligations, the non-European territories recently placed under League Mandates, and the French 'protectorates' of North Africa whose status had been constructed, at least at the overt level, as intrinsically transitional between dependence and autonomy. In each of these rather diverse areas, disputes arose that implicated competing notions of the relationship of religion, national identity, and law. They also implicated competing notions of the role of international authority in establishing an appropriate configuration of these spheres – or, to put it in the terms I favour in this paper, competing notions of international authority as a secularized religious authority (in the sense of 'secularization-transfer'), able to separate the sacred and the profane as well as the 'left' and 'right' sacred.

In the European context, the key principle conventionally viewed as the legacy of international law in relation to religion was that of *cuius regio, eius religio*. This principle has long been attributed to the Peace of Westphalia, though there are

reasons for questioning that attribution.⁹⁷ In any event, this attribution has been crucial to the image of Westphalia as a key milestone in the epochal secularization of the West. The legal layer at which such secularization took place must, however, be carefully specified: for if the principle's protection for national religious autonomy seems to embody secularization-retreat in terms of international law's relationship to religion, it also firmly enshrines the principle of the establishment of religion by the state, unifying spiritual and temporal authority even as it subordinates the former to the latter. Secularization-retreat at the international level, in the sense of the nascent separation of religion from international law, also entailed an internationally authorized transfer of religious authority to the state. Or, to put it another way: what seems at first to be international agnosticism about religious identity can be equally characterized as the international legal construction of a territorialized political/religious state.

In the interwar period, the primary international institutions in which discussion took place concerning conflicts about the relationship between European religious and state authority were the League of Nations forums overseeing the minority protection system, the 'Committees of Three'. The Committees' treatment of these disputes may seem, upon an initial consideration, to reflect a straightforward application of the *cuius regio* principle. A closer examination of the (admittedly rather laconic) reports of these disputes, however, reveals the reconfigurations of state, nation, religion, and internationalism that they implicated.

The Committees of Three discussed a number of disputes concerning state-established religions that had shifted from the tutelage of a pre-war territorial sovereign to that of a post-war successor territorial sovereign: for example, the replacement of the King of Prussia by the head of the Polish state as the 'supreme authority' over the United Protestant Church of Upper Silesia⁹⁸ and the incorporation of the Russian Orthodox population of Rumania into the Rumanian Orthodox Church.⁹⁹ Petitions by church members claimed that such shifts represented an improper infringement of their religious identity and thus violated their minority rights. The petitions thereby implicitly called for a rather dramatic departure from the *cuius regio* principle: the identity of the churches should, in their view, belong to the religious communities, rather than the states – perhaps a throw-back to a pre-modern conception. The authority to decide the locus of identity would, for the petitioners, belong to the new international community institutionalized in the League and authorized by the minorities' treaties. To be sure, one might argue that this position represents continuity with the *cuius regio* regime, as I have interpreted it above, in which international authority constructed the relationship between state and religious identities. Nonetheless, because the *cuius*

97 This principle was probably more apt as a characterization of the mid-sixteenth-century Peace of Augsberg, with the 'Westphalian' Treaty of Osnabrück something of a retreat in this regard. See, e.g., A. Oslander, 'Sovereignty, International Relations, and the Westphalian Myth', (2001) 55 *International Organization* 251, at 272.

98 'General Questions Relating to the Rights of Minorities', (1922) 3 *League of Nations Official Journal* 705.

99 'Minorities in Romania', (1932) 13 *League of Nations Official Journal* 1490, at 1491; see the thorough discussion of disputes of these kinds in M. Evans, *Religious Liberty and International Law in Europe* (1997), 157–71.

regio regime made those two kinds of identity coincide within the boundaries of states, the petitioners' position would have called for a dramatic increase in international authority; the international instance would now be called upon to determine the boundaries of state and religious identities *within the borders* of a sovereign state. Such a juxtaposition of the premodern (here, the autonomy of local church communities) and the hyper-modern (here, deep international intervention into identity conflicts within states) is one of the hallmarks of early twentieth-century modernism in international law and across a wide range of Western cultural domains.¹⁰⁰

The Committees of Three adopted a bifurcated response to these petitions. On the one hand, they denied that they had competence to critically evaluate the overall fact of shifts in the national/religious identity of the churches concerned. With varying degrees of explicitness, they adopted the general view that these shifts were purely 'ecclesiastical or canonical' matters and concerned 'religious law' over which they had no competence.¹⁰¹ By contrast, they were willing to inquire into the specifically *linguistic consequences* of the shifts, seeking to assure that 'relations between the clergy and the population', including 'sermons', were conducted in the 'local language'.¹⁰²

The Committees' refusal to consider the effects on the petitioners' religious life as a result of the overall transformation of the national identity of their churches may appear simply to flow from the *cuius regio* principle – under which international law endorsed, even constructed, the sovereign's power to determine the religious identity of its territory. However, the modification of this principle, in the form of international competence to evaluate the linguistic consequences of the shift in religious identity, requires a dramatic modification of that interpretation, for such competence entailed oversight of relationships *within the very walls of the church*. Indeed, the Committees' bifurcated position – refusing to intervene in 'ecclesiastical' matters while inquiring into the linguistic medium of religious life – may be viewed as effecting a new sacred/profane distinction within the religious domain itself. The new international emphasis on the protection of European national minorities, whose identity was often closely linked to language, thus led to internationalist reconstruction of the contours of the sacred. Again, while the brevity of the reports suggests caution about a definitive interpretation, this reconstruction can be viewed as a kind of purification of the religious domain, constructing the newly internationalized aspects of church life – the national-identity aspects – as desacralized, in contrast with other aspects constructed as purely 'ecclesiastical'. Such a purifying function may be viewed, in the Durkheim tradition, as the quintessential religious function, the 'very goal of religious acts' – and thus the League here may be viewed as a secularized religious authority (in the sense of secularization-transfer).

Turning to the colonial context, the question of religion arose both in the Permanent Mandates Commission and in the Permanent Court. In the Permanent Mandates

100 See N. Berman, 'Modernism, Nationalism, and the Rhetoric of Reconstruction', (1995) 13 *Current Legal Theory* 3.

101 'Protection of Minorities in Greece', (1934) 15 *League of Nations Official Journal* 1674, at 1675.

102 *Ibid.*

Commission, such discussions were marked by a greater willingness to explicitly address substantive religious questions than in the Committees of Three. This stance befitted a forum highly imbued with the colonialist spirit of frankly embracing the reconstruction of subject cultures, albeit with marked variation depending on the Mandate under discussion. For example, in the context of the Mandate over Ruanda-Urundi, the Belgian delegate expressed the following general valorization of missionary activity: 'In colonial circles, it was generally agreed, irrespective of the private philosophical opinions of those concerned, that the religious missions were of very great assistance in furthering the work of civilization.'¹⁰³ This comment thus endorsed the use of religion to further internationalist political goals, and affirmed that such instrumentalization commanded the approbation of secular as well as religious European masters.

However, this putative 'general agreement' about the usefulness of religion for the goal of civilization was rather overstated, at least in relation to France. French rule in Syria was marked by sharp controversy about whether the secular republic should be allied with religious forces, both local and French, in its conduct of the Mandate.¹⁰⁴ The Mandated Territory became a site of struggle between perennially conflicting 'French passions', those of the 'clericals' and 'anticlericals' – a struggle summed up in the divergent views about whether Jacobin 'anticlericalism is an export product'.¹⁰⁵ Indeed, it was Syria that was the object of the key activities of the 'French Secular Mission' (La Mission Laïque Française). This organization's name implicated both senses of secularization: the word 'secular' suggests secularization-retreat in its aspiration to limit religion, while the word 'mission' suggests secularization-transfer in its attempt to usurp the role played by Catholic 'missions' in diffusing European culture in the French empire.¹⁰⁶

In the context of the Cameroun Mandate, the French delegate to the Mandates Commission posed a question that pithily presented a somewhat different version of this issue: namely, whether 'Christianity, by developing an individual conscience, might affect native customs and undermine the authority of the chief – and thus 'whether it was better to have a Christian population, less respectful of its chiefs, or a population submissive to its chiefs but uninfluenced by the Catholic or Protestant churches'.¹⁰⁷ In its willingness to consider the relative political advantages of different religions, this statement presupposes the legitimacy of the active deployment of religion by the internationally authorized European overseer in the name of civilizing goals. Interestingly, Christianity appeared here as a destabilizing, even potentially dangerous, force in the short run, due to its putative effect on the construction of subjectivity – though conducive of 'civilization' in the long run.

103 'Ruanda-Urundi: Examination of the Annual Report for 1933', Permanent Mandates Commission, (1934) 26th Session, 34, at 149 (C.489.M.214.1934.VI).

104 P. Fournié, 'Le Mandat à l'épreuve des passions françaises: L'affaire Sarrail' (1925), in N. Méouchy (ed.), *France, Syrie et Liban, 1918–1946* (2002), 125.

