

DRAFT

For *University of St. Thomas Law Journal* 2 (2005): 439-452

Law and Religion: The Challenges of Christian Jurisprudence

John Witte, Jr.

Legal Positivism and the Rise of Interdisciplinary Legal Study

"The better the society, the less law there will be. In Heaven there will be no law, and the lion will lie down with the lamb.... In Hell there will be nothing but law, and due process will be meticulously observed." So wrote Grant Gilmore to conclude his classic 1974 title, *Ages of American Law*. Gilmore crafted this catchy couplet to capture the pessimistic view of law, politics, and society made popular by the American jurist and Supreme Court Justice Oliver Wendell Holmes, Jr. (1841-1935). Contrary to the conventional portrait of Holmes as the sage and sartorial "Yankee from Olympus," Gilmore portrayed Holmes as a "harsh and cruel" man, chastened and charred by the savagery of the American Civil War and by the gluttony of the Industrial Revolution. These experiences, Gilmore argued, had made Holmes "a bitter and lifelong pessimist who saw in the course of human life nothing but a continuing struggle in which the rich and powerful impose their will on the poor and the weak." The cruel excesses of the Bolshevik Revolution, World War I, and the Great Depression only confirmed Holmes in his pessimism that human life was without values.

This bleak view of human nature shaped Holmes' bleak view of law, politics, and society. Holmes regarded law principally as a barrier against human depravity -- a means to check the proverbial "bad man" against his worst instincts and to make him pay dearly if he yielded to temptation. Holmes also regarded law as a buffer against human suffering -- a means to protect the vulnerable against the worst exploitation by corporations, churches, and Congress. For Holmes, there was no higher law in heaven to guide the law below. There was no path of legal virtue up which a man should go. For Holmes, the "path of the law" cut a horizontal line between heaven and hell, between human sanctity and depravity. Law served to keep society and its members from sliding into the abyss of hell. But it could do nothing to guide its members in their ascent to heaven.

Holmes was the "high priest" of a new "age of faith" in American law, Gilmore wrote with intended irony, that replaced an earlier era dominated by the church and the clergy. The confession of this new age of faith was that America was a land "ruled by laws, not by men." Its catechism was the new case law

method of the law school classroom. Its canon was the new concordance of legal codes, amply augmented by New Deal legislation. Its church was the common law court where the rituals of judicial formalism and due process would yield legal truth. Its church council was the Supreme Court which now issued opinions with as much dogmatic confidence as the divines of Nicea, Augsburg, and Trent.

This new age of faith in American law was in part the product of a new faith in the positivist theory of knowledge that swept over America in the later nineteenth and twentieth centuries, eclipsing earlier theories of knowledge that gave religion and the church a more prominent place. In law, the turn to positivism proceeded in two stages. The first stage was scientific. Inspired by the successes of the early modern scientific revolution--from Copernicus to Newton--eighteenth-century European and nineteenth-century American jurists set out to create a method of law that was every bit as scientific and rigorous as that of the new mathematics and the new physics. This scientific movement in law was not merely an exercise in professional rivalry. It was an earnest attempt to show that law had an autonomous place in the cadre of positive sciences, that it could not and should not be subsumed by theology, philosophy, or political economy. In testimony to this claim, jurists in this period poured forth a staggering number of new legal codes, encyclopedias, dictionaries, textbooks, and other legal syntheses that still grace, and bow, the shelves of our law libraries.

The second stage of the positivist turn in law was philosophical. A new movement--known variously as legal positivism, legal formalism, and analytical jurisprudence--sought to reduce the subject matter of law to its most essential core. If physics could be reduced to "matter in motion" and biology to "survival of the fittest," then surely law and legal study could be reduced to a core subject as well. The formula was produced in the mid-nineteenth century--most famously by John Austin in England and Christopher Columbus Langdell in America: Law is simply the concrete rules and procedures posited by the sovereign, and enforced by the courts. Many other institutions and practices might be normative and important for social coherence and political concordance. But they are not law. They are the subjects of theology, ethics, economics, politics, psychology, sociology, anthropology, and other humane disciplines. They stand beyond what Austin called "the province of jurisprudence properly determined."

