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Beyond The Ordinary Religion

Roger C. Cramton

Some years ago I was asked to speak at a conference at Harvard on "Theology and Law: Responsibilities of Vocation." I chose to talk about the unarticulated (and usually unexamined) value system of legal education, the "ordinary religion" of the law school classroom¹—"ordinary" in the sense that the set of ideas are part of the woodwork, furnishings, and structure of law school and legal education; "religion" in the sense that the ideas involve fundamental presuppositions.²

My thesis was that "[t]he essential ingredients of the ordinary religion of the American law school classroom are: a skeptical attitude toward generalizations; an instrumental approach to law and lawyering; a 'tough-minded' and analytical attitude toward legal tasks and professional roles; and a faith that man, by the application of reason and the use of democratic processes, can make the world a better place."³ I then criticized each of these premises, concluding that "modern dogmas entangle legal education—a moral relativism tending toward nihilism, a pragmatism tending toward an amoral instrumentalism, a realism tending toward cynicism, an individualism tending toward atomism, and a faith in reason and democratic processes tending toward mere credulity and idolatry."⁴

My earlier article on "ordinary religion" is a critique of what I believe to be the implicit value system of legal education and American lawyering. Only by implication does the paper address the more constructive questions: What values should one presuppose in teaching, studying, or practicing law? To what extent, and how, should one's basic value commitments be articulated and discussed?

Roger C. Cramton is Robert S. Stevens Professor of Law, Cornell University. This paper was initially prepared as a presentation to the Christian Legal Society, Cornell Law School, September 17, 1986. It has been much improved by conversations with Greg Alexander and John Lee Smith; and has benefitted from comments by Clark Byse, Jim Elkins, Geoff Hazard, Larry Palmer, Peter Strauss, and James Boyd White.

1. Roger C. Cramton, *The Ordinary Religion of the Law School Classroom*, 29 *J. Legal Educ.* 247 (1978).
2. "Religion" is a dangerous word because it has so many different meanings and carries so much emotional freight. I use the term in a broad but ancient sense: one's "religion" is one's most deeply held beliefs or commitments. Religion, in this sense, "binds one together" (from *re-ligere*, to bind together) and provides ultimate commitments. I am not using "religion" in the sense of the organized church, or sectarian groups, or even to imply a belief in God—in my usage, an ethical humanist who does not believe in God has a "religion."
3. Cramton, *supra* note 1, at 248.
4. *Id.* at 262.

One of the wise elders of our profession, Howard Lesnick, has said that most teachers use people to teach things, although true teaching uses things to teach people. Spelling out the implications of this position, he says:

If we set about to teach people, rather than teach (for example, Torts or Professional Responsibility), what is it that we would teach them? To say that we would teach people Torts does not capture the point: Besides making the whole thing a play on words, it seeks to teach a subject, rather than use a subject, a thing, to teach—what? Years after being led to reflect on this question, my answer is that I want to teach people to *be* people, to *become* people, to *become more fully human*. And what that means to me is to lead students to ask themselves: Who am I? What am I doing in the world? What do I want to do in the world?⁶

Should Lesnick's questions be addressed in a university law school? Although I recognize that they should not be the sole agenda or even the principal one, I do contend that they should have a major place in our teaching and scholarship. There is much information to convey about law and legal institutions; and an enormous number of skills and attitudes need to be taught or at least introduced. But as one of my mentors, Karl N. Llewellyn, was wont to say: "Compassion without technique is a mess; and technique without compassion is a menace." Law teachers cannot and should not ignore technique, but they should not limit themselves to it; they should balance it with the larger view suggested by the word *compassion*.

My defense for putting larger normative questions on our teaching agenda rests on a notion that a university law school has a broader function than a cooking institute, a barber college, or some other trade-oriented technical school.⁷ A school for the tonsorial arts is not expected to help students develop their "moral and political judgments" or their "commitment to love and justice." It would be absurd to charge such job-oriented training programs with these undertakings. Imposing the responsibility on university law schools rests on a claim that they have a larger obligation, one that includes the probing of love and justice as well as the development of civic virtue and a sense of public duty.