105 *Ibid.*, at 125–33.

106 R. Deguilhem, 'Impérialisme, colonisation intellectuelle et politique culturelle de la Mission Laïque française en Syrie sous Mandat', in N. Méouchy (ed.), *British and French Mandates in Comparative Perspective* (2004), 321.

107 'Cameroun: Examination of the Annual Report of 1932, Permanent Mandates Commission', (1933) 22nd Session, 32, at 38 (C.619.M.292.1933.VI).

Such discussions in the Mandates Commission can be productively read in terms of both their similarities and their differences in relation to the modification of the *cuius regio* principle I have analysed in the European context. As in the minority-protection context, part of the ultimate competence for determining the role and boundaries of religion were here (at least in principle), transferred from the sovereign to the international authority – of course, with the dramatic difference in the Mandate context that the ‘sovereign’ in whom residual authority still remained was that of the European Mandatory Power rather than a local government. More fundamentally, however, the abstention from intervention in matters considered truly ‘religious’ that is found in the Committees of Three (albeit in the context of reconstructing the very category of the ‘religious’) is considerably diminished here, and replaced by the Commission’s entertainment of questions of the relative merits of different religions.

Finally, the kinds of deliberation that I have cited here inscribe the Commission in the liberal colonialist tradition as portrayed by Antony Anghie. According to Anghie, this tradition, whose earliest articulation and enduring template he finds in the writings of Francisco Vitoria, is marked by the use of anti-essentialist notions of identity to legitimate colonial rule. In Anghie’s reading, Vitoria argued that it was precisely because the Indians were full human beings, capable of development and not bound permanently by their cultural particularities, that they were rendered obligated to conform to universal (i.e., Christian European) norms. And it was precisely this anti-essentialist conception of the malleability of the Indians that ultimately justified their subjugation to European principles: the ‘discrepancy between the ontologically “universal” Indian and the socially, historically, “particular” Indian must be remedied by the imposition of sanctions which effect the necessary transformation.’¹⁰⁸ Moreover, as in Vitoria (in Anghie’s reading), religion appears in the Mandate Commission’s deliberations not as constitutive of the legitimacy of colonial rule, but as a crucial element within it – that is, it does not by itself constitute a justification for that rule, but rather appears as a means to the end of civilizing the ruled. I caution again that, in contrast to classic colonialism, here ‘civilization’, whose agent the colonizer purports to be, was now embodied institutionally in a formal international body, the Permanent Mandates Commission (at least in principle). Rather than *cuius regio*, even in its colonialist version, it was now the international institution, rather than the territorial sovereign, that had become the ultimate arbiter (again, at least in principle) of the relative merits of different religions.

A rather different emphasis was expressed in 1931 in relation to Iraq, an ‘A’ Mandate on the cusp of independence. Members of the Assyrian community, a linguistically, ethnically, and religiously distinct group, petitioned the League for a number of remedies designed to safeguard the survival of their identity. One petition requested that the Assyrians be recognized as a ‘*millet* (nation) domiciled in Iraq’, that a ‘national home’ be set aside for them within Iraq, and that ‘temporal and

108 A. Anghie, *Imperialism, Sovereignty and the Making of International Law* (2007), 22.

ecclesiastical' authority be vested in their leader.¹⁰⁹ The petition also asked for a redrawing of the boundary between Turkey and Iraq to unite historically Assyrian areas. Another petition, declaring it 'impossible' for the community to live in Iraq after independence, sought the 'transfer of the Assyrians to a country under the rule of any of the Western nations, or, if this is not possible, to Syria'.¹¹⁰ The self-conception implicit in both petitions was clearly that of a community in which religious and national identities were indistinguishable and in which, moreover, identity was not linked to a particular state sovereign – nor even, in the case of the second petition, to a specific territory.¹¹¹ Taking the two petitions together, the Assyrians can be seen as uniting a call for a restoration of an Ottoman-style 'millet' autonomy with an expansive and innovative modern conception of internationalist authority. In this conception, the League would have the authority to redraw boundaries, grant autonomy, and even transport a population from one state to another – a novel, heightened internationalist power that would be legitimated by its concern for a community defined by a unified conception of religious/national identity. Though the British stigmatized this unified conception of Assyrian identity as mired in the past, the Assyrians' proposed alliance between the premodern and the hypermodern is, again, an exemplification of a key feature of early twentieth-century modernism.

The rapporteur appointed by the Permanent Mandates Commission declared that all solutions involving the autonomy of the Assyrians as a 'millet' must be ruled out, since it would 'imperil the unity of the Iraqi State' and 'perpetuate the antipathy with which the Assyrians believe themselves to be viewed by the other elements of the [Iraqi] nation'.¹¹² The rapporteur thus viewed the Assyrian religious/national self-conception as a subversive force incompatible with the stability of the political and social-psychological order. The rapporteur's opinion was based on respect for territorially based sovereignty modified by interwar conceptions of minority protection. Indeed, the rapporteur went beyond encouraging the Assyrians to take advantage of the general avenues of minority protection to which Iraq had committed itself as a condition of its League membership. Rather, he affirmed that the 'root cause' of the problem could be only remedied by 'collect[ing] the Assyrians of Iraq into a homogeneous group in a region suitable to their needs'.¹¹³

This amalgam of concern for sovereign territorial integrity, minority rights, and a limited territorial solution strongly resembles the stance of the Commission of Rapporteurs in the *Aalands* case, another opinion in which claims for broader autonomy, in that case self-determination, were rejected in favour of minority rights coupled with a limited territorial solution.¹¹⁴ And, though the autonomy granted

109 'Annex 10. Iraq', Permanent Mandates Commission, (1932) 22nd Session, 327, at 328 (C.772.M.364.1932.VI). I note that the parenthetical translation of 'millet' as 'nation' is in the original text itself.

110 Ibid.

111 See the discussion of this dispute in W. Cahnman, 'Religion and Nationality', (1944) 49 *American Journal of Sociology* 524.

112 'Conclusions of the Rapporteur, Appendix to the Opinion of the Commission', Permanent Mandates Commission, 22nd session, 374, at 375.

113 Ibid.

114 See my discussion in N. Berman, "'But the Alternative Is Despair": European Nationalism and the Modernist Renewal of International Law', (1993) 106 *Harvard Law Review* 1792.

the Aalanders was broader than the rapporteur here seemed to favour, the act of ‘collecting the Assyrians’ was a more activist social intervention than in the *Aalands* case, where the islanders were already ‘collected’ in Aaland. In any event, as in the *Aalands* case, the discussions opposed two broadly competing conceptions: on the one hand, a more restricted acknowledgement of identity coupled with a more restricted role for international authority (advocated by the rapporteur here and by the Commission of Rapporteurs in the *Aalands* case) and, on the other hand, a more expansive embrace of identity coupled with a much wider international role (advocated by the Assyrians here and by the Commission of Jurists in the *Aalands* case). Of course, the cases differed in numerous ways, both procedural and substantive, but the fundamental dispute over broad principles underlying these arguments was quite similar and characteristic of this era.

Perhaps the most elaborate consideration of the relationship between religious and national identity in a territory on the threshold between colonial and sovereign status emerged before the Permanent Court of International Justice in the 1923 *Nationality Decrees* case. In this dispute, France was obliged to defend its complex reform of the nationality laws in its North African Protectorates of Tunisia and Morocco, affecting both indigenous Muslims and non-French European settlers. The aspect of this defence most relevant here was France’s claim that its reform would provide a stable citizenry for states whose nationality laws were hitherto subject to Islamic law. According to the French, Islamic law did not provide for a continuous national identity for individuals, but rather required of them allegiance to whichever Islamic state they happened to be living in.¹¹⁵ By contrast:

Called upon by the treaties [of protectorate] into Tunisia and Morocco to guide them in the paths of civilization and progress, France has taken from this mission a duty to help them to establish, on the *foundation of territory*, the firm basis of a *homogeneous, coherent* population, attached by a direct tie to the Prince . . . , by awakening in these States who were *completely penetrated by the principles of a theocratic civilization*, the free, independent, *stronger, and more durable idea of nationality* which would evolve in the broader framework of Western conceptions, *freed from all religious contingencies*.¹¹⁶

The French argued that their law-reform project would achieve in North Africa ‘the firming up [*l’affermissment*] of the concept of nationality, the basis and substance of the State’¹¹⁷ – transmuting erstwhile ‘contingencies’ into a ‘foundation’ for a state suitable for integration into the international legal order.

There was something more at work here than a ‘secularist’ drive (in the sense of secularization-retreat) to separate religion and the state and to subordinate the former to the latter. The distinctive deficiency of Islamic law, according to France, was not simply its religious nature, but its instability, its inability to establish a ‘durable idea of nationality’ on a ‘firm basis’ and on the ‘foundation of territory’. It was not simply ‘theocracy’ from which the North African states would be freed,

¹¹⁵ *Nationality Decrees Issued in Tunis and Morocco (French Zone)*, *French Mémoire*, PCIJ Rep., (1923) Series C No. 2, Additional Volume, at 3 (hereafter, ‘French Mémoire’).

