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7 **Law and Religion: The Challenges of Christian Jurisprudence**

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10 **Abstract**

11 *This article is both an apologia and agenda for the interdisciplinary study of*
12 *law and religion, especially the Christian religion. Briefly tracing the rise of the*
13 *contemporary interdisciplinary legal studies movement against the backdrop of legal*
14 *positivism, the article argues that legal studies must take full account of the religious*
15 *sources and dimensions of law. Law and religion are two great interlocking systems*
16 *of values and belief with their own sources and structures of normativity and*
17 *authority, their own methods and measures of enforcement and amendment, and*
18 *their own rituals and habits of conceptualization and celebration of values. Yet, they*
19 *share many elements, many concepts, and many methods. They balance each other*
20 *by counterpoising justice and mercy, rule and equity, orthodoxy and liberty,*
21 *discipline and love. Though Christian jurists, theologians, and ethicists have made*
22 *monumental contributions to this burgeoning field of law and religion study, this*
23 *article addresses several challenges that lie before them in this new century,*
24 *including the need to look to neglected traditions and times and to engender a more*
25 *ecumenical and concrete Christian jurisprudence.*

26 **Keywords:** jurisprudence, law, religion, Christianity, positivism

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¹ I presented an earlier draft of this text on September 30, 2004 in the lecture series that was generously sponsored by the John Paul II Cultural Center at Catholic University of America and graciously hosted by Professor Patrick M. Brennan. I have drawn portions of this text from the Introduction to *Modern Christian Teachings on Law, Politics, Society, and Human Nature*, ed. John Witte, Jr. and Frank S. Alexander, 2 vols. (New York/London: Columbia University Press, 2005). I would like to thank Professors Alexander and Brennan, as well as Professors Don S. Browning, Martin E. Marty, and Timothy P. Jackson for their helpful criticisms and suggestions.

Legal Positivism and the Rise of Interdisciplinary Legal Study

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31 "The better the society, the less law there will be. In Heaven there will be no
32 law, and the lion will lie down with the lamb.... In Hell there will be nothing but law,
33 and due process will be meticulously observed."² So wrote Grant Gilmore to
34 conclude his *Ages of American Law*. Gilmore crafted this catchy couplet to capture
35 the pessimistic view of law, politics, and society made popular by the American jurist
36 and Supreme Court Justice Oliver Wendell Holmes, Jr. (1841-1935). Contrary to the
37 conventional portrait of Holmes as the sage and sartorial "Yankee from Olympus,"³
38 Gilmore portrayed Holmes as a "harsh and cruel" man, chastened and charred by
39 the savagery of the American Civil War and by the gluttony of the Industrial
40 Revolution. These experiences, Gilmore argued, had made Holmes "a bitter and
41 lifelong pessimist who saw in the course of human life nothing but a continuing
42 struggle in which the rich and powerful impose their will on the poor and the weak."⁴
43 The cruel excesses of the Bolshevik Revolution, World War I, and the Great
44 Depression in the first third of the twentieth century only confirmed Holmes in his
45 pessimism that human life was "without values."⁵

46 This bleak view of human nature shaped Holmes' bleak view of law, politics,
47 and society. Holmes regarded law principally as a barrier against human depravity -
48 - a means to check the proverbial "bad man" against his worst instincts and to make
49 him pay dearly if he yielded to temptation.⁶ Holmes also regarded law as a buffer
50 against human suffering -- a means to protect the vulnerable against the worst
51 exploitation by corporations, churches, and Congress. For Holmes, there was no
52 higher law in heaven to guide the law below. There was no path of legal virtue up
53 which a man should go. For Holmes, the "path of the law" cut a horizontal line
54 between heaven and hell, between human sanctity and depravity. Law served to
55 keep society and its members from sliding into the abyss of hell. But it could do
56 nothing to guide its members in their ascent to heaven.

57 Holmes was the "high priest" of a new "age of faith" in American law, Gilmore
58 wrote with intended irony, that replaced an earlier era dominated by the church and
59 the clergy.⁷ The confession of this new age of faith was that America was a land
60 "ruled by laws, not by men." Its catechism was the new case law method of the law
61 school classroom. Its canon was the new concordance of legal codes, amply
62 augmented by New Deal legislation. Its church was the common law court where

² Grant Gilmore, *The Ages of American Law* (New Haven/London: Yale University Press, 1977), 110-11.