This positivist theory of law, which swept over American universities from the 1890s onward, rendered legal study increasingly narrow and insular. Law was simply the sovereign's rules. Legal study was simply the analysis of the rules that were posited, and their application in particular cases. Why these rules were posited, whether their positing was for good or ill, how these rules affected society, politics, or morality were not relevant questions for legal study. By the early twentieth century, it was rather common to read in legal textbooks that law

is an autonomous science, that its doctrines, language, and methods are self-sufficient, that its study is self-contained. It was rather common to think that law has the engines of change within itself; that, through its own design and dynamic, law marches teleologically through time -- "from trespass to case to negligence, from contract to quasi-contract to implied warranty," as Barbara Shapiro once put it.

Holmes was an early champion of this positivist theory of law and legal development. He rebuked more traditional views with a series of famous aphorisms that are still often quoted today. Against those who insisted that the legal tradition was more than simply a product of pragmatic evolution, he wrote: "The life of the law is not logic but experience." Against those who appealed to a higher natural law to guide the positive law of the state, Holmes cracked: "There is no such brooding omnipresence in the sky." Against those who argued for a more principled jurisprudence, Holmes retorted: "General principles do not decide concrete cases." Against those who insisted that law needed basic moral premises to be cogent, Holmes mused: "I should be glad if we could get rid of the whole moral phraseology which I think has tended to distort the law. In fact even in the domain of morals I think that it would be a gain, at least for the educated, to get rid of the word and notion [of] Sin."

Despite its new prominence in the early twentieth century, American legal positivism was not without its ample detractors. Already in the 1920s and 1930s, sociologists of law argued that the nature and purpose of law and politics cannot be understood without reference to the spirit of a people and their times--of a *Volksggeist und Zeitgeist* as their German counterparts put it. The legal realist movement of the 1930s and 1940s used the new insights of psychology and anthropology to cast doubt on the immutability and ineluctability of judicial reasoning. The revived natural law movement of the 1940s and 1950s saw in the horrors of Hitler's Holocaust and Stalin's gulags the perils of constructing a legal system without transcendent checks and balances. The international human rights movement of the 1950s and 1960s pressed the law to address more directly the sources and sanctions of civil, political, social, cultural, and economic rights. Marxist, feminist, and neo-Kantian movements in the 1960s and 1970s used linguistic and structural critiques to expose the fallacies and false equalities of sundry legal and political doctrines. Watergate and other political scandals in the 1970s and 1980s highlighted the need for a more comprehensive understanding of legal ethics and political accountability.

By the early 1970s, the confluence of these and other movements had exposed the limitations of a positivist definition of law standing alone. Leading jurists of the day--Lon Fuller, Jerome Hall, Karl Llewellyn, Harold Berman, and others--were pressing for a broader understanding and definition of law. Of course, they said in concurrence with legal positivists, law consists of rules--the black letter rules of contracts, torts, property, corporations, and sundry other

familiar subjects. Of course, law draws to itself a distinctive legal science, an "artificial reason," as Sir Edward Coke once put it. But law is much more than the rules of the state and how we apply and analyze them. Law is also the social activity by which certain norms are formulated by legitimate authorities and actualized by persons subject to those authorities. The process of legal formulation involves legislating, adjudicating, administering, and other conduct by legitimate officials. The process of legal actualization involves obeying, negotiating, litigating, and other conduct by legal subjects. Law is rules, plus the social and political processes of formulating, enforcing, and responding to those rules. Numerous other institutions, besides the state, are involved in this legal functionality. The rules, customs, and processes of churches, colleges, corporations, clubs, charities, and other non-state associations are just as much a part of a society's legal system as those of the state. Numerous other norms, besides legal rules, are involved in the legal process. Rule and obedience, authority and liberty are exercised out of a complex blend of concerns, conditions, and character traits -- class, gender, persuasion, piety, charisma, clemency, courage, moderation, temperance, force, faith, and more.