An honest look at the law school world today requires the confession that we rarely fulfill this larger obligation. In a world of rampant vocationalism, some will ask whether law teachers should or can attempt to do so. What makes a law school different from a technical training school? Why should law teachers and law students aspire educationally to something more than technique? The answer in the liberal arts generally turns on the intrinsic value of beauty, truth, and goodness wholly apart from their possible instrumental utility. In the professions the response historically has wedded the liberal arts' "ends-in-themselves" claim with the idea that some work is a "calling"—that people accepting a call and professing (vowing or promising) to obey that call march to the beat of a different drummer. They pursue the *vita activa*, not the *vita acquisitiva*—they are not in it solely for money. Their calling is to serve the public weal: to heal the sick and to

6. Howard Lesnick, Remarks on Teaching Alternative Dispute Resolution, Harvard Law School, Oct. 9, 1982 (unpublished ms.), at 1–2.

7. The argument in this and the next three paragraphs draws on discussions with John Lee Smith and some very helpful comments that he provided on an earlier draft.

comfort the infirm, or to defend those threatened with loss of freedom or property, or to mediate forgiveness and acceptance of those who sin and have fallen from grace.

Perhaps true professionals combine all of these roles: healer, helper, defender, mediator, and teacher. I recognize, of course, that in the process they also must earn a living. The problem today is that we let the one dominate the other. We have lost for the most part the ability to distinguish between a calling and a station in life, to see differences between a profession and a business or trade, to differentiate the *vita activa* from the *vita acquisitiva*. To the extent that law students and lawyers become single-mindedly absorbed in status and gain, law ceases to be a profession, and the law school becomes merely another training school. As law, medicine, and other professions become commercialized, we experience what can only be called the deprofessionalization of the professions. A business mentality comes to dominate, with efficiency and reward as the only goals. Pro bono publico, if it exists at all, becomes a tithe lawyers sometimes pay as a quid pro quo for special privileges (e.g., exclusion of competitors, economic reward, high social status); it ceases to be the heart and center of the enterprise.

I believe that a sense of calling is essential for law teachers and students. The search for truth, with all that implies concerning the meaningfulness of objective reality and the importance of the procedures by which we attempt to describe and talk about it, is a central commitment of the legal scholar. Is there not also a commitment, both for the law teacher and student, to search for the good? A renewed understanding of what it means to be a professional should include a commitment to something other than acquisition and success. If so, law schools have an educational responsibility to deal with the larger normative issues that infuse the application and use of legal technique.

The more difficult question, in my view, is not whether law schools have this obligation—there would be no excuse for housing them on the university campus if they did not—but whether the task can be performed effectively. How to do it is a serious question; and doubts about our capacity to do it well may lead conscientious teachers to exercise caution in undertaking the effort to deal with fundamental questions of professional identity, purpose, and meaning.

The problems of failing to be self-conscious and critical concerning our assumptions about professional identity, purpose, and meaning have been well stated by Howard Lesnick:

Now, a teacher can invite students to address those questions while teaching Torts, or Professional Responsibility, or Labor Law. A teacher can also *not* do it teaching any of those subjects. And that is the path generally taken in the secular law school of today.

My hypothesis, and the premise of my concern, is that if teachers do not teach by inviting students to ask themselves the questions I have put—who are you? what do you want in the world?—we in fact answer them. We answer them implicitly—and therefore loudly—without discussing our answers, without espousing them, without

putting the issues on the table. By not asking the questions, we take the answers for granted.⁸

My original "ordinary religion" piece argues in a similar vein that, when we do not make our students' life choices part of the explicit agenda, we are by silence and acquiescence conveying a powerful message. We are telling them something along the following lines (this is Howard Lesnick's formulation, which is somewhat similar to mine):

* Each of you is here (that is, in the world) to get ahead in the world.

* You are here (in law school) to learn a job, one that will help you get ahead in the world.

* Your job (after law school) is to help your client get ahead in the world.

* People can relate to each other only instrumentally, as objects, in a world that is characterized by separateness, competition, and scarcity.

* Justice, which is a basic aspiration, is obtained by fair procedures, by following the rules of the game (not lying, for example), and by seeking mutually beneficial exchanges.

* Justice *is* obtained, by and large, under present social arrangements; the interaction of individuals seeking to advance themselves produces a reasonably harmonious and legitimate social order.⁹

Lesnick refers to these statements, in the aggregate, as The Answer; I call them the lawyer's "ordinary religion." Whatever they are called, their truth or falsity is not generally at issue in the American law school.