³ Catherine Drinker Bowen, *Yankee From Olympus: Justice Holmes and His Family* (Boston: Little, Brown, and Company, 1944).

⁴ Gilmore, *Ages of American Law*, 48-56, 110, 147 n.12.

⁵ Albert W. Alschuler, *Life Without Values: The Life, Work and Legacy of Justice Holmes* (Chicago: University of Chicago Press, 2000).

⁶ Oliver Wendell Holmes, Jr., *The Path of the Law* [1897], in id., *Collected Legal Papers* (New York: Harcourt, Brace and Howe, 1920), 170.

⁷ Gilmore, *Ages of American Law*, 41-67

63 the rituals of judicial formalism and due process would yield legal truth. Its church
64 council was the Supreme Court which now issued opinions with as much dogmatic
65 confidence as the divines of Nicea, Augsburg, and Trent.

66 This new age of faith in American law was in part the product of a new faith in
67 the positivist theory of knowledge that swept over America in the later nineteenth
68 and twentieth centuries, eclipsing earlier theories of knowledge that gave religion
69 and the church a more prominent place. In law, the turn to positivism proceeded in
70 two stages. The first stage was scientific. Inspired by the successes of the early
71 modern scientific revolution--from Copernicus to Newton--eighteenth-century
72 European and nineteenth-century American jurists set out to create a method of law
73 that was every bit as scientific and rigorous as that of the new mathematics and the
74 new physics. This scientific movement in law was not merely an exercise in
75 professional rivalry. It was an earnest attempt to show that law had an autonomous
76 place in the cadre of positive sciences, that it could not and should not be subsumed
77 by theology, politics, philosophy, or economics.⁸ In testimony to this claim, jurists in
78 this period poured forth a staggering number of new legal codes, new constitutions,
79 new legal encyclopedias, dictionaries, textbooks, and other legal syntheses that still
80 grace, and bow, the shelves of our law libraries.

81 The second stage of the positivist turn in law was philosophical. A new
82 movement--known variously as legal positivism, legal formalism, and analytical
83 jurisprudence--sought to reduce the subject matter of law to its most essential core.
84 If physics could be reduced to "matter in motion" and biology to "survival of the
85 fittest," then surely law and legal study could be reduced to a core subject as well.
86 The formula was produced in the mid-nineteenth century--most famously by John
87 Austin in England and Christopher Columbus Langdell in America: Law is simply the
88 concrete rules and procedures posited by the sovereign, and enforced by the courts.
89 Many other institutions and practices might be normative and important for social
90 coherence and political concordance. But they are not law. They are the subjects of
91 theology, ethics, economics, politics, psychology, sociology, anthropology, and other
92 humane disciplines.⁹ They stand beyond the province of "jurisprudence properly
93 determined."¹⁰

94 This positivist theory of law, which swept over American universities from the
95 1890s onward, rendered legal study increasingly narrow and insular. Law was
96 simply the sovereign's rules. Legal study was simply the analysis of the rules that
97 were posited, and their application in particular cases. Why these rules were

⁸ I. Bernard Cohen, *Revolution in Science* (Cambridge, MA/London: Harvard University Press, 1985); Donald R. Kelly, *The Human Measure: Social Thought in the Western Legal Tradition* (Cambridge/London: Harvard University Press, 1990).

⁹ See esp. John Austin, *The Province of Jurisprudence Determined, Being the First of a Series of Lectures on Jurisprudence, or, The Philosophy of Positive Law*, 2d. ed., 3 vols. (London: J. Murray 1861-63); Christopher Columbus Langdell, *A Selection of Cases on the Law of Contracts*, 2d ed. (Boston: Little, Brown, and Company, 1879), preface; id., "Harvard Celebration Speeches," *Law Quarterly Review* 3 (1887): 123.

¹⁰ Austin, *The Province of Jurisprudence Determined*.