Legal positivism could not, by itself, come to terms with law understood in this broader sense. In the last third of the twentieth century, American jurists thus began to (re)turn with increasing alacrity to the methods and insights of other disciplines to enhance their formulations. This was the birthing process of the modern movement of interdisciplinary legal study. The movement was born to enhance the province and purview of legal study, to refigure the roots and routes of legal analysis, to render more holistic and realistic our appreciation of law in community, in context, in concert with various humane, social, and exact sciences. In the 1970s, a number of interdisciplinary approaches began to enter the mainstream of American legal education--combining legal study with the study of philosophy, economics, medicine, politics, and sociology. In the 1980s and 1990s, new interdisciplinary legal approaches were born in rapid succession--the study of law coupled with the study of anthropology, literature, environmental science, urban studies, women's studies, gay-lesbian studies, and African-American studies. And, importantly for our purposes, in these last three decades, the study of law was also recombined with the study of religion.

In 1960, the catalogues of the 30 leading law schools listed a total of 56 interdisciplinary legal courses; by 2000, the number of such courses in these 30 schools had increased to 812. In 1960, law libraries stocked six interdisciplinary legal journals; in 2000, the number of interdisciplinary legal journals had increased to 136, with many other traditional journals suffused with interdisciplinary articles. The pendulum of the law has swung a long way from the predominantly positivist position of two generations before.

The pendulum might well have swung too far. The interdisciplinary legal studies movement was born in an effort to integrate legal studies--both internally

among its own subjects, and externally among the other disciplines. It is still doing that in some quarters. But in other quarters, ironically, integration is giving way to even further balkanization and isolation of the legal academy--in part because of this interdisciplinary legal studies movement. With so many rival methodologies emerging, different schools of interdisciplinary legal study have begun to clamor for legitimacy, even superiority. With so many new interdisciplinary legal terms and texts gaining legitimacy, whole quarters of legal study have become ever more intricate miniatures, increasingly opaque even to well-meaning fellow jurists eager to learn. All this has resulted in even further isolation of the legal academy than existed in the 1970s when a sustained interdisciplinary studies movement was born--isolation not only from other disciplines, but increasingly also from the bench and the bar.

Legal study is more than the sum of its interdisciplinary parts--and should be more than a collection of the methods and manners of special interest groups. Law is an irreducible mode of human life and social living. Legal science offers unique forms of language, logic, and learning. Legal study should be enhanced, not eclipsed, by the methods and insights of other disciplines. The urgent task of our day is to create a new legal paradigm, or least a new set of criteria to separate the legitimate from the illegitimate, the legally salient from the legally spurious, methods of interdisciplinary study.

The Interdisciplinary Study of Law and Religion

Whatever the new paradigm of legal study might be, it will need to take full account of the religious sources and dimensions of law. For religion, in sundry forms, has proved its resilience, and inevitability, in our life, lore, and law. In the course of the twentieth century, religion defied the wistful assumptions of the Western academy that the spread of Enlightenment reason and science would slowly eclipse the sense of the sacred and the sensibility of the superstitious. Religion also defied the evil assumptions of Nazis, Fascists, and Communists alike that gulags and death camps, iconoclasm and book burnings, propaganda and mind controls would inevitably drive religion into extinction. Yet another great awakening of religion is upon us, now global in its sweep, and frightening in its power. Religion has proved to be an ineradicable condition of human lives and communities -- however forcefully a society might seek to repress or deny its value or validity, however cogently the academy might logically bracket it from its legal and political calculus.

Indeed, today it has become increasingly clear -- as it was in prior centuries -- that religion and law are two universal solvents of human living, two interlocking sources and systems of values and beliefs that have existed in all axial civilizations. Law and religion, Justice Harry Blackmun once wrote, "are an inherent part of the calculus of how a man should live" and how a society should

run. To be sure, the spheres and sciences of law and religion have, on occasion, both converged and contradicted each other. Every religious tradition has known both theonomism and antinomianism -- the excessive legalization and the excessive spiritualization of religion. Every legal tradition has known both theocracy and totalitarianism -- the excessive sacralization and the excessive secularization of law. But the dominant reality in most eras and cultures is that law and religion stand in a dialectical harmony, constantly crossing-over and cross-fertilizing each other. Every major religious tradition strives to come to terms with law by striking a balance between the rational and the mystical, the prophetic and the priestly, the structural and the spiritual. Every legal tradition struggles to link its formal structures and processes with the beliefs and ideals of its people. Law and religion are distinct spheres and sciences of human life, but they exist in dialectical interaction, constantly crossing-over and cross-fertilizing each other.