¹¹⁶ *Ibid.* (emphasis added).

¹¹⁷ *Ibid.*

but from 'religious *contingencies*', from the volatility associated with certain forms of religion. Such instability, as I have noted, has long been associated with 'left sacred' forms, whose 'heterogeneity', non-localized 'mobile' nature, and 'explosive violation' of 'social cohesion', to use the radical-Durkheimian terms, were particularly resistant to *legal* attempts, such as those of the French in North Africa, to establish a 'homogeneous, coherent population' on the 'foundation of territory'.

Indeed, the French arguments closely converged with Durkheimian language. Their description of the power of law to transmute instability into stability, to replace 'contingencies' with *affermissement*, was almost exactly repeated in Roger Caillois's 1938 description at the Collège de Sociologie of the 'pure' sacred's role in relation to the 'impure':

The words 'cohesion' and 'dissolution' serve quite well to define the respective unity of those complex ensembles to which the 'pure' and 'impure' belong. The forces which define the former [i.e., the 'pure'] are those which firm up [*affermissent*], make solid and strong, vigorous and healthy, stable and regular. In the world, they preside over cosmic harmony; in society, they watch over material prosperity and good administrative functioning. . . . They are that which grounds, maintains, or perfects norms, order, health. One can understand that it is the sovereign that embodies them. The others, conversely, are responsible for effervescence, for disorder, for fever.¹¹⁸

Moreover, the 1923 French legal pleadings also expressed fear of a lethal combination of religious and other identities closely related to that which I have highlighted in other writers of this period. This French fear appeared in the course of their defence of their introduction of the principle of *jus soli* into North African nationality law, part of their campaign to stabilize individuals' identification with the sovereign of the land of their birth, as opposed to *jus sanguinis*, the relatively more deterritorialized rival principle. Playing on the literal meaning of *jus sanguinis*, the French declared that this principle would lead to 'fanning the flames of blood quarrels by perpetuating racial distinctions'.¹¹⁹ Moreover, they declared that onto the racial distinctions intrinsic to *jus sanguinis* were 'grafted religious distinctions, which combine with them to strengthen xenophobic hostility'. Such a lethal 'grafting' together of religion and race was another version of the contamination of religious with other identities that I have shown, in very different forms, at the core of the concerns of Bentwich, Bataille, and others.

The French also declared that the kinds of unrestrained passion unloosed by such 'grafting' were particularly dangerous 'in a country where Western civilization stands face to face with Oriental civilization'.¹²⁰ That the 'Orient' was specifically identified as a particularly dangerous locus of this lethal mixture coheres with the French association of these dangers with 'fanaticism', drawing on one of the historical legacies of this term and turning it in a direction distinctive to the new

¹¹⁸ Caillois, *supra* note 36, at 396.

¹¹⁹ *Nationality Decrees Issued in Tunis and Morocco (French Zone)*, Speech by M. A. de Lapradelle, PCIJ Rep., (1923) Series C No. 2, at 69. Where available, I have used the English translations of French material provided in the Court's documents. I have, however, occasionally modified the translation to conform to the strict sense of the French.

¹²⁰ *Ibid.*

conception of transformative international authority used to legitimate the Protectorates and Mandates. Thus, the French contended that the long-standing exemption of Europeans from the legal jurisdiction of the Islamic states where they resided was justified where ‘there is a population which is still *undisciplined*, an authority which is still *backward*, a government which is a *fanatical government*’.¹²¹ The ‘fanaticism’ of the pre-Westernized Muslim states was not clearly explained and one possible reading is that it was simply used as a synonym for their Islamic character. However, in the context of the passage, with its reiterative rhetorical rhythm, the term forms a series with ‘backwardness’ and, above all, lack of ‘discipline’. As I have noted, the French identified the absence of ‘progress’ with a specific kind of lack of discipline: the lack of a ‘foundation of territory’ and the absence of ‘homogeneity’ and ‘coherence’. This allegation of ‘fanaticism’ and lack of ‘discipline’ may be viewed as closely related to Hayes’s assertion of the need for ‘conscious direction and control’ of ‘religious emotion’.

The French seemed to attribute a number of not wholly compatible dangers to Islamic societies. First, they pointed to both their non-territorial, *undisciplined* nature, and their ‘theocratic’, one might say *exorbitantly disciplined*, nature, an exorbitance particularly residing in these theocracies’ transnational reach – an excess of discipline that is thus also a lack of discipline, a lack of the self-restraint required to respect boundaries. Second, their allegations on the relative strength of religion and the state also seemed mixed. On the one hand, the role of religion in the Islamic world was viewed as too strong – for Muslims’ primary identification was alleged to lie with the Islamic world as a whole, not with their state of birth or long-time residence, resulting in the ephemeral quality of their identification with any state. On the other hand, the power of territorial sovereigns seemed too strong – for they were able to command the allegiance of all those residing on their soil, tearing them away from their allegiance to the sovereign of the land of their birth or former residence. It is thus not wholly accurate to say that it was the *dominance* of religion over sovereignty that was the problem for the French, but rather an inappropriate *configuration* of religion and sovereignty. Nonetheless, despite their heterogeneity, all these allegations shared the feature of transgression of proper boundaries: the literal boundaries between states, on the one hand, and the legally or political-theoretically appropriate boundaries between religion and politics, on the other.

The seeming tension between these diverse accusations may be clarified if one considers that the charge of ‘theocracy’, a form of the ‘right sacred’, was combined in the French discourse with the charge of an excess of the ‘left sacred’, a kind of ‘theo-anarchy’, religion in its proliferating, ‘contagious’, boundary-disrespecting form. This lethal combination of ‘left’ and ‘right’ sacred generated a terrifying brood of boundary-disrespecting, religiously contaminated sovereignties: the perversely monstrous ‘fanatical governments’. And it is thus that the French could, in one breath, declare that there were ‘no autonomous States in the Muslim world, in the Western sense’, *and* that those states were irreducibly dangerous, ‘vis-à-vis the

¹²¹ Ibid., at 127 (emphasis added).

Christians with whom they are in a perpetual war, so that the Muslims' peace with the Christians is never more than a truce':¹²² what seems like a contradictory juxtaposition of weakness and ferocity (a paradox often attributed to the left sacred¹²³) was actually an image of a perverse configuration of features of the left and right sacred.

French discourse and practice in relation to North Africa provide an instance of the periodic refoundation of international law through the projection of religious difference – specifically, the relegitimation and reconfiguration of international legal authority through its arrogation of the task of confronting a difference whose contours and significance are constructed by that very authority. The French sought to portray their domination of these societies as that of an agent of a sophisticated and progressive internationalism in its encounter with religious difference – that is, on the basis of the French ability to identify distorted religious forces and to transform them, rendering them suitable for integration into the international order. Once this transformative process was accomplished, the French declared, these states could join the international community, for only such a process could make them truly sovereign.¹²⁴ I contend, moreover, that such constructions should be seen as instances of a more general early twentieth-century refoundation of internationalism on the basis of its arrogation of the power to identify and discipline 'primitive' forces projected as exorbitant, to convert the 'left sacred' into the 'right sacred' – whether such 'sacred' forces be those of 'religion' or 'nationalism'. I caution that this refoundation should be seen as just one of the genealogical strands leading to the present response to religious forces, just one of a variety of early twentieth-century refoundations of international law that lead to our own time.

French discourse and practice in relation to North Africa also provide very concrete support for the rejection by a variety of recent scholars of the notions of 'religion' and 'secularity' as transhistorical and transcultural categories. This thesis, advanced powerfully by Talal Asad, among others, contends that both should be seen as contingent constructions whose changing content and function must be traced in particularized historical inquiries to changing configurations of power.¹²⁵ The French protectorates exemplify the notion that 'religion' can be a way of constructing certain societies as invidiously different, legitimizing and shaping regimes of power. Such a construction of a society as exorbitantly religious can be both a legitimation of overall conquest and a justification for instituting detailed regimes of discipline. I emphasize again that internationalism here is something other than a 'secular authority' (in the sense of secularization-retreat); rather, it becomes the author of highly differentiated constructions of religion and systematic attempts to reconfigure its nature – and can even be viewed as a 'secularized' religious authority (in the sense of secularization-transfer), charged with purification and separation rituals.

122 'French Mémoire', *supra* note 115, at 3.

123 Thus, Hertz describes how the left sacred is often perceived as both 'weak and incapable', as well as 'maleficent and dreaded'; Hertz, *supra* note 14, at 95.