98 posited, whether their positing was for good or ill, how these rules affected society,
99 politics, or morality were not relevant questions for legal study.¹¹ By the early
100 twentieth century, it was rather common to read in legal textbooks that law is an
101 autonomous science, that its doctrines, language, and methods are self-sufficient,
102 that its study is self-contained.¹² It was rather common to think that law has the
103 engines of change within itself; that, through its own design and dynamic, law
104 marches teleologically through time "from trespass to case to negligence, from
105 contract to quasi-contract to implied warranty."¹³

106 Holmes was an early champion of this positivist theory of law and legal
107 development. He rebuked more traditional views with a series of famous aphorisms
108 that are still often quoted today. Against those who insisted that the legal tradition
109 was more than simply a product of pragmatic evolution, he wrote: "The life of the law
110 is not logic but experience."¹⁴ Against those who appealed to a higher natural law to
111 guide the positive law of the state, Holmes cracked: "There is no such brooding
112 omnipresence in the sky."¹⁵ Against those who argued for a more principled
113 jurisprudence, Holmes retorted: "General principles do not decide concrete cases."¹⁶
114 Against those who insisted that law needed basic moral premises to be cogent,
115 Holmes mused: "I should be glad if we could get rid of the whole moral phraseology
116 which I think has tended to distort the law. In fact even in the domain of morals I
117 think that it would be a gain, at least for the educated, to get rid of the word and
118 notion [of] Sin."¹⁷

119 Despite its new prominence in the early twentieth century, American legal
120 positivism was not without its ample detractors. Already in the 1920s and 1930s,
121 sociologists of law argued that the nature and purpose of law and politics cannot be
122 understood without reference to the spirit of a people and their times--of a *Volksgeist*
123 *und Zeitgeist* as their German counterparts put it.¹⁸ The legal realist movement of
124 the 1930s and 1940s used the new insights of psychology and anthropology to cast

¹¹ See, e.g., John Wigmore, "Nova Methodus Discendae Docendaeque Jurisprudentiae," *Harvard Law Review* 30 (1917): 812; Oliver Wendell Holmes, Jr., "Learning and Science," and "Law in Science, Science in Law," in id., *Collected Legal Papers*, 139, 231; Robert Stevens, *Law School: Legal Education in America from the 1850s to 1980s* (Chapel Hill/London: University of North Carolina Press, 1983).

¹² See samples in Jerome Hall, *Readings in Jurisprudence* (Indianapolis: Bobbs-Merrill, 1938).

¹³ Barbara Shapiro, "Law and Science in Seventeenth-Century England," *Stanford Law Review* 21 (1969): 724, 728.

¹⁴ Oliver Wendell Holmes, Jr., *The Common Law* (Boston: Little, Brown and Company, 1881), 1.

¹⁵ *S. Pac. Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J. dissenting); see also Michael H. Hoffheimer, *Justice Holmes and the Natural Law* (New York: Garland Publishing, 1992).

¹⁶ *Lochner v. New York*, 198 U.S. 45, 76 (1905).

¹⁷ Letter to Sir Frederick Pollock (May 30, 1927) in *Holmes-Pollock Letters: The Correspondence of Mr. Justice Holmes and Sir Frederick Pollock, 1874-1932*, ed. Mark DeWolfe Howe, 2 vols. (Cambridge, Mass.: Harvard University Press 1941), 2:200.

¹⁸ See, e.g., Julius Stone, *The Province and Function of Law: Law as Logic, Justice, and Social Control* (London: Stevens, 1947); Gustav Radbruch, *Der Geist des englischen Recht* (Heidelberg: A. Rausch, 1946).

125 doubt on the immutability and ineluctability of judicial reasoning.¹⁹ The revived
126 natural law movement of the 1940s and 1950s saw in the horrors of Hitler's
127 Holocaust and Stalin's gulags, the perils of constructing a legal system without
128 transcendent checks and balances.²⁰ The international human rights movement of
129 the 1950s and 1960s pressed the law to address more directly the sources and
130 sanctions of civil, political, social, cultural, and economic rights.²¹ Marxist, feminist,
131 and neo-Kantian movements in the 1960s and 1970s used linguistic and structural
132 critiques to expose the fallacies and false equalities of legal and political doctrines.²²
133 Watergate and other political scandals in the 1970s and 1980s highlighted the need
134 for a more comprehensive understanding of legal ethics and political accountability.