Although there obviously is much truth in aspects of the "ordinary religion," two fatal flaws undermine it. The first is that it remains outside the agenda. We suggest that something is true without explicitly addressing it. The "ordinary religion" is often experienced by students as not only not on the agenda, but as not discussable in the law school classroom. "When students try to question the implicit answer," Lesnick observes, "the response often is: 'You are out of college, you are in law school; decide such questions for yourself, they are a private matter, not appropriate to take up in class.'"¹⁰ The second flaw is that The Answer is not the whole truth. The truth that lurks unspoken in the "ordinary religion" is at best a partial one.

My point is that the approach of implicitly answering fundamental questions by not asking them pervades legal education: it is in fact the not-so-hidden message of law school. Many teachers find it difficult or inappropriate to raise the fundamental questions in class or in their writing. It *is* difficult, because they are often hard and controversial questions.¹¹ And many students find it difficult and inappropriate for precisely the same

8. Lesnick, *supra* note 6, at 1-2.

9. *Id.* These paragraphs are a slightly paraphrased version of the Lesnick text.

10. *Id.* at 2.

11. The very real difficulties of discussing fundamental moral issues in the law school classroom have been discussed by Thomas L. Shaffer, *Moral Theology in Legal Ethics*, 12 *Capital U. L. Rev.* 179, 184-90 (1982).

reasons: they are embarrassed and uneasy about considering issues as sensitive and as vital as who they are and what their future should be. The dilemma is that if teachers and students do *not* address these questions and struggle to articulate the best answers they can discover and defend, they answer the questions by ignoring them. There is (to borrow from Sartre), quite literally, "no exit."

One of the tragic but inevitable aspects of the human situation is that our choices (including inaction or inattention, which is itself a choice, often the worst one) must be made under less than optimal conditions. Our knowledge of alternatives and their consequences is always limited; our information about other variables is incomplete; limited time and limited resources require a decision before these deficiencies can be remedied; and brute circumstance and the positions of other participants radically limit the range of feasible alternatives. Inevitably, we act on the basis of what we know and believe, recognizing its partiality and incompleteness. Without a moral compass to guide us—a framework that gives significance to alternatives and their rationale—we are adrift.

Thus far I have argued that, whether we like it or not, we teach values and therefore we should do so more openly and forthrightly. The difficulties are enormous. We all worry about indoctrination and dogmatism from the podium. Few law teachers have a background in moral philosophy or other disciplines that permits a confident approach to ultimate questions. In a social milieu in which fundamental commitments are viewed as intimate or private, there is legitimate concern about classroom explorations that force the revelation of ideas that define the self. For many people the core of meaning has its roots in religious experience or tradition, and religious ideas and language have been largely banished from the public arena and from the discourse of the secular university. The language of our individualistic, instrumental, and technocratic society has rich resources when dealing with individual rights and autonomy, efficiency, and technique, but it is impoverished in dealing with "the habits of the heart."¹²

These and other difficulties lead most of us most of the time to neglect issues of love, justice, or ultimate reality. We pretend that we are technicians teaching technique in a value-neutral context in which everyone decides individually the uses to which technique is put. But the falseness of the pretense and the empty superficiality of much of what we do pushes many of us from time to time to invite an exploration of more serious matters by being open with our students and readers about our own fundamental commitments. My own halting efforts to do so have been successful only intermittently.¹³ I have few clues concerning how to do what

12. This point is persuasively argued in Robert N. Bellah, Richard Madsen, William M. Sullivan, Ann Swidler & Steven M. Tipton, *The Habits of the Heart: Individualism and Commitment in American Life* (Berkeley, 1986) [hereinafter Bellah].

13. The use of problems providing a rich context for discussion of role-playing choices made by student participants in Torts has sometimes resulted in moral dialogue of depth and quality as well as energy. Similarly, the use in teaching Professional Responsibility of some films and stories, such as *The Verdict*, has sometimes had a similar result. More explicit efforts to draw on religious beliefs and commitments in the latter course has usually

I believe should be done other than the ancient insight that moral example is always more effective than mere talk. I do know that in openness there is risk; but one invites others to growth and change only by exposing oneself to growth and change.