124 See, e.g., 'French Mémoire', *supra* note 115, at 4.

125 See, e.g., T. Asad, *Formations of the Secular: Christianity, Islam, Modernity* (2003).

The highly charged use of the trope of ‘fanaticism’ in the French argument links this case to some of the broader cultural themes of the period that I have been highlighting throughout this paper. In contrast to the usage by the French lawyers of this term, I have already noted its embrace by Bataille as a portrayal of his own identity. This attempt goes along with a range of efforts by early twentieth-century religious radicals to find precursors in religious polemics of the past. A particularly symptomatic example can be found in the fascination of a number of modernist writers with the sixteenth-century conflict between Martin Luther and Thomas Münzer, leader of a series of peasant revolts. For Luther, such revolts embodied an unacceptably exorbitant radicalization of the Gospels’ message of brotherhood, abandoning proper Christian obedience for the sake of destabilizing rebellion.¹²⁶ Luther referred to these ‘insane peasants in their raging’¹²⁷ as *Schwärmer*, translatable as something like ‘swarming fanatics’ – contrasting the social unity secured by loyalty to the prince with the disorganized multiplicity of the exorbitantly religious.¹²⁸ More than one of the partisans of a radical religiosity in the early twentieth century looked to Thomas Münzer as a key precursor. One of the best known of these analyses, that of Ernst Bloch, constructed the opposition between Münzer and Luther precisely in terms of the contrast between the two theologians’ conceptions of religiosity and the state. In terms directly relevant to my concerns here, Bloch analysed the construction of the modern sovereign in the sixteenth century as deeply linked to Luther’s disciplining of Münzer’s exorbitant religiosity.¹²⁹

More generally, in the history of Western conflicts over religion, the fear of instability provoked by exorbitant religiosity has often gone by the name of ‘fanaticism’. In polemics among Christians as well as against non-Christians, ‘fanaticism’ has long been a choice epithet cast upon religious adversaries. Kant, among others, analysed both religious and nationalist excesses with the category of *Schwärmerei*, taxing both with the same kind of delusional thinking – and even suggested that distinctive national character was itself a by-product of specific national forms of religious fanaticism.¹³⁰ The theme of ‘fanaticism’ has also often had a marked Orientalist tilt, as in the title of Voltaire’s 1741 play *Le fanatisme, ou Mahomet le prophète*.

I note that some of the legal consequences of being classed as ‘fanatical’ have been more overtly brutal than might appear from the seemingly technical questions of nationality law and legal jurisdiction at stake in the *Nationality Decrees* case. Above all, ‘fanatics’ were often excluded from the protection of normal law, even of the law otherwise applicable in wartime. In his 1525 polemic against the peasant *Schwärmer*, Luther made the following pronouncement in relation to such quintessential ‘unlawful combatants’: ‘[A]ny man against whom it can be proved that he is a maker

126 See A. Toscano, ‘Fanaticism: A Brief History of the Concept’, *Eurozine*, 7 December 2006, available online at www.eurozine.com/articles/2006-12-07-toscano-en.html#.

127 M. Luther, ‘Against the Robbing and Murdering Hordes of Peasants’ (1525), in E. G. Rupp and B. Drewery (eds.), *Martin Luther, Documents of Modern History* (1970), 121.

128 On the history of this term, see A. La Vopa, ‘The Philosopher and the “Schwärmer”: On the Career of a German Epithet from Luther to Kant’, (1997) 60 *Huntington Library Quarterly* 85.

129 E. Bloch, *Thomas Münzer als Theologe der Revolution* (1921).

130 See I. Kant, *Observations on the Feeling of the Beautiful and Sublime* (2003), 108–9; I. Kant, *Religion within the Limits of Reason Alone* (1960), 162–3.

of sedition is outside the law of God and Empire, so that the first who can slay him is doing right and well.' Some four centuries later, in a 1927 article in the *American Journal of International Law*, Elbridge Colby, identified only as 'Captain, US Army' and the author of a number of articles on the impact of aerial bombing on the law of war, argued that the normal rules did not apply to 'savage tribes':

Speaking of aerial operations, the United States Army doctrine states:

The effect of bombing . . . is generally very great upon the morale of an irregular enemy. The objective of irregular operations . . . may be the capital of the people, their main source of supply, their prominent leaders, or, *if a fanatical people, the seat of their religion.*

. . . [I]t is essential to recognize the different character of the people and their usual lack of discrimination between combatants and non-combatants, in their own as well as in enemy personnel. To a Frenchman, [both] a shell striking Rheims Cathedral . . . [and] a bomb exploding on a railroad train . . . [are] lawless act[s] of the enemy which infuriate the temperamental soul and arouse wrath and give a fine incident for overseas propaganda. *To a fanatical savage, a bomb dropped out of the sky on the sacred temple of his omnipotent God is a sign and a symbol that that God has withdrawn his favor.*¹³¹

This justification for extraordinary uses of force relied on the notion that certain peoples were defined by their religiosity – peoples for whom the 'seat of their religion' occupied the same crucial role that was occupied, for other peoples, by 'the capital, the main source of supply, or their prominent leaders'. When dealing with such 'fanatical' peoples, for whom nation and religion are excessively intertwined, one must bomb their 'sacred temples' if one would defeat them – an act that, in relation to the 'non-savage', would be 'lawless', as well as incapable of producing the desired effect on their morale, precisely because of their lack of 'fanaticism'. From this perspective, the disentangling of religion and nationalism was thus required not only, as in Bentwich, for the establishment of a liberal legal order, but also as a prerequisite for entitlement to the benefits of that order. One might even say that Colby's projection of the 'fanaticism' of the 'savage' came to contaminate his own self-conception as a civilized law-abider, allowing him to justify what might be truly called 'savage fury' unleashed on the supposed 'fanatical savages'.

While Colby's article was a response to the directly contrary position taken by the influential internationalist Quincy Wright,¹³² it nonetheless reflects the enduring power, or rather the early twentieth-century reappropriation, of this use of the category of the 'fanatic'. It may also be a truer reflection of practice – in both his time and our own – than Wright's position. The 'fanatic', in whom Bataille saw the potential for something 'completely different' from the 'civilized', has long been perceived by the latter as deserving of an exceptional destructive fury, directed especially at the symbols of that 'fanaticism'.

Against this background, one can more fully appreciate the significance of the reappropriation of the term 'fanaticism' by elements of the twentieth-century avant-garde, as in the writings of the Bataille circle, in addition to the import of its

131 E. Colby, 'How to Fight Savage Tribes', (1927) 21 AJIL 279, at 283, 287 (emphasis added).

132 See Q. Wright, 'The Bombardment of Damascus', (1926) 20 AJIL 263.

deployment in reformist colonial discourse, as in the French pleadings in the *Nationality Decrees* case. Through his embrace of ‘fanaticism’, with its connotation of excessive and destabilizing religiosity, Bataille was choosing to describe the programme of ‘The Sacred Conspiracy’ with a synonym for the ‘left sacred’ drawn from historical religious polemics – a term with a long and diverse history as a negative epithet but with a revived and renewed meaning in the reconfiguration of Western ideologies of colonialism in the early twentieth century.¹³³ Indeed, for Bataille, this choice was intimately bound up with his diagnosis of his historical moment, for it was only such ‘fanaticism’, for Bataille, that could respond to fascism, the ultimate expression of the ‘right sacred’¹³⁴ – just as for the 1925 surrealist/Marxist manifesto, the embrace of ‘barbarianism’ was a crucial element of their attack on the attempt to reform and relegitimize colonialism after the First World War.

6. THE INDETERMINACY OF IDENTITY, OR READING ‘GREEK’

Given the intense anxiety and extraordinary fury provoked by putatively inappropriate combinations of religion and nationalism, one would hope that the two could at least be easily distinguished at an analytical level. As I have shown, however, both Bentwich’s historical lectures and the French international court pleadings affirmed that the two have an inconvenient habit of ‘grafting’ themselves onto each other, taking on each other’s characteristics, switching places in an uncontrolled manner. The puzzling heterogeneity of the commonly used list of parties to the Bosnia war of the early 1990s – ‘Serbs’, ‘Croats’, and ‘Muslims’ – may be read as a more recent symptom of this slippage between religious identities and ‘ethno-national’ identities (even leaving aside the controversies lurking in the latter composite term). Moreover, even the direction of the slippage was unclear or, more precisely, a matter of contestation or historical variability: were the putatively secular Serb and Croat identities stand-ins, or historical alternatives, for religious identities (‘Orthodox’ and ‘Catholic’) or was the seemingly religious Muslim identity a stand-in, or a historical alternative, for a secular national identity (eventually called ‘Bosniak’)? Had secularization-retreat made the religious dimensions anachronistic or had secularization-transfer created national identities deeply structured by religious legacies?

In the interwar period, the arguments in another PCIJ case, the *Greco-Bulgarian ‘Communities’* case, explicitly confronted the difficulties of this task of disentangling national and religious identity. The aspect of this complex case relevant here was the dispute between Greece and Bulgaria about the method to be used to determine the identity of certain ‘communities’, a term that referred to religious, educational, medical, and similar institutions in Macedonia, a region by then divided among three sovereign states. This determination, necessary for allocating property among the pertinent groups, was rendered difficult by the shifts in the identities of the ‘communities’ during the vexed history of the region. A noteworthy aspect of this case was thus that it implicated two kinds of ‘transfer’ between identities: both

¹³³ See La Vopa, *supra* note 128; Toscano, *supra* note 126.