It is these points of cross-over and cross-fertilization that are the special province of the interdisciplinary field of law and religion. How do religious ideas and institutions, methods and mechanisms, beliefs and believers influence legal ideas and institutions -- for better and for worse, in the past, present, and future? These are the cardinal questions that the burgeoning field of law and religion has set out to answer.

Various modes of interaction between law and religion can now be distinguished. For example, law and religion are institutionally related -- principally in the relation between church and state, but also in the relations among sundry other religious and political groups. Jurists and theologians have worked hand-in-hand, and sometimes combatted hand-to-hand, to define the proper relation between these religious and political groups, to determine their respective responsibilities, to facilitate their cooperation, to delimit the forms of support and protection one can afford the other. Many of the great Western constitutional doctrines of church and state -- the two cities theory of Augustine, the two powers theory of Gelasius, the two swords theory of the High Middle Ages, the two kingdoms theory of the Protestant Reformation -- are rooted in both civil law and canon law, in theological jurisprudence and political theology. Much of our American constitutional law of church and state is the product both of Enlightenment legal and political doctrine and of Christian theological and moral dogma.

Law and religion are conceptually related. Both disciplines draw upon the same underlying concepts about the nature of being and order, of the person and community, of knowledge and truth. Both law and religion embrace closely analogous concepts of sin and crime, covenant and contract, redemption and rehabilitation, righteousness and justice that invariably combine in the mind of the legislator, judge, or juror. The modern legal concept of crime, for example, has been shaped by an ancient Jewish and medieval Catholic theology of sin. The

modern legal concept of absolutely obligating contracts was forged in the crucible of Puritan covenant theology. The modern legal concept of the purposes of punishment are rooted in part in Catholic doctrines of the causes of natural law and Protestant doctrines of the uses of moral law. Both law and religion draw upon each other's concepts to devise their own doctrines. The legal doctrine that the punishment must fit the crime rests upon Jewish and Catholic doctrines of purgation and repentance. The theological doctrine of humanity's fallen sinful nature is rooted in legal concepts of agency, complicity, and vicarious liability.

Law and religion are methodologically related. Both have developed analogous hermeneutical methods, modes of interpreting their authoritative texts. Both have developed logical methods, modes of deducing precepts from principles, of reasoning from analogy and precedent. Both have developed ethical methods, modes of molding their deepest values and beliefs into prescribed or preferred habits of conduct. Both have developed forensic and rhetorical methods, modes of arranging and presenting arguments and data. Both have developed methods of adducing evidence and adjudicating disputes. Both have developed methods of organizing, systematizing, and teaching their subject matters. These methods have constantly cross-fertilized each other; indeed the same method is often simply applied to both legal and religious subjects. For example, the medieval dialectical method, of harmonizing contradictory legal and theological texts from the tradition emerged almost simultaneously in the twelfth century -- with Gratian's 1140 *Concordance of Discordant Canons* and Peter Lombard's 1150 *Book of Sentences*. The early modern "topical" methods of arranging theological and legal data under rhetorical and analytical loci or topoi emerged simultaneously among early Protestant theologians and jurists.

These and other forms of interaction have helped to render the spheres and sciences of law and religion dependent on each other -- indeed, as Harold Berman puts it, as "dimensions" of each other. On the one hand, law gives religion its structure -- the order and orthodoxy that it needs to survive and to flourish in society. Legal "habits of the heart" structure the inner spiritual life and discipline of religious believers, from the reclusive hermit to the aggressive zealot. Legal ideas of justice, order, atonement, restitution, responsibility, fault, obligation, and others pervade the theological doctrines of many religious traditions. Legal structures and processes -- the Jewish Halacha, the Christian canon law, the Muslim Shari'a, and others -- define and govern religious communities and their distinctive beliefs and rituals, mores and morals, translating their enduring principles of faith into evolving precepts of works.