135 By the early 1970s, the confluence of these and other movements had
136 exposed the limitations of a positivist definition of law standing alone. Leading jurists
137 of the day--Lon Fuller, Jerome Hall, Karl Llewellyn, Harold Berman, and others--
138 were pressing for a broader understanding and definition of law.²³ Of course, they
139 said in concurrence with legal positivists, law consists of rules--the black letter rules
140 of contracts, torts, property, corporations, and sundry other familiar subjects. Of
141 course, law draws to itself a distinctive legal science, an "artificial reason," as Sir
142 Edward Coke once put it.²⁴ But law is much more than the rules of the state and
143 how we apply and analyze them. Law is also the social activity by which certain
144 norms are formulated by legitimate authorities and actualized by persons subject to
145 those authorities. The process of legal formulation involves legislating, adjudicating,
146 administering, and other conduct by legitimate officials. The process of legal
147 actualization involves obeying, negotiating, litigating, and other conduct by legal
148 subjects. Law is rules, plus the social and political processes of formulating,
149 enforcing, and responding to those rules.²⁵ Numerous other institutions, besides the
150 state, are involved in this legal functionality. The rules, customs, and processes of
151 churches, colleges, corporations, clubs, charities, and other non-state associations

¹⁹ See generally, *American Legal Realism*, ed. W.W. Fisher, Morton Horwitz, Thomas Reed (New York: Oxford University Press, 1993); Wilfred E. Rumble, *American Legal Realism: Skepticism, Reform, and the Judicial Process* (Ithaca, NY: Cornell University Press, 1968)

²⁰ Charles Grove Haines, *The Revival of Natural Law Concepts* (New York: Russell & Russell, 1965); Roscoe Pound, *The Revival of Natural Law* (Notre Dame: University of Notre Dame Press, 1942).

²¹ *Religious Human Rights in Global Perspective*, ed. John Witte, Jr. and Johan D. van der Vyver, 2 vols., (The Hague/Boston: Martinus Nijhoff, 1996).

²² See generally *At the Boundaries of Law: Feminism and Legal Theory*, ed. Martha Albertson Fineman and Nancy Sweet Thomadsen (New York: Routledge, 1990); Ernst Cassirer, *Der Mythos der Staates: Philosophische Grundlagen politischen Verhaltens*, 2d. ed. (Zurich: Artemis Verlag, 1978).

²³ See esp. Karl Llewellyn, *Jurisprudence* (Chicago: University of Chicago Press, 1962); Lon L. Fuller, *The Morality of Law*, rev. ed. (New Haven, CT: Yale University Press, 1964); Jerome Hall, *Studies in Jurisprudence and Criminal Theory* (New York: Oceana Publishers, 1958); id., *Foundations of Jurisprudence* (Indianapolis: Bobbs-Merrill, 1973); Harold J. Berman, *The Interaction of Law and Religion* (Nashville, TN: Abingdon Press, 1974).

²⁴ Anthony Lewis, "Sir Edward Coke (1552-1633): His Theory of 'Artificial Reason' as a Context for Modern Basic Legal Theory," *Law Quarterly Review* 84 (1968), 330.

²⁵ See Harold J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Cambridge, MA: Harvard University Press, 1983), 4ff. Jerome Hall, *Comparative Law and Social Theory* (Baton Rouge, LA: Louisiana State University Press, 1963), 78ff.

152 are just as much a part of a society's legal system as those of the state. Numerous
153 other norms, besides legal rules, are involved in the legal process. Rule and
154 obedience, authority and liberty are exercised out of a complex blend of concerns,
155 conditions, and character traits -- class, gender, persuasion, piety, charisma,
156 clemency, courage, moderation, temperance, force, faith, and more.

157 Legal positivism could not, by itself, come to terms with law understood in this
158 broader sense. In the last third of the twentieth century, American jurists thus began
159 to (re)turn with increasing alacrity to the methods and insights of other disciplines to
160 enhance their formulations. This was the birthing process of the modern movement
161 of interdisciplinary legal study. The movement was born to enhance the province
162 and purview of legal study, to refigure the roots and routes of legal analysis, to
163 render more holistic and realistic our appreciation of law in community, in context, in
164 concert with politics, social sciences, and other disciplines.²⁶ In the 1970s, a number
165 of interdisciplinary approaches began to enter the mainstream of American legal
166 education--combining legal study with the study of philosophy, economics, medicine,
167 politics, and sociology. In the 1980s and 1990s, new interdisciplinary legal
168 approaches were born in rapid succession--the study of law coupled with the study
169 of anthropology, literature, environmental science, urban studies, women's studies,
170 gay-lesbian studies, and African-American studies. And, importantly for our
171 purposes, in these last two decades, the study of law was also recombined with the
172 study of religion, including Christianity.