I do not believe we are faced with a choice between objectivism and relativism.¹⁴ Objectivism is a term for the belief in an “ultimate reality” that is not contingent on any particular cultural or historical situation: there are permanent, immutable standards of rationality to which we can appeal when evaluating competing claims of what is good and what is real. These standards are “rational” in the strongest possible sense—they constitute a given, and hence uncontested, framework. But given by whom? One of the legacies of the Enlightenment is skepticism that we can locate in God or anywhere else a source of valid claims that transcend subjectivity. We also justifiably worry that by accepting the possibility of such an objective form of validity, we create a serious risk that some will use objectivism to achieve and to justify domination of other members of society, just as the Nazis justified their despicable racism on the basis of an objectivist argument. He who claims to have “the truth” is a person, we have learned, to be feared, unless with genuine humility he is willing fully to expose his truth to the data, arguments, and experiences of others.

Relativism, on the other hand, is the notion that man has created a variety of moral and ethical systems and that there is no rational process by which it can be demonstrated that one of them is better than any other. You have your “values” and I have mine. Neither of us can (or, relativism implies, should) persuade the other on rational grounds that our own position is preferable. The Spanish missionary who accompanied Cortez in his conquest of the Aztecs in Mexico, encountering a prevalent practice in which young maidens are sacrificed to an Aztec god, can disagree, but he should not act to persuade the Aztecs to change their views, which happened to include human sacrifice.¹⁵

Scientism is another alternative. But it is naive to rely on scientific progress to rescue us from dilemmas of moral choice. The positivists, for example, held the view that, if we can know anything at all, it is only a very little about a small hunk of reality—there is an object there and we can use language and science to describe certain of its apparent qualities. Under this view, nothing is true unless it cannot be disproved or falsified—a test so severe that most of science as well as all of ethics and morality goes out the window. As Bertrand Russell put it (in a passage wholly inconsistent with the strong affirmations that characterized his entire life), we are left with

backfired, with some students expressing hostility at inquiry they view as either intrusive, threatening, or preachy.

14. See Richard Bernstein, *Beyond Objectivism and Relativism: Science, Hermeneutics, and Praxis* (Philadelphia, 1983).

15. This example is drawn from Bernard Williams, *Morality: An Introduction to Ethics* 24–25 (New York, 1972). For the standard philosophical arguments concerning ethical relativism and references to the relevant literature, see Richard B. Brandt, *Ethical Relativism*, in *3 Encyclopedia of Philosophy*, ed. Paul Edwards (New York, 1967).

nothing to build on except "the firm foundation of unyielding despair."¹⁶ I believe it is possible to say something more than that about things that are important.¹⁷

If objectivism, relativism, and scientism were the only alternatives, our situation would indeed be one of despair.¹⁸ Fortunately, they are not the only alternatives. There are methods by which we can arrive at larger and more meaningful affirmations. One's own religious and cultural tradition is a good starting point, which in my case is the formerly dominant Protestant Christian inheritance that came to us from Augustine, Luther, Calvin, John Winthrop, and Jonathan Edwards (with a large dollop of enlightenment and pragmatism from such worthies as Thomas Jefferson and Benjamin Franklin).¹⁹ This is not a bad place to start, if you are a Protestant American, but surely no better than a number of other starting points (Moses, the prophets, Maimonides, and Buber for one; Aquinas, the church fathers, and Newman for another; and there are others).

Now, the argument from authority is the weakest of all arguments—a good starting point, perhaps, but only that. Every belief must be tested by one's experience, evaluated for consistency with other beliefs that one has found useful and reliable, and compared with contrasting views. All great religions, including that of secular humanism, require that we use our minds to discover what is required of us. Being fully human is being rational as well as intuitive and insightful. Openness to new experiences and insights, constant reformulation of beliefs based on new knowledge, a tolerance for other views that are supported by data or rational argument—these are the basic elements of the method by which we can arrive at closer approximations of the truth. There will always be doubt; witness the follower of Christ who said, "I believe, Lord; help me thou in my unbelief."²⁰

The process I am describing is not confined to theologians such as Aquinas, Luther, Buber, or Tillich. Richard Rorty, a modern ethicist, refers to it as "edifying conversation."²¹ John Rawls, a moral philosopher, describes the process as a search for "reflective equilibrium."²² Whatever it is called, it embodies the idea that rigorous examination of our beliefs in the light of experience, data, and competing views—a dialectic process involving earnest and serious conversation with oneself and others—can produce a set of beliefs that are more consistent with one another and with what one knows, beliefs that are likely to be a closer approximation to the truth.²³

16. Bertrand Russell, *A Free Man's Worship*, in *Mysticism and Logic* (London, 1917).

17. For a good discussion of the grounds for saying "yes" to something, see Wayne C. Booth, *Modern Dogmas and the Rhetoric of Assent* (Chicago, 1975).