On the other hand, religion gives law its spirit -- the sanctity and authority it needs to command obedience and respect. Religion inspires the rituals of the courtroom, the decorum of the legislature, the pageantry of the executive office, all of which aim to celebrate and confirm the truth and justice of the law. Religion

gives law its structural fairness, its "inner morality," as Lon Fuller called it. Legal rules and sanctions, just like divine laws and promises, are publicly proclaimed, popularly known, uniform, stable, understandable, prospectively applied, consistently enforced. Religion gives law its respect for tradition, for the continuity of institutions, language, and practice, for precedent and preservation. Just as religion has the Talmudic tradition, the Christian tradition, and the Islamic tradition, so law has the common law tradition, the civil law tradition, the constitutional tradition. As in religion, so in law, we abandon the time-tested practices of the past only with trepidation, only with explanation. Religion gives law its authority and legitimacy, by inducing in citizens and subjects a reverence for law and structures of authority. Like religion, law has written or spoken sources, texts or oracles, which are considered to be decisive in themselves. Religion has the Bible and the Torah and the pastors and rabbis who expound them. Law has the constitutions and the statutes and the judges and agencies that apply them.

Law and religion, therefore, are two great interlocking systems of values and belief. They have their own sources and structures of normativity and authority, their own methods and measures of enforcement and amendment, their own rituals and habits of conceptualization and celebration of values. These spheres and sciences of law and religion exist in a dialectical harmony. They share many elements, many concepts, and many methods. They also balance each other by counterpoising justice and mercy, rule and equity, orthodoxy and liberty, discipline and love.

The Challenges of Christian Jurisprudence

Happily, in recent years, American legal education has become more open to studying the religious sources and dimensions of law. The Association of American Law Schools, the professional guild to which most American law professors belong, now has a substantial section of members on law and religion, and growing sections on Jewish law and Christian law. The *Index to Legal Periodical Literature* recently added "religion" as a legitimate subject under which to categorize articles. The libraries of our law schools and state bars now regularly carry stock periodicals like the *Journal of Law and Religion* and the *Journal of Church and State*, as well as a growing list of monographs, handbooks, and casebooks on law and religion. Virtually all law schools now have at least a basic course on religious liberty or church-state relations. A growing number of law schools now also teach courses in Christian canon law, Jewish law, Islamic law, and natural law, and include serious consideration of religious materials in their treatment of legal ethics, legal history, jurisprudence, law and literature, legal anthropology, comparative law, environmental law, family law, human rights, and other basic courses. Several schools now have burgeoning interdisciplinary programs in law and religion and law and ethics.

Religion is no longer just the hobbyhorse of isolated and peculiar professors principally in their twilight years. It is no longer just the preoccupation of religiously-chartered law schools. Religion now stands alongside economics, philosophy, literature, politics, history, and other disciplines as a valid and valuable conversation partner with law.

Catholic and Protestant scholars have been among the leaders of this law and religion movement in American legal education -- along with substantial numbers of Jewish and Muslim scholars, and a growing number of specialists on Asian and Traditional religions. Legal scholars from these various religious traditions have already learned a great deal from each other and have cooperated in developing richer understanding of sundry legal and political subjects. This comparative and cooperative interreligious inquiry into fundamental issues of law, politics, and society needs to continue -- especially in our day of increasing interreligious conflict and misunderstanding.

Christian scholars of law and religion, however, face some distinct challenges and opportunities in this new century that are worth spelling out. One major challenge is for Western Catholics and Protestants to make room for our brothers and sisters in the Eastern Orthodox Christian tradition. Many leading Orthodox lights dealt with fundamental questions of law, politics, and society with novel insight, often giving a distinct reading and rendering of the biblical, apostolic, and patristic sources that Christians have in common. Moreover, the Orthodox Church has immense spiritual resources and experiences whose implications are only now beginning to be seen. These spiritual resources lie, in part, in Orthodox worship -- the passion of the liturgy, the pathos of the icons, the power of spiritual silence. They lie, in part, in Orthodox church life -- the distinct balancing between hierarchy and congregationalism through autocephaly, between uniform worship and liturgical freedom through alternative vernacular rites, between community and individuality through a trinitarian communalism, centered on the parish, on the extended family, on the wizened grandmother (the "babushka" in Russia). And these spiritual resources lie, in part, as James Billington reminds us, in the massive martyrdom of millions of Orthodox faithful in the last century -- whether suffered by Russian Orthodox under the Communist Party, by Greek and Armenian Orthodox under Turkish and Iranian radicals, by Middle Eastern Copts at the hands of religious extremists, or by North African Orthodox under all manner of fascist autocrats and tribal strongmen.