173 In 1960, the catalogues of the 30 leading law schools listed a total of 56
174 interdisciplinary legal courses; by 2000, the number of such courses in these 30
175 schools had increased to 812.²⁷ In 1960, law libraries stocked six interdisciplinary
176 legal journals; in 2000, the number of interdisciplinary legal journals had increased to
177 136, with many other traditional journals suffused with interdisciplinary articles.²⁸
178 The pendulum of the law has swung a long way from the predominantly positivist
179 position of two generations ago. .

180 The pendulum might well have swung too far. The interdisciplinary legal
181 studies movement was born in an effort to integrate legal studies--both internally
182 among its own subjects, and externally among the other disciplines. It is still doing
183 that in some quarters. But in other quarters, ironically, integration is giving way to

²⁶ See, e.g., Richard A. Posner, "The Present Situation in Legal Scholarship," *Yale Law Journal* 90 (1981): 1113; Robert C. Clark, "The Interdisciplinary Study of Legal Evolution," *Yale Law Journal* 90 (1981): 1238; Symposium, "American Legal Scholarship: Directions and Dilemmas," *Journal of Legal Education* 33 (1983): 403.

²⁷ These numbers are based on a simple count of courses listed in the catalogues of the law schools at Harvard, Boston College, Boston University, Cornell, Yale, Pennsylvania, Columbia, New York University, Georgetown, George Washington, American, Virginia, William & Mary, Washington & Lee, Duke, Emory, Texas, Vanderbilt, North Carolina, Illinois, Notre Dame, Michigan, Chicago, Northwestern, Minnesota, Iowa, Stanford, Berkeley, UCLA, and USC. A more systematic curricular analysis was prepared for the American Bar Association by William B. Powers, *A Study of Contemporary Law School Curricula* (Chicago, 1987).

²⁸ See listing in Index to Legal Periodicals (1958-1961), 5-9 and Current Law Index (2000).

217 sources and systems of values and beliefs that have existed in all axial civilizations.
218 Law and religion, Justice Harry Blackmun once wrote, "are an inherent part of the
219 calculus of how a man should live" and how a society should run.³² To be sure, the
220 spheres and sciences of law and religion have, on occasion, both converged and
221 contradicted each other. Every religious tradition has known both theonomism and
222 antinomianism -- the excessive legalization and the excessive spiritualization of
223 religion. Every legal tradition has known both theocracy and totalitarianism -- the
224 excessive sacralization and the excessive secularization of law. But the dominant
225 reality in most eras and cultures is that law and religion stand in a dialectical
226 harmony, constantly crossing-over and cross-fertilizing each other. Every major
227 religious tradition strives to come to terms with law by striking a balance between the
228 rational and the mystical, the prophetic and the priestly, the structural and the
229 spiritual. Every legal tradition struggles to link its formal structures and processes
230 with the beliefs and ideals of its people. Law and religion are distinct spheres and
231 sciences of human life, but they exist in dialectical interaction, constantly crossing-
232 over and cross-fertilizing each other.

233 It is these points of cross-over and cross-fertilization that are the special
234 province of the interdisciplinary field of law and religion, and the special opportunity
235 for Christian reflection. How do legal and religious ideas and institutions, methods
236 and mechanisms, beliefs and believers influence each other -- for better and for
237 worse, in the past, present, and future? These are the cardinal questions that the
238 burgeoning field of law and religion has set out to answer. Over the past generation
239 of scholarship, a number of tentative answers have become to come forth, focused
240 on the various modes of interaction between law and religion.³³

241 For example, law and religion are institutionally related -- principally in the
242 relation between church and state, but also in the relations among sundry other
243 religious and political groups. Jurists and theologians have worked hand-in-hand,
244 and sometimes combatted hand-to-hand, to define the proper relation between
245 these religious and political groups, to determine their respective responsibilities, to
246 facilitate their cooperation, to delimit the forms of support and protection one can
247 afford the other. Many of the great Western constitutional doctrines of church and
248 state—the two cities theory of Augustine, the two powers theory of Gelasius, the two
249 swords theory of the High Middle Ages, the two kingdoms theory of the Protestant
250 Reformation—are rooted in both civil law and canon law, in theological jurisprudence
251 and political theology.³⁴ Much of our American constitutional law of church and state
252 is the product both of Enlightenment legal and political doctrine and of Christian

³² Harry A. Blackmun, "Foreword," to *The Weightier Matters of the Law: Essays on Law and Religion*, ed. John Witte, Jr. and Frank S. Alexander (Atlanta: Scholars Press, 1988), ix.