18. See Bernstein, *supra* note 14.

19. For a valuable summary of the belief systems that dominated Protestant America until very recently, see Bellah, *supra* note 12, at 27–51.

20. Mark 9: 24.

21. Richard Rorty, *Philosophy and the Mirror of Nature* (Princeton, 1979).

22. John Rawls, *A Theory of Justice* 46–53 (Cambridge, Mass., 1971).

23. Socrates, of course, exemplified the method. For a valuable attempt to justify the activity of lawyering as an essential element of the dialectic process by which a community refines and reshapes its ideals and values, see James Boyd White, *The Ethics of Argument: Plato's Gorgias and the Modern Lawyer*, 50 *U. Chi. L. Rev.* 849 (1983).

Since my thesis is that ultimate questions need to be discussed in law school, it is only fair that I reveal my tentative and halting views on some of the vital questions: Who am I? What am I doing here? What should I do with my life? There is a risk in opening oneself in this manner, but one encouraging belief of mine is that trust in others and acceptance of oneself is a crucial predicate of meaningful moral discourse. Hence I believe—a belief itself worthy of analysis and criticism—that the effort to be self-consciously critical about our operating assumptions requires us to reveal our most deeply held beliefs. Doing so, of course, challenges the tacit agreement of academic culture, at least in recent times, that the classroom is to be resolutely secular and “value-free.” Yet the vacuum of belief must be filled; if religion and theology have been banished from academic halls, as is generally the case, we must do the best we can with what is at hand—our own most deeply held convictions.

I am a professor; my students are future professionals. A wise academic, commenting about junior colleagues in another discipline, said: “They all want to be professionals. But none of them has anything to profess.”²⁴ Of course, we all have careers. *Career* comes from the late Latin word *carraria*—a carriage route or road—and suggests a common path, a serviceable way. Almost everyone these days, adopting the “ordinary religion” as if it were a suit of clothes, takes the common path of the unexamined life. Only a few, the true professionals, have something to profess.

What do I profess? Here I am, a struggling pilgrim, beset by doubts and anxieties, painfully aware of my own limitations and failures. Even Moses, when God called to him out of the burning bush, replied that he was not adequate to the task of bringing the Jewish people out of bondage. “But who am I,” Moses said, “that I should [do these great deeds]. . . . I am [unworthy] and slow and hesitant in speech.” And God replied: “Who is it that gives man speech? Is it not I? . . . Go now; I will help your speech. . . .”²⁵ Well, God has not spoken to me, so I cannot rely on a vivid and overpowering personal experience. I have had to figure things out for myself as best I could, evaluating those parts of my cultural and religious traditions that seemed most relevant, consistent, and truthful.

My own tentative formulation builds on traditional Judeo-Christian ideas of “faith, hope, and charity”²⁶ as well as the idea of justice. My basic faith is in the goodness of creation and the sacredness of many things but especially the human spirit. These ideas, consistent with my experience and reflection, lead me to believe that human life has meaning and purpose. Our daily existence is not just the product of random concatenations of atoms that have resulted in a genetic structure that controls our fates.

24. The remark was made to Mark Solomon, a recent Cornell law graduate, during his earlier incarnation as a college teacher. I am indebted to Gray Thoron for showing me a paper Solomon had prepared for one of his courses, and to Solomon for permitting me to use it.

25. Exodus 3:4, 11; 4:10–14.

26. I Corinthians 13:13. “And now abideth faith, hope, and charity, these three; but the greatest of these is charity.”

Although we see through the glass only darkly, outlines of a deeper origin and explanation are visible.