¹³⁴ G. Bataille, ‘The Psychological Structure of Fascism’ (1933), reprinted in Stoekel, *supra* note 1.

literal 'transfer' of property between different groups and figurative 'transfer' among human identities, both religious and national, of the people in the region. The case thereby furthers my exploration of the issues raised in the minorities, Mandates, and protectorates contexts discussed above.

The Bulgarians pointed to some of the key difficulties of disentangling various kinds of identity by asserting that, in the Balkans:

the word, 'Greek,' so apparently simple, comprises three distinct senses. First of all, 'Greek' means a Greek citizen. Next, 'Greek' means a person of Greek culture and affinity, but of Bulgarian, Serbian, Romanian citizenship. Thirdly, 'Greek' means a person of Orthodox faith, without regard to her state citizenship or national sentiment.¹³⁵

The multiple meanings of identity terms – including allegiances to a state, a culture, a nation, and a religion – led to such composite appellations being bandied about in the pleadings as the 'bulgarophone Greeks' (a composite, both of whose terms designated non-state forms of identity). A desire to determine a univocal 'truth' of such identities would need to confront both the imperative and the impossibility of effecting an interpretive disentanglement of their elements. It is easy to see how any such effort would inevitably wreak violence on an inherently complex and ambivalent reality.

Even more importantly for my purposes here, both parties agreed that it was not merely a question of clearing up such complexities through semantic or analytic rigour, but rather of dynamic processes involving historical shifts among the various identities. Both sides would have concurred with the Bulgarian statement that 'the minority character of a community . . . is in no way a stable element'.¹³⁶ The perceived instability of the 'minority character', as it emerges from both parties' arguments, ultimately stemmed from the volatility that international lawyers and policy makers often attribute to non-state identities generally. This notion thus echoes that of the French in the 1923 *Nationality Decrees* case that a 'firm basis' for the 'durable' identity of a population cannot be established without reference to a territorial sovereign (provided, of course, that the sovereign does not itself bear a 'fanatical' character!).

The meanings and causes of the instability of 'minority character' were, however, fiercely disputed by the parties. For the Bulgarians:

Monasteries whose ethnic origin was Bulgarian, Georgian, or otherwise non-Greek . . . have been hellenized. Monasteries whose religious character was Greek, in other words, orthodox, became, what is quite a different matter, monasteries whose ethnic character was Greek, in other words, composed of monks of the Greek race. Later, by *the natural force of things*, they were again dehellenized.¹³⁷

In this portrayal, words designating identity, like the walls of the 'communities' themselves, could thus be mere facades that concealed change, diversity, and indeterminacy – or, to shift metaphors, could be substances that could be 'transferred' among different identities. The Bulgarians were, in effect, calling here for a version

¹³⁵ *Greco-Bulgarian 'Communities' Case*, Discours Prononcé par M. le Professeur Verzijl (Bulg.), PCIJ Rep., (1930) Series C, at 69, 81 (hereafter, 'Verzijl').

¹³⁶ *Ibid.*

¹³⁷ *Ibid.* (emphasis added).

of the dissection of the religious/ethno-linguistic knot within institutional walls that was outlined by the Committees of Three in the case of the churches whose national identity had been transformed. Moreover, the Bulgarian insistence on the recurrence and the ‘naturalness’ of such historical shifts suggests something like a ‘contagiousness’ of identity. Finally, the Bulgarians argued that the designation of all persons of Orthodox faith as ‘Greek’ originated in the early days of Ottoman rule, when the Sultan placed the Christians under the authority of a Greek patriarch in Constantinople – ‘a period when the idea of nationality was very vague, if not nonexistent.’¹³⁸ This observation adds a layer of temporal discontinuity to the other complexities in the relationship between religious and national identity: discontinuity between periods in which the two could and could not be distinguished.

In this context of the polysemy of identity terms, dynamic transferences among identities, and lack of comparability of different historical periods, it is hard to see how the Bulgarians could have maintained with such confidence that the ‘bulgarophone Greeks’ were simply ‘Bulgarians, true Bulgarians, of Bulgarian sentiment, but who have the peculiarity of being of the Greek Orthodox faith . . . slightly hellenized Bulgarians, persons of Bulgarian ethnic affinity, but who have the [Greek] Patriarch as their supreme religious chief.’¹³⁹

The solution to this puzzle seems to lie in Bulgaria’s understanding of the new wave of nationalism as aiming at a perversion of the relationship between religious and national identities. Nationalists were now attempting to parasitically usurp identity terms that had a predominantly religious meaning, seeking to subordinate religious identity to national identity. To be sure, the Bulgarians argued that this potential perversion of identity only existed in relation to ‘Greekness’, for if:

in Macedonia and Greek Thrace, a church or a school is in the hands of the Bulgarian population and is said to be Bulgarian, this is truth itself [*la vérité même*]. . . . But it is quite a different matter of churches, schools, and other establishments called Greek.¹⁴⁰

For its part, Greece denounced the notion that the ‘natural force of things’ had produced the transformations in the identity of the ‘communities’ as well as the idea that the key task of the Court should be to discern the true meaning of identity terms – and specifically to apply a contextual approach to determine whether they had a religious or national meaning. Rather, for Greece, the transformations in the identity of the ‘communities’ were the result of purposeful violence inflicted by the religious and national groups upon each other; in particular, it stressed the escalation of such violence at the end of the nineteenth century due to the Bulgarian policy of ‘constant, stubborn and methodical denationalization and suppression of the Greek communities Greek churches, schools, and establishments were closed, then “bulgarized” and their goods confiscated’.¹⁴¹ ‘Greek’ institutions became ‘Bulgarian’

¹³⁸ See *Greco-Bulgarian ‘Communities’ Case*, Exposé du Gouvernement Bulgare, PCIJ Rep., (1930) Series C, at 430 (hereafter, ‘Exposé du Gouvernement Bulgare’).

¹³⁹ ‘Verzijl’, *supra* note 135, at 81.

¹⁴⁰ ‘Exposé du Gouvernement Bulgare’, *supra* note 138, at 429.

¹⁴¹ *Greco-Bulgarian ‘Communities’ Case*, Discours Prononcé par S. Exc. M. Politis (Greece), PCIJ Rep., (1930) Series C, at 146.

due not to 'nature' or to a shift between using national rather than religious identity terms, but to nationalist violence. Transference of persons and things from one identity to another had only been accomplished through the use of force, marshalled by the state and enforced through law; the Bulgarian projection of this phenomenon onto 'nature' made their argument an 'apology' for 'violence'.¹⁴² Thus, while the Bulgarians implicitly attributed a figurative violence to inappropriate interpretive slippage between the national and religious referents of identity terms (at least when it came to 'Greek' identities), the Greeks highlighted the literal violence in historical campaigns to coercively alter the identity of real people and things.

The determination of the lines between the religious and the national, the reasons for their intertwining, and the methods and consequences of their disentanglement thus lay at the heart of this case. If, for Bataille and Bentwich, it was the inappropriate *combination* of religion and nationalism that was the source of lethal violence, the arguments in the *Greco-Bulgarian 'Communities'* case concerned precisely the violence in interpretive and practical efforts to *disentangle* them. In both the Greek and Bulgarian views, Balkan history was marked by a variety of composite and shifting identities, rendering the isolation or reordering of their respective ethnic and religious components highly problematic. Indeed, the horror of various campaigns aimed at the disentanglement of complex Balkan identities, with all of their genocidal and 'ethnic-cleansing' accompaniments, are all too familiar. And, to return to the issues raised in the *Nationality Decrees* case, violence carried out on comparably terrifying scales accompanied the European programmes to create 'non-fanatical' polities by disentangling and reconfiguring the various elements of identity in the colonized world. Both in intra-European and colonial contexts, the fear of the lethal consequences of 'contagious' identities has ever yielded the lethal consequences of the drive for purification.

7. AN EXCURSUS ON COMPARATIVE DISCIPLINE, OR WHICH IS SCARIER, RELIGION OR NATIONALISM?

Despite all the anxieties expressed about the intertwining of religion and nationalism, the writings I have analysed thus far reveal religion functioning in the discourse of the interwar period in ways very similar to nationalism, in both cases deeply marked by the distinctively early twentieth-century ambivalent posture of fear and fascination in relation to a variety of forces viewed as 'primitive'. In a series of earlier studies, I have portrayed the multiple forms taken by this ambivalent, 'primitivist' relationship to nationalism in internationalist discourse of the period.¹⁴³ On the one hand, nationalism was seen as a vital, indispensable force for renewing international society; on the other hand, it was seen as a dangerous, destabilizing, disintegrating force. I identified a strand in interwar internationalism, which I call 'modernist', in which this ambivalent stance towards nationalism was central to its understanding

¹⁴² *Ibid.*, at 176.