³³ See, e.g., F.C. DeCoste and Lillian MacPherson, eds., *Law, Religion, and Theology: A Selective Annotated Bibliography* (West Cornwall, CT, 1997) (a 326 page listing); *Journal of Law and Religion* 11 and 12 (2000-2001) (a comprehensive review of scholarship on law and religion published in the 1990s).

³⁴ See generally Sidney Z. Ehler and John B. Morrall, *Church and State Through the Centuries* (Lanham, MD: Westminster Press, 1954).

253 theological and moral dogma.³⁵

254 Law and religion are conceptually related. Both disciplines draw upon the
255 same underlying concepts about the nature of being and order, of the person and
256 community, of knowledge and truth. Both law and religion embrace closely
257 analogous concepts of sin and crime, covenant and contract, redemption and
258 rehabilitation, righteousness and justice that invariably combine in the mind of the
259 legislator, judge, or juror.³⁶ The modern legal concept of crime, for example, has
260 been shaped by an ancient Jewish and medieval Catholic theology of sin.³⁷ The
261 modern legal concept of absolutely obligating contracts was forged in the crucible of
262 Puritan covenant theology.³⁸ The modern legal concept of the purposes of
263 punishment are rooted in Catholic doctrines of the causes of natural law and
264 Protestant doctrines of the uses of moral law.³⁹ Both law and religion draw upon
265 each other's concepts to devise their own doctrines. The legal doctrine that the
266 punishment must fit the crime rests upon Jewish and Catholic doctrines of purgation
267 and repentance.⁴⁰ The theological doctrine of humanity's fallen sinful nature is
268 rooted in legal concepts of agency, complicity, and vicarious liability.

269 Law and religion are methodologically related. Both have developed
270 analogous hermeneutical methods, modes of interpreting their authoritative texts.
271 Both have developed logical methods, modes of deducing precepts from principles,
272 of reasoning from analogy and precedent. Both have developed ethical methods,
273 modes of molding their deepest values and beliefs into prescribed or preferred
274 habits of conduct. Both have developed forensic and rhetorical methods, modes of
275 arranging and presenting arguments and data. Both have developed methods of
276 adducing evidence and adjudicating disputes. Both have developed methods of
277 organizing, systematizing, and teaching their subject matters. These methods have
278 constantly cross-fertilized each other; indeed the same method is often simply
279 applied to both legal and religious subjects.⁴¹ For example, the medieval dialectical
280 method, of harmonizing contradictory legal and theological texts from the tradition
281 emerged almost simultaneously in the twelfth century—with Gratian's 1140

³⁵ John Witte, Jr., *Religion and the American Constitutional Experiment*, 2d ed. (Boulder/London: Westview Press, 2005), chaps 1-5.

³⁶ Mark C. Modak-Truran, "Corrective Justice and the Revival of Judicial Virtue," *Yale Journal of Law and the Humanities* 12 (2004): __; Symposium, "Religion and the Judicial Process: Legal, Ethical, and Empirical Dimensions," *Marquette Law Review* 81 (1998): 177-567.

³⁷ Jeffrie C. Murphy and Patrick M. Brennan, eds., "Special Issue on Religion and the Criminal Law: Legal and Philosophical Perspectives," *Punishment and Society: The International Journal of Penology* 5 (2003):259-365.

³⁸ See, e.g., Harold J. Berman, "The Religious Sources of General Contract Law: An Historical Perspective," *Journal of Law and Religion* 4 (1986): 103.

³⁹ See, e.g., John Witte, Jr. and Thomas C. Arthur, "The Three Uses of the Law: A Protestant Source of the Purposes of Criminal Punishment?" *Journal of Law and Religion* 10 (1994): 433

⁴⁰ Patrick M. Brennan, "On What Sin (and Grace) Can Teach Crime," *Punishment and Society: The International Journal of Penology* 5 (2003):347.

⁴¹ See, e.g., Jaroslav Pelikan, *Interpreting the Bible and the Constitution* (New Haven/London: Yale University Press, 2004); Wolfgang Fikentscher, *Modes of Thought: A Study of the Anthropology of Law and Religion* (Tübingen: J.C.B. Mohr, 1995).

