

in the past we had to debate capital punishment in terms of the competing values to be attached to life itself, given the absence of any clear evidence of the efficacy or otherwise of the death penalty in deterring homicide, so we are now called upon to re-evaluate our expanding use of imprisonment. The utilitarians still like to think that the crime control industry is cleaning up and removing harmful elements from the social system, but Christie doubts the data and calls upon us to reject the "rational" economic approach to crime management and to face more squarely the moral question of when incarceration levels are to be regarded as intolerable.

Limits on the growth of the crime control industry are required as a matter of urgency and of policy. How large the system of formal coercion, which includes psychiatric as well as penal institutions, should be allowed to grow is a normative question, not an empirical one. Because we are not aware of, or have forgotten, that we possess the freedom to determine what limits are to be placed on coercive power, growth in this area has continued unabated. This book is no plea for a return to some idealised earlier condition of society with lesser formal social controls, but is an expression of a fear that, because we lack a conscious policy of restraint, we are moving, as its subtitle indicates, "toward GULAGS, Western style". He asks us to take stock of our willingness to give free rein to the crime control and corrections industry because, as he says, "[t]he major dangers of crime in modern societies are not the crimes, but that the fight against them may lead societies towards totalitarian developments" (p14).

It is advice worth heeding; it is a book worth reading.

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**FAITH AND ORDER: THE RECONCILIATION OF LAW AND RELIGION** by Harold J Berman, Atlanta, Scholars Press, 1993, 401pp, \$US 39.95, ISBN 55540 852 4

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This book collects a body of essays, some previously published, whose underlying theme is described by the author as being that:

the legal order of a society, that is, the formal institutions, structures, rules, and procedures by which it is regulated, is intrinsically connected with fundamental beliefs concerning the ultimate meaning of life and the ultimate purpose of history, that is, with religious faith. (Preface p ix).

The author accepts that most people today — at least in the academic world — hold the opposite view, seeing only a remote connection between legal institutions and religious beliefs.

This modern heterodoxy, which regards religion as a "private matter", stems from the postmodernist attitude to knowledge itself, and the particular application of that attitude to religion. As a result of an "epistemological effort", religion has been reassigned "to the realm of opinion as opposed to knowledge" (Bloom, A, "The Closing of the American Mind", p28.)

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As the author demonstrates, law (like religion) "channels and communicates transrational values" (see p4) through ritual, tradition, authority and universality. He might perhaps have added a fifth, namely through the processes of change itself. This is because the four values enunciated by Berman render each system a poor candidate for self-adjustment. Yet that is essential for both law and religion because of each system's existence as an historical and social phenomenon. Of course, each system seeks to exploit the tension between that which is received and revealed, and that which is to be applied and used to serve humanity today. For each, to be set "adrift on a featureless sea of pragmatism" (*Attorney General (NSW) v Quin* (1990) 170 CLR 1 at 38 per Brennan J) would be to lose its own soul.

Berman teases out the interrelationship of law and religion from many perspectives. He freely acknowledges that it is not his task to explore in depth the tensions between law and religion. Rather he seeks to show that, despite those tensions, the two stand in a dialectical relationship with each other, each dependent on the other to maintain their vitality. The evidence amassed in support of this grand plan is itself breathtaking in its scope. Anthropology, history, sociology, philosophy and theology are addressed and integrated. In Part III, Berman deals with theological, prophetic and educational themes. He argues that one of the major problems facing the legal system is the fragmentation of legal philosophy because of our failure to recognise the contribution of belief systems. This charge can certainly not be laid at his door.

Berman aptly describes law as a "balancing of justice and order in the light of experience" (p297). But that experience is rooted in the religious experience of those who participate in making and administering the law. It was, I think, Learned Hand J who once said: "I have an open mind, not an empty one".

Berman asserts that, even in societies which make a sharp distinction between law and religion, the two need each other — "law to give religion its social dimension and religion to give law its spirit and direction as well as the sanctity it needs to command respect" (p4). This analysis involves giving both law and religion a broader scope than detractors of each usually do. The spirit and social dimension of law are easily recognised by those educated about legal realism and sympathetic to a judicial activism that responds to widely perceived needs in society. But this role is still controversial, especially outside legal circles. And the author's concept of religion vigorously resists the blinkered and bigoted pigeonhole into which the detractors of modern religiosity seek to place it. Yet surely this is a correct understanding of "true religion", both as conceived for example, by those who used these words in the *Book of Common Prayer*, and as understood in the modern law. In *Church of the New Faith v Commissioner of Pay-Roll Tax* (Vic) ((1983) 154 CLR 120 at 121 and 134-5), Mason ACJ and Brennan J said that "religious belief is not by itself a religion. Religion is also concerned, at least to some extent, with a relationship between man and the supernatural order and with supernatural influence upon his life and conduct".

Freed from the restraints of legalism and private devotion into which the opponents of true law and true religion would wish to box these phenomena, both law and religion necessarily interact at virtually every level.

The author's assertion that "law is not only an instrument of secular policy but also part of the ultimate purpose and meaning of life" (p7) may appear to lie ill with Grant Gilmore's claim that "in Heaven there will be no law, and the lion will lie down with the lamb" (Gilmore, G, *The Ages of American Law* (1977) at 111). Gilmore added "[i]n Hell there will be nothing but law, and due process will be meticulously observed". But surely the essential realm of

religion lies, as Gilmore inferred, in places outside Heaven, and none would dispute that law and society intermingle in that field. But one must sometimes question the aura with which Berman perceives "Law", although (to be fair) he is seeking to describe the sanctity with which law seeks to clothe itself. Many instruments of the law encourage the belief in its sanctity of which Berman speaks. And I am not just speaking of the four elements identified by Berman: ritual, tradition, authority and universality. We don't have trial by ordeal any more (in the medieval sense), but the expectations placed upon the unreasoning verdict of a jury sometimes approach a tenet of faith.

Berman concludes his chapter on the Religious Foundations of Western Law on a pessimistic note. He sees the disintegration of the religious foundation of Western Law as rendering barren the dualism of the secular and spiritual aspects of life. "Religion is irrelevant in the law schools, and law is alien to the religious mind. Law becomes just a mechanism, religion just an escape" (p53). This gloomy prognostication seems to defy much of what is written elsewhere in the work. Berman the historian and sociologist emphasises again and again the parallels and overlaps of law and religion. True, the experience and expression of each changes over time, but the parallel tracks of a railway line can penetrate new areas without losing touch with each other. The explanation lies, perhaps, in the differing uses of the term "religion" that one encounters in the work, as in life. In places, he refers to the "secular religions of democracy and socialism". One might add: specific sects in those religions like reverence for the flag, or the spirit of (Anzac) mateship. In other places, Berman uses "religion" to describe what he sees as a rational life-focus. The sentences quoted earlier in this paragraph use religion in this sense.

My point about the differing ways in which Berman refers to "religion" is not a criticism. It illustrates the author's fidelity to his own theme: the unavailability and undesirability of placing religion outside law and law outside religion. Those of similar ancient views might justly claim to call themselves both modern and postmodern.

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