¹⁴³ See, e.g., N. Berman, 'Modernism, Nationalism, and the Rhetoric of Reconstruction', in C. Lunch and M. Loriaux (eds.), *Law and Moral Action* (1999); see, generally, Berman, *supra* note 13.

of the ‘new international law’ that emerged from the First World War. In this vision, international law would ‘discipline’ nationalism,¹⁴⁴ restraining its destructive side, while facilitating its socially and culturally energizing side. This disciplinary role for international law, its ability to transmute the untamed energy of nationalism into a form compatible with the new international system, was elaborated both in general theories and in specific legal doctrines designed to deal with nationalist conflict, and informed the design of comprehensive international regimes for particularly vexing trouble spots.

As I have shown here, early twentieth-century discourse about religion in a variety of domains was marked by a related set of ambivalences. Religion could be constructed as both stabilizing and destabilizing, unifying and disaggregating. The opposition between a ‘pure’ and ‘impure’, or ‘left’ and ‘right’, sacred, so fundamental to Durkheimian ‘sacred sociology’, and the related distinctions I have identified in other texts, can be seen both as tools of period scholarly analysis and as symptoms of modernist ambivalence – as was explicitly proclaimed by the Collège de Sociologie writers. If those who would incorporate nationalism into the international legal order had to confront the fear of its ‘vague and disintegrating’ (*vague et dissolvant*) aspects,¹⁴⁵ those who would incorporate religion had to deal with the fear of the ‘disintegrating pollution’ (*la souillure dissolvante*)¹⁴⁶ of the ‘left sacred’. If those who would incorporate nationalism had to face the rationalist criticism that the very idea of a unitary ‘nation’ is a myth, that all populations are composed of heterogeneous mixtures, those who would incorporate religion had to confront the ‘diffuse and indeterminate’¹⁴⁷ quality of the forces of the ‘left sacred’, those forces of ‘dissolution’¹⁴⁸ that always appear as a ‘multitude’¹⁴⁹ rather than a unity. Moreover, if internationalist ambivalence about non-state groups has long resulted in an interminable proliferation of the terms designating them (‘races’, ‘peoples’, ‘nations’, ‘minorities’, ‘ethnicities’, ‘linguistic groups’, ‘populations’, ‘communities’, etc.), the Durkheim school argued that the perception of the ‘left sacred’ as multiplicitous and ‘ambiguous’¹⁵⁰ had a similar impact on its linguistic representation:

While there is a single term for ‘right’ which . . . shows great stability, the idea of ‘left’ is expressed by a number of distinct terms, which . . . seem destined to disappear constantly in the face of new words. . . . The multiplicity and instability of terms for the left and their evasive and arbitrary character may be explained by the sentiments of disquiet and aversion felt by the community with respect to the left side.¹⁵¹

And, just as law sought to ‘discipline’ nationalism, cleansing it of its dangerous, disintegrating potential and rendering it stable and safe for international order, so,

¹⁴⁴ R. Redslob, *Le principe des nationalités* (1930).

¹⁴⁵ G. Padelletti, ‘L’Alsace et la Lorraine, et le droit des gens’, (1871) 3 *Revue de Droit International & de Législation Comparée* 464, at 491.

¹⁴⁶ Caillois, *supra* note 36, at 398.

¹⁴⁷ *Ibid.*, at 396.

¹⁴⁸ *Ibid.*, at 397.

¹⁴⁹ Bataille, *supra* note 134, at 137, 148.

¹⁵⁰ R. Hertz, *The Pre-Eminence of the Right Hand: A Study in Religious Polarity* (1960), 89, at 95.

¹⁵¹ *Ibid.*, at 99.

for the Bataille circle, it was the essential function of institutionalized religion to 'transmute' the 'impure', 'left' sacred into its 'pure', 'right' form – or, to use Carlton Hayes's terms, to provide 'conscious direction and control' to 'religious emotion'.

Law's claim to be able to transmute exorbitant nationalist desires into a manageable, legally restricted self-determination claim for a state within limited borders, or the even 'bolder' claim for its ability to transmute claims for self-determination into contentment with minority rights,¹⁵² partakes of no less extravagant alchemy than religion's claims to be able to transmute a sinner into a saint, a decomposing cadaver into a blessed spirit,¹⁵³ or a tortured and vilified man into an incarnation of God.¹⁵⁴ Moreover, just as international law has continually faced challenges from those nationalists who refuse its disciplinary tutelage, so have religions continually faced challenges from those who advance visions that may be viewed as emanating from the 'left sacred'. Indeed, from the perspective of established international order, as in Bentwich, the transmutations of the 'disintegrating' features of both nationalism and religion into their stabilizing counterparts were equally vital. The French arguments in the *Nationality Decrees* case also brought both these transformative functions together, expressing the legal aspiration to discipline and transmute religion as well as nationalism – thereby domesticating both 'undisciplined populations' and 'fanatical governments'.

Despite these homologies and overlaps between the ambivalences and disciplinary desires expressed in relation to nationalism and religion, it is important also to note their differences. While separatist and irredentist nationalisms provisionally threaten the stability of existing states, they usually seek as their ultimate goal the establishment of new states (or expanding the territory of existing states). Thus, claims for self-determination can be viewed as merely exceptional disruptions of the state system, and as working for that system's reconsolidation on firmer grounds. By contrast, when a religion does not identify itself with a particular nation or state, religious claims can seem difficult to accommodate in an international legal system founded on states as its fundamental units, even when expanded to embrace 'nations' (or 'peoples') as proto-states. Claims for power by transnational religious communities have always been perceived as grave threats by the upholders of a state-based international order, from the seventeenth century's violent departure from the 'more or less unified society of Western Christendom' to current fears of a supposed Islamicist plan to establish a transnational Caliphate or of the impact of a range of 'transnational religions' on European integration.¹⁵⁵

On the other hand, precisely because religious claims, unlike nationalist claims, do not necessarily involve territorial claims, they may be perceived as potentially operating alongside, rather than in conflict with, the fundamental structures of the international legal system. Unlike nationalist claims, they do not necessarily challenge the territorial identity of states. Accordingly, religious claims can be perceived

152 C. Macartney, *Nation States and National Minorities* (1934), 278.

153 Hertz, *supra* note 150.

154 G. Bataille, 'Attraction and Repulsion II', *supra* note 14, at 164.

155 See T. Byrnes, 'Transnational Religion and Europeanization', in T. Byrnes and P. Katzenstein, *Religion in an Expanding Europe* (2006), 283–305.

as occurring in a different domain than the state system, and thus their universalism as potentially serving as inspirational guidance for a system left intact in its basic structure – for example, in the form of a ‘League of Religions’ operating alongside a ‘League of Nations’ and serving as the latter’s ‘soul’.

8. CONCLUSION: A PERENNIAL ‘CONSPIRACY’?

What drives the crowds to the street is the emotion directly aroused by striking events in the atmosphere of a storm; it is the contagious emotion that . . . suddenly turns a hesitating man into a frenzied being. . . . [If] insurrections had had to wait for learned disputes between communities and the political offices of parties, then there would never have been an insurrection.¹⁵⁶

The foregoing analysis has been directed at providing a genealogy for some of the key features of the fears and fantasies marking internationalist debate about religious forces in the past few decades, particularly since 9/11. I have shown that the early twentieth century was the crucible out of which many of the most familiar of these features emerged. These features include the exorbitant panic elicited specifically by the transnational aspect of the putative Islamicist threat, the dispersed quality of seemingly ubiquitous terrorist networks, the ostensibly viral diffusion of extremist ideology, the legal conundrum posed by ‘unlawful combatants’ with their stubborn refusal to submit to territorial state discipline – as well as the rather opposite obsession with the notion that the real danger of such networks lies in their ties to perverse ‘state sponsors’. The features bequeathed by the early twentieth century also include the responses to this panic ranging from the need to distinguish between ‘good Muslims’ and ‘bad Muslims’ as a manner of disciplining the feared religious forces¹⁵⁷ – as well as the rather different turn to ‘nation-building’ as a programme that can transmute instability into stability. All of these fears and responses become legible when read as parts of the script written in the first decades of the last century. Altogether less clear, as is so often the case with such genealogies, is the question of the impact of this demonstration: does the disclosure of an enduring cultural matrix have the power to do away with its fascinations and terrors, its desires and revulsions, its loves and hatreds? Is it just a question of acquiring a rationalist insight that could dispel irrational fear, or at least of gaining ironic distance in relation to that fear, or is there something more powerful in this matrix, something within which we continue to live even after the genealogical demonstration?

Before turning to that question, however, I briefly explore the persistence of the basic matrix that I have outlined here. The seemingly irrepressible entanglements of religion and nationalism, and the internationalist preoccupations with religion, have taken a number of forms in the past few decades. To cite just a few familiar examples preceding the more obvious events of the past decade: the 1979 Iranian Revolution, the increasingly religious cast of the Israeli–Palestinian conflict since at least the 1980s, the role of the Catholic Church in the events of ‘1989’, the periodic

¹⁵⁶ Bataille, *supra* note 39.