282 *Concordance of Discordant Canons* and Peter Lombard's 1150 *Book of*
283 *Sentences*.⁴² The early modern "topical" methods of arranging theological and legal
284 data under rhetorical and analytical loci or topoi emerged simultaneously among
285 early Protestant theologians and jurists.⁴³

286 These and other forms of interaction have helped to render the spheres and
287 sciences of law and religion dependent on each other -- indeed, as Harold Berman
288 puts it, as "dimensions" of each other.⁴⁴ On the one hand, law gives religion its
289 structure -- the order and orthodoxy that it needs to survive and to flourish in society.
290 Legal "habits of the heart" structure the inner spiritual life and discipline of religious
291 believers, from the reclusive hermit to the aggressive zealot.⁴⁵ Legal ideas of
292 justice, order, atonement, restitution, responsibility, obligation, and others pervade
293 the theological doctrines of many religious traditions. Legal structures and
294 processes -- the Halacha in Judaism, the canon law in Christianity, the Shari'a in
295 Islam -- define and govern religious communities and their distinctive beliefs and
296 rituals, mores and morals.

297 On the other hand, religion gives law its spirit -- the sanctity and authority it
298 needs to command obedience and respect. Religion inspires the rituals of the court
299 room, the decorum of the legislature, the pageantry of the executive office, all of
300 which aim to celebrate and confirm the truth and justice of the law.⁴⁶ Religion gives
301 law its structural fairness, its "inner morality," as Lon Fuller called it. Legal rules and
302 sanctions, just like divine laws and promises, are publicly proclaimed, popularly
303 known, uniform, stable, understandable, prospectively applied, consistently
304 enforced.⁴⁷ Religion gives law its respect for tradition, for the continuity of
305 institutions, language, and practice, for precedent and preservation. Just as religion
306 has the Talmudic tradition, the Christian tradition, and the Islamic tradition, so law
307 has the common law tradition, the civil law tradition, the constitutional tradition. As in
308 religion, so in law, we abandon the time-tested practices of the past only with
309 trepidation, only with explanation. Religion gives law its authority and legitimacy, by
310 inducing in citizens and subjects a reverence for law and structures of authority. Like
311 religion, law has written or spoken sources, texts or oracles, which are considered to
312 be decisive in themselves. Religion has the Bible and the Torah and the pastors
313 and rabbis who expound them. Law has the constitutions and the statutes and the
314 judges and agencies that apply them.

315 Law and religion, therefore, are two great interlocking systems of values and

⁴² Berman, *Law and Revolution*, 120-164.

⁴³ John Witte, Jr., *Law and Protestantism: The Legal Teachings of the Lutheran Reformation* (Cambridge/London: Cambridge University Press, 2002), 119-176; Theodor Viehweg, *Topics and Law*, trans. and ed. W. Cole Durham, Jr. (Frankfurt am Main: Peter Lang, 1993).

⁴⁴ See, e.g., Harold J. Berman, *Faith and Order: The Reconciliation of Law and Religion* (Atlanta: Scholars Press, 1993), 1-29

⁴⁵ Robert N. Bellah, et al., *Habits of the Heart: Individualism and Commitment in American Life* (New York: Perennial Library, 1986).

⁴⁶ Berman, *Faith and Order*, 1-29

⁴⁷ Fuller, *The Morality of the Law*, 33-94.

316 belief. They have their own sources and structures of normativity and authority, their
317 own methods and measures of enforcement and amendment, their own rituals and
318 habits of conceptualization and celebration of values. These spheres and sciences
319 of law and religion exist in dialectical harmony. They share many elements, many
320 concepts, and many methods. They also balance each other by counterpoising
321 justice and mercy, rule and equity, orthodoxy and liberty, discipline and love.
322 Without law, religion decays into shallow spiritualism. Without religion, law decays
323 into empty formalism.⁴⁸