Hope implies much more than a naive optimism concerning the inevitability of human progress. Things can and do get worse as well as better: witness Auschwitz, genocide in Cambodia, and the parochialism of much of our own contemporary patriotic saber-rattling. Yet despite the reality of human evil—our selfishness, separation from others, and alienation from God—I believe hope is warranted. One can take courage in what one believes knowing that, in terms of a larger reality, truth and justice will yet prevail,²⁷ even though the immediate reward of virtue may well be suffering. But we can act with hope and trust.

Love and justice, finally, are two faces of the same ultimate reality.²⁸ Love is a special problem in today's law school. All the taboos have been shattered and four-letter words have lost their shock value. Ironically, "love" has become a dirty word in the precincts of the university. Why are we so embarrassed to speak of so fundamental a matter? To confess that we love our parents, our spouse, our children, even ourselves? Self-love, when cloaked in the dress of self-interest of economic man, is here aplenty; but we are embarrassed to state that we aspire (at least some of the time) to "love our neighbor as we love ourselves," and to explore with each other what that means.²⁹

The problem is in part one of language. "Love" carries connotations of both sexual love and a shallow, other-oriented do-goodism of the kind Reinhold Neibuhr warned against. We have no word that embodies a committed concern for commonweal, whether the social unit is the family or a neighborhood or the workplace or the nation or the world. Committed concern entails taking risks and giving trust, but it must also include recognition of the need for expressing and maintaining self-respect, and it must be alert to the omnipresent menaces of incompetence, unrealism, utopianism, and the human capacity for self-deception. Committed concern—the kind of love that is needed—excludes the vices of avarice, cruelty, and indifference, but it must guard against lapsing into mushy and uncritical humanitarianism.

There is something more to being a fully developed human being than atomistic selfishness—when each seeks to advance oneself, one's tribe, or one's genes at the expense of others, of society, or of nature. Even though we may experience it only rarely, love is a reality that, like truth, can build

27. The concept of hope, from a Christian perspective, is applied to the functions of lawyers in Thomas L. Shaffer, *On Being a Christian and a Lawyer*, ch. 19 (Provo, Utah, 1981).

28. The problem of serving both love and justice in a self-centered and power-hungry world is discussed, from differing Christian perspectives, in Stanley Hauerwas, *The Peaceable Kingdom: A Primer in Christian Ethics* (South Bend, Ind., 1983); Donald P. McNeill, Douglas A. Morrison, and Henri J. M. Nouwen, *Compassion: A Reflection on the Christian Life* (New York, 1982); and John Howard Yoder, *The Politics of Jesus* (Grand Rapids, 1972). Non-Christian writers could also be cited. E.g., Bertrand Russell, *What I Believe*, in *Why I Am Not a Christian* 56 (New York, 1957): "The good life is one inspired by love and guided by knowledge."

29. Mark 12:33. "The second [great commandment] is this, 'You shall love your neighbor as yourself.'"

communities that are fully human.³⁰ In an ultimate sense, both love and justice come from a source beyond us—a transforming, ennobling source that some call God. Love and justice are gifts that come to us by grace; they are not things given by government or institutional arrangements, although fully human people can help by giving them to each other.³¹ Law, the efforts of lawyers, and the character of our social and legal arrangements can further them or frustrate them. In this view, love and justice are related: justice must always be informed by love if it is to be just; and love must always meet the demands of justice if it is to be loving.³²

The struggle for justice and the use of law to define the demands of justice is where love ceases to be an abstraction and takes on flesh and blood. The task of a lawyer is often difficult and frustrating, but it is a high calling to serve justice, much more than a “job” or “career.” The prophets sound the lawyer’s clarion call: “Do justice, love mercy, and walk humbly with thy God.”³³ “Let justice roll on like a river, and righteousness like an everflowing stream.”³⁴

30. The most familiar exposition of love in the New Testament is that of St. Paul, I Corinthians 13:1–13.

31. Thomas L. Shaffer argues persuasively that it is unrealistic, and therefore untruthful, to expect that governments can assure justice. “[P]eople do not get justice from the government; justice is a gift people give to one another. Lawyers and judges can help justice along, but they cannot dispense it.” Preface to M. Swygert & R. Batey, *Maximizing the Law School Experience: A Collection of Essays*, at iii, viii (Stetson College of Law, 1983). The argument is more fully developed in Shaffer, *supra* note 27.

32. See Paul Tillich, *Love, Power, and Justice* (Oxford, 1954).

33. Micah 6:8.

34. Amos 5:24.