¹⁵⁷ M. Mamdani, *Good Muslim, Bad Muslim: America, the Cold War, and the Roots of Terror* (2005).

upsurge of the influence of the Christian right in US foreign policy, the emergence of a powerful Hindu nationalism in India, and so on. While a full examination of the internationalist response to such events would take several volumes, I propose to highlight the persistence of the interwar matrix by looking at a text by Richard Falk, one of the most progressive prominent scholars of American international law since the 1960s and lately UN rapporteur on human rights in the occupied Palestinian territories.

Anticipating, as he often has, the preoccupations of the mainstream, Falk published a book in mid-2001 on *Religion and Humane Global Governance*, the key theses of which he restated in light of 9/11 in a 2002 article, 'Religion and Global Governance: Harmony or Clash?'.¹⁵⁸ In this article, Falk strikingly recapitulates all the key themes of the interwar matrix. Like Philip Marshall Brown eight decades earlier, Falk advocates a turn to religion to remedy the deficiencies of a putatively secular international law and global governance. The failures of secular governance, Falk asserted, may be at least partially attributed precisely 'to the exclusion of religious and spiritual dimensions of human experience from the shaping of the vision and practices associated with the quest for global humane governance'.¹⁵⁹ On the other hand, like Bataille, Bloch, and other early twentieth-century religious radicals, his turn to religion is motivated largely by the sheer energy that it arouses in people, which secular law fails to do and which nationalism does malevolently: only a 'religious movement' can 'mobilize and motivate' people in a manner 'more powerful' than the inhumane forces of 'the market, secular reason and varieties of nationalism'.¹⁶⁰

To be sure, this turn to the motivating power of religion lacks the lust for anti-nomian transgressiveness found in Bataille. Nevertheless, Falk's faith, as it were, in the power of religion rests on the kind of affirmation of the irreducibility of religiosity so prevalent in early twentieth-century writings: 'religious attachments are so strong in society that religion, excluded from entering the front door of political life, will find other entrances, including concealed trap-doors'.¹⁶¹ Accordingly, the progressive movement envisioned by Falk is one 'informed by religious and spiritual inspiration', and must therefore form alliances with the 'emancipatory aspects' of the 'great world religions',¹⁶² the latter term a reference to entities that, as I have noted, were conceptually constructed as such approximately a century earlier.

Like Brown and the early twentieth-century 'world religions' discourse, the 'religion' to which Falk turns is both overtly universal and covertly particularist. On the one hand, this 'religion' cannot be 'reduced to any single religious tradition';¹⁶³ on the other hand, it must exclude 'aspects of certain religious traditions' that would be 'antithetical' to the humane governance project. Falk names only two such 'antithetical aspects', each clearly evoking one of the two main rivals of Christianity:

158 R. Falk, 'Religion and Global Governance: Harmony or Clash', (2002) 19 *International Journal of World Peace* 3.

159 *Ibid.*, at 12.

160 *Ibid.*, at 27.

161 *Ibid.*, at 8.

162 *Ibid.*, at 27.

163 *Ibid.*, at 27.

the 'chosen people' concept and that of *'jihad'*.¹⁶⁴ These simultaneous exclusions of 'aspects' of Judaism and Islam, which come in the same sentence, suggest the role that the deployment of certain stereotypical religious tropes play *a contrario* in carving out a space for Falk's religious vision: if the first is too national, limited to one 'people', the latter is too transnational, determined to cross borders and 'crush the infidels'. Falk's humane internationalism seeks to carve out a middle space, a respect for particulars within a universalist matrix: the very project of liberal internationalism since at least the 'gentle civilizers' of the mid-nineteenth century.¹⁶⁵ In his list of the positive aspects of religion, Falk relies on familiar Christian tropes ('faith', 'humility', and especially the replacement of the notion of 'citizen' with 'citizen pilgrim'), along with an 'appreciation of suffering' said to be 'Gandhian'.¹⁶⁶

Nevertheless, at least at the overt level, Falk stresses that the 'good religion/bad religion' problematic affects all religions: 'all great religions,' he declares, 'have two broad tendencies . . . : the first is to be universalistic and tolerant . . . ; the second is to be exclusivist and . . . regressive', the latter carrying with it the 'genuine danger of a new cycle of religious warfare'.¹⁶⁷ In this 2002 essay, to be sure, the only examples of the 'regressive' tendencies Falk cites are those putative features of Judaism and Islam already mentioned, even while he remains silent about any good tendencies these traditions might possess. More importantly, like the earlier good/bad religion discourses I have examined, whose distinctions were directed towards some policy of 'discipline' or 'conscious direction and control', Falk's distinction between good and bad 'tendencies' is geared towards a strategic programme. Falk frames this programme as an aspiration: 'the hope of the future is to give prominence and support' to the good tendencies and to 'marginalize' the bad, those forces of 'religious extremism based on alleged dualism between good and evil'.¹⁶⁸

This is a rather curious formulation, on both the substantive and syntactic levels. There is, even upon a cursory reading, a small irony in Falk following up on his quite formal distinction between good and bad religious 'tendencies' with an announcement that the principal characteristic of the latter is their 'dualism'. More striking, however, is the discursive anonymity, indeed absence, of the agent whose task is alternatively to 'give prominence to' and 'marginalize' each of the two 'tendencies'. Bereft of faith in the universal vocation and legitimacy of Western power or even of the legally constituted international community of his more mainstream peers, Falk presents the double strategy of 'support' and 'marginalization' as emanating from an unmoored noun, 'the hope', a free-floating emotion without an agent or locus, either geopolitical or institutional. Of course, the strategy of 'support' for some tendencies in other, putatively problematic societies and 'marginalization' of their other tendencies is a classic feature of imperial efforts to divide and conquer. Falk's strange

164 Ibid., at 28.

165 See, generally, M. Koskenniemi, *The Gentle Civilizer of Nations* (2004).

166 Falk, *supra* note 158, at 29–31. It goes without saying that, for this paper, Falk's particular ethnic or religious background is irrelevant. This is not an ad hominem analysis, but an explication of broader discursive structures.

167 Ibid., at 7.

168 Ibid.

syntax stems, I think, from his desire to reconcile his longing for the power marshalled by past self-proclaimed incarnations of the universal with his long-standing and deep anti-imperialism, the latter dating at least from his vigorous scholarly and activist opposition to the Vietnam War. In short, he seeks in religious fervour a way to empower those forces commonly, if somewhat paradoxically, referred to on the political left as those of 'globalization from below'¹⁶⁹ – a dispersed set of movements hardly suited for the role of 'discipliner' of the welter of global religious forces.

The tensions in this approach can be illuminated through briefly recalling the complex relationship of current internationalism to historic colonialism, specifically to colonialism's late, aspirationally reformist versions. The legitimacy *vel non* of colonialism is usually thought of as the great divide that separates postwar international law, at least starting around 1960, from the early twentieth century, indeed from the previous few centuries of international legal history. Nevertheless, the foregoing analysis brings to the fore one of the ways in which the absoluteness of that divide may be put into question. As I showed in relation to the *Nationality Decrees* case, the early twentieth century saw attempts to refound the legitimacy of international power by virtue of its ability to create a good form of non-European sovereignty through the reconfiguration of the relationship between religion and sovereignty, or, more precisely, a particular construction of 'religion', and a reconstructed version of sovereignty. This new construction of sovereignty was presented as a criterion for a dependent, 'protected' state to emerge into the status of a full member of the international community – in other words: decolonization as a reward reserved for formerly 'backwards' societies who have achieved the requisite 'discipline'.

In this light, Falk's discourse may be seen as performing a move structurally similar to that of the reformist colonialism of the 1920s French court pleadings. Falk's 'hope' to mould religions through internationalist 'support' and 'marginalization' of their divergent 'tendencies' is a close progeny of the French 'discipline' of 'religious contingencies'. In both discourses, internationalist shaping of religion was advanced as a prerequisite for a new form of the reconstruction and relegitimation of sovereignty, as well as of internationalism itself. In Falk's formulation, 'It is not a matter of repudiating state or market but of insisting that these arenas of authority and influence be spiritualized in accordance with the generalized attributes of religion.'¹⁷⁰ Again, the agent and means of this 'insisting' are left unstated, but presumably would come from those forces from 'below' in which Falk places his hopes, but whose heterogeneous and dispersed nature makes them unlikely candidates for such a task. Falk thus proves to be the heir of both the radical *and* mainstream discourses about religion and internationalism that are the legacy of the early twentieth century, as he tries to combine the destabilizing religious energies from 'below' with the imperative to discipline religion from the outside through 'support' and

¹⁶⁹ *Ibid.*, at 31.

¹⁷⁰ *Ibid.*, at 31.