These deep spiritual resources of the Orthodox Church have no exact parallels in modern Catholicism and Protestantism, and most of their implications for law, politics, and society have still to be drawn out. It would be wise to hear what an ancient church, newly charred and chastened by decades of oppression and martyrdom, considers essential to the regime of human rights. It would be enlightening to watch how ancient Orthodox communities, still largely centered on the parish and the family, will reconstruct Christian theories of society and

political order. It would be instructive to listen how a tradition, that still celebrates spiritual silence as its highest virtue, might recast the meaning of freedom of speech and expression. And it would be illuminating to feel how a people, that has long cherished and celebrated the role of the woman -- the wizened babushka of the home, the faithful remnant in the parish pews, the living icon of the Assumption of the Mother of God -- might elaborate the meaning of gender equality.

A second challenge is make Christian teachings on law, politics, and society more concrete. In centuries past, the Catholic, Protestant, and Orthodox traditions alike produced massive codes of canon law and church discipline that covered many areas of private and public life. They instituted sophisticated tribunals for the equitable enforcement of these laws. They produced whole shelves of books on political theology and theological jurisprudence, with ample handholds in catechisms, creeds, and confessional books to guide the faithful. Some of that sophisticated legal and political work still goes in parts of the Christian church today. Modern Christian ethicists still take up some of the old questions. Some Christian jurists have contributed to current discussion of human rights, family law, legal ethics, and church-state relations. But the legal structure and sophistication of the modern Christian church as a whole is a pale shadow of what went on before. It needs to be restored lest the church lose its capacity for Christian self-rule, and its members lose their capacity to serve as responsible Christian "prophets, priests, and kings."

A third challenge is for modern Catholic, Protestant, and Orthodox Christians to develop a rigorous ecumenical understanding of law, politics, and society. This is a daunting task. It is only in the past three decades, with the collapse of Communism and the rise of globalization, that these three ancient warring sects of Christianity have begun to come together and have begun to understand each other. It will take many generations more to work out the great theological disputes over the nature of the Trinity or the doctrine of justification by faith. But there is more confluence, than conflict, in Catholic, Protestant, and Orthodox understandings of law, politics, and society, especially if they are viewed in long and responsible historical perspective. Scholars from these three great Christian traditions need to come together to work out a comprehensive new ecumenical "concordance of discordant canons" that draws out the best of these traditions, that is earnest about its ecumenism, and that is honest about the brightest flashpoints of tension. Few studies would do more both to spur the great project of Christian ecumenism and to drive modern churches to get their legal houses in order.

A final, and perhaps the greatest, challenge of all will be to join the principally Western Christian story of law, politics, and society known in North America with comparable stories that are told in the rest of the Christian world. Over the past two centuries, Christianity has become very much a world religion--

claiming nearly two billion souls. Strong new capitals and captains of Christianity now stand in the south and the east -- in Africa, in the Middle East, in Korea, China, the Indian subcontinent, and beyond. In some of these new zones of Christianity, the Western Christian classics are still being read and studied. But rich new indigenous forms and norms of law, politics, and society are also emerging, premised on very different Christian understandings of theology and anthropology and very different interpretations of Scripture and tradition. It would take a special form of cultural arrogance for Western and non-Western Christians to refuse to learn from each other.

John Witte, Jr. is Director of the Center for the Study of Law and Religion at Emory University in Atlanta. This text is adapted from his 2004 lecture at the John Paul II Cultural Center in Washington DC and his Introduction to The Teachings of Modern Christianity on Law, Politics, and Human Nature, 2 vols., forthcoming from Columbia University Press