'marginalization' – a discipline that is intended to serve as a prerequisite for a new construction of state legitimacy.¹⁷¹

The persistence of the interwar matrix even in a writer as self-aware as Falk returns me to the question I posed at the outset of this section. We have seen that interwar writers as different as French colonial lawyers, mainstream internationalists, and avant-garde provocateurs were concerned about the danger posed by the improper intertwining of religion and nationalism, though each with a distinctive conception of their correct relationship and its significance for international order. For Bentwich and Bataille, for the French colonialists and the Balkan state-builders, the real challenge was not posed by *rivalries* between nationalism and religion or between internationalism and religion (rivalries, to use Osama bin Laden's terms, between 'international legitimacy' and the 'legitimacy of the Holy Book'¹⁷²), but, on the contrary, by the danger in the unholy *alliances* of religion and nationalism, or even religion and internationalism – alliances produced by their contagious drive for perverse entanglements. Much of the discourse of our own time, of which Falk is a particularly acute example, reveals that this matrix remains our own.

The intensity of the century-old anxiety about the dangerous tendencies towards the entanglement of religion and nationalism, of their spontaneous 'grafting' onto each other, suggests a fear that their 'contagiousness' may well be irreducible and that rectifying the relationship between the two 'permanent instincts' may lie beyond the transformative powers of either religious ritual or legal process, let alone those of a 'League of Nations' or a 'League of Religions', or even of the forces of 'globalization

171 A different variation on these themes has recently been offered by Habermas. See E. Mendieta, *A Postsecular World Society? On the Philosophical Significance of Postsecular Consciousness and the Multicultural World Society: An Interview with Jürgen Habermas*, 3 February 2010, available online at www.ssrc.org/blogs/immanent_frame/wp-content/uploads/2010/02/A-Postsecular-World-Society-TIF.pdf. In marked contrast to Falk, Habermas wishes to preserve primacy of the non-religious legitimations of state power: '[T]he decisions of the legislator, the executive branch, and the courts are not only *formulated* in a universally accessible language, but are also *justified* on the basis of universally acceptable reasons. This excludes religious reasons from decisions about all state-sanctioned – that is, legally binding – norms', Mendieta, at 9 (emphasis in original). Nonetheless, he insists on the need to maintain dialogue in the public sphere between religious and non-religious viewpoints. This dialogue, however, is only reserved for good religious tendencies, which, like Falk and other writers I have discussed, he defines through a formalistic, even if more sophisticated, dichotomy between 'two specifically modern forms of religious consciousness', coupled with a classically 'world religions' attitude towards religious phenomena that need not be taken seriously: '[O]n the one hand, a fundamentalism that either withdraws from the modern world or turns aggressively toward it; on the other, a reflective faith that relates itself to other religions and respects the fallible insights of the institutionalized sciences as well as human rights. This faith is still anchored in the life of a congregation and should not be confused with the new, deinstitutionalized forms of a fickle religiosity that has withdrawn entirely into the subjective', Mendieta, at 3. Moreover, Habermas's discussion of the possibilities of 'the motivational powers of religion against the neoliberal desolidarization of society' (Mendieta, at 9) links up to similar themes in Falk as well as Bataille. Habermas declares that only religious communities have the ability to create a 'world', through a 'self-referential communal practice'. He also affirms that ritual is 'a source of societal solidarity for which the enlightened morality of equal respect for all does not provide a real, motivational equivalent', Mendieta, at 5. However, again relying on the good/bad religion dichotomy, he reminds us that the political significance of religiously motivated action is 'highly ambivalent', Mendieta, at 9. Most strikingly, and with reference to Peter Weiss, he harks back to the historical avant-garde, specifically, the 'surrealist-inspired' notion that a radical 'aesthetics of resistance' can replace religion as a basis for a new progressive solidarity; he comments, perhaps sadly, that that 'hope' has 'faded in the meantime'. Thus, Habermas, though arriving at a rather different set of conclusions than Falk, let alone Bataille, presents us with a variant configuration of the same elements discussed throughout this paper.

172 Translation of Osama bin Laden's speech, Al Jazeera broadcast, 3 November 2001, available online at http://news.bbc.co.uk/2/hi/world/monitoring/media_reports/1636782.stm.

from below'. When one realizes that some of the writers in this matrix stress that only a properly rectified religiosity can remedy the grave deficiencies of the legal–political order, others that only a properly rectified legal–political framework can remedy the excesses of religiosity, and still others that only a novel kind of internationalism can remedy both, the reasons for this anxiety become only too clear.

Indeed, the persistence of the interwar matrix suggests that we might take seriously the insistence of the Collège de Sociologie that the analysis of the sacred, with all its fears, fantasies, and ambivalences, developed in relation to the past and the 'primitive', be transposed to contemporary, putatively secularized society.¹⁷³ The highly charged and contradictory relation to the sacred would, in this view, be limited neither to Durkheim's aborigines nor to the Western avant-garde, despite contrary claims by rationalists, secularists, and, more recently, Agambenians. Adopting this perspective means considering the irreducibility, even if only a historically contingent irreducibility, of the phenomena of mirroring and contagion highlighted by our interwar predecessors. It means taking seriously the persistence of the dangerous proximity between the sacred and the profane, between the 'left' and 'right' sacred, between such hybrids as religious nationalism and politicized religion – as well as of the intensity of the fascination that such 'impure' hybrids exert on our twenty-first-century imaginations still decisively shaped by the modernist and avant-garde revolutions of long ago.

In the 1930s, many were suspicious of the Bataille circle's fascination with the sacred dimension of politics, due to its seemingly dangerous proximity to the fascist strategy of conscripting ecstatic emotion for pernicious causes. Bataille, for his part, had sought to respond to fascism on its own terrain – the terrain of myth, of ecstasy, of the longing for the 'creative effervescence' latent in the social bond. Yet, aware of the dangerous proximity charged by his critics, he also strove to demonstrate precisely how his conception of a politics rooted in the 'left sacred' differed from fascism, which he saw as the extreme manifestation of the 'right sacred'. Nonetheless, some remained far from convinced. Describing the scene at one of Bataille's lectures, one observer wrote that 'one could not tell whether the speakers were perfidious anti-democrats or if they were defending a personal conception of an ideal democracy'.¹⁷⁴ In the course of discussions with Walter Benjamin about a possible alliance between the Frankfurt School and the Collège de Sociologie, Theodor Adorno expressed himself even more definitively. Referring to Roger Caillois, one of the Collège's founders, Adorno declared that 'the man belongs to the other side'.¹⁷⁵ Whether Adorno's social theory could perform the shamanistic ritual of cleanly separating the pure from the impure forces, the Holy Side from the demonic 'Other Side', remains, of course, a matter for debate.

In any event, the intensity of our current perplexity about the evaluation of various forms of religion and their relationship to nationalism and internationalism

173 Caillois, *supra* note 15, at 9–11.

174 B. D'Astorg, 'Au Collège de Sociologie' (1938), reprinted in *Le Collège de Sociologie*, *supra* note 29, at 455, 457.

175 M. Weingrad, 'The College of Sociology and the Institute of Social Research', (Autumn 2001) *New German Critique* 129, at 139.

suggests that we remain squarely situated within the ambivalent experience of the terrifying and fascinating sacred, within the anxieties about its contagions and perversions, within the preoccupation with exorcising its dangers through analytical distinctions and compensatory rituals, through ‘discipline’ and ‘direction’, and even, in the case of the Agambenians, through etymological alchemy. We experience the stakes in determining such matters as matters of life and death, with the same hopes and anxieties as those we may pretend to study with the ironies of the detached historian, the empathetic anthropologist, the religious-studies iconoclast, and the international-relations realist. Indeed, perhaps never so much as in the world of the 2000s has the Durkheimian portrayal of the complex, anxious, and conflict-ridden experience of the sacred seemed more relevant in the ‘developed’ world.

Nor can law protect us from the contagiousness of the sacred, for it is simply one more player in the drama, as Philip Marshall Brown suggested long ago. Religion, whether in the recognizable forms of established denominations or not, does not seem to be content with its relegation to legal–historical antiquarianism, sentimental internationalist idealism, or paternalist ministrations in the margins of human rights law. But, if the dreams and nightmares of Caliphs and Crusaders, messiahs and avatars, lost temples and vanished prophets seem destined to remain part of the global imagination, at least for the foreseeable future, the past century has also bequeathed us a range of discourses with which to portray them and even to critically evaluate them without the rationalist/shamanistic dream of ridding ourselves of them. In short, if grappling with the inexorable ‘grafting’ of multiple identities seems destined to remain our interminable task, we should urgently seek a fresh encounter with the vital cauldron in which modernist ambivalence towards the sacred first bubbled up to the surface of our ‘civilization’ – in law as much as in the arts, in the study of power as much as in the study of faith, in assemblies of states as in assemblies of religions, in the managers of ‘globalization from above’ as in the energies of ‘globalization from below’.