324 **The Challenges of Christian Jurisprudence in the Twenty-First Century**

325 Happily, in recent years, American legal education has become more open to
326 studying the religious sources and dimensions of law. The Association of American
327 Law Schools, the professional guild to which most American law professors belong,
328 now has a substantial section of members on law and religion, and growing sections
329 on Jewish law and Christian law. The *Index to Legal Periodical Literature* recently
330 added "religion" as a legitimate subject under which to categorize articles. The
331 libraries of our law schools and state bars now regularly carry stock periodicals like
332 the *Journal of Law and Religion* and the *Journal of Church and State*, as well as a
333 growing list of monographs, handbooks, and casebooks on law and religion.
334 Virtually all law schools now have at least a basic course on religious liberty or
335 church-state relations. A growing number of law schools now also teach courses in
336 Christian canon law, Jewish law, Islamic law, and natural law, and include serious
337 consideration of religious materials in their treatment of legal ethics, legal history,
338 jurisprudence, law and literature, legal anthropology, comparative law,
339 environmental law, family law, human rights, and other basic courses. Several
340 schools now have burgeoning interdisciplinary programs in law and religion and in
341 law, religion, and ethics. Religion is no longer just the hobbyhorse of isolated and
342 peculiar professors -- principally in their twilight years. It is no longer just the
343 preoccupation of religiously-chartered law schools. Religion now stands alongside
344 economics, philosophy, literature, politics, history, and other disciplines as a valid
345 and valuable conversation partner with law.

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

⁴⁸ See Harold J. Berman, *The Interaction of Law and Religion* (Nashville: Abingdon Press, 1974);
Howard O. Hunter, ed., *The Integrative Jurisprudence of Harold J. Berman* (Boulder/London:
Westview Press, 1996).

355 Christian scholars of law and religion, however, face some distinct challenges
356 and opportunities in this new century that are worth spelling out. A first challenge is
357 for us Western Catholics and Protestants to make room for our brothers and sisters
358 in the Eastern Orthodox Christian tradition. Many leading Orthodox lights dealt with
359 fundamental questions of law, politics, and society with novel insight, often giving a
360 distinct reading and rendering of the biblical, apostolic, and patristic sources that
361 Christians have in common.⁴⁹ Moreover, the Orthodox Church has immense
362 spiritual resources and experiences whose implications are only now beginning to be
363 seen. These spiritual resources lie, in part, in Orthodox worship -- the passion of the
364 liturgy, the pathos of the icons, the power of spiritual silence. They lie, in part, in
365 Orthodox church life -- the distinct balancing between hierarchy and
366 congregationalism through autocephaly, between uniform worship and liturgical
367 freedom through alternative vernacular rites, between community and individuality
368 through a trinitarian communalism, centered on the parish, on the extended family,
369 on the wizened grandmother (the "babushka" in Russia). And these spiritual
370 resources lie, in part, in the massive martyrdom of millions of Orthodox faithful in the
371 last century -- whether suffered by Russian Orthodox under the Communist Party, by
372 Greek and Armenian Orthodox under Turkish and Iranian radicals, by Middle
373 Eastern Copts at the hands of religious extremists, or by North African Orthodox
374 under all manner of fascist autocrats and tribal strongmen.⁵⁰

375 These deep spiritual resources of the Orthodox Church have no exact
376 parallels in modern Catholicism and Protestantism, and most of their implications for
377 law, politics, and society have still to be drawn out. It would be wise to hear what an
378 ancient church, newly charred and chastened by decades of oppression and
379 martyrdom, considers essential to the regime of human rights. It would be
380 enlightening to watch how ancient Orthodox communities, still largely centered on
381 the parish and the family, will reconstruct Christian theories of society. It would be
382 instructive to listen how a tradition, that still celebrates spiritual silence as its highest
383 virtue, might recast the meaning of freedom of speech and expression. And it would
384 be illuminating to feel how a people that has long cherished and celebrated the role
385 of the woman -- the wizened babushka of the home, the faithful remnant in the
386 parish pews, the living icon of the Assumption of the Mother of God -- might
387 elaborate the meaning of gender equality.

388 A second challenge is to trace the roots of these modern Christian teachings
389 into the earlier modern period of the seventeenth through early nineteenth centuries.
390 Scholars have written a great deal about patristic, scholastic, early Protestant, and
391 post-Tridentine Catholic contributions to law, politics, and society. But many of the
392 best accounts of the history of Christian legal, political, and social thought stop in

⁴⁹ See, e.g., the chapters by Paul Valliere, Vigen Guroian, Mikhail Kulakov, Michael Plekon, and Lucian Turcescu in *Modern Christian Teachings on Law, Politics, and Society*, supra note 1.

⁵⁰ See James H. Billington, "Orthodox Christianity and the Russian Transformation," in *Proselytism and Orthodoxy in Russia: The New War for Souls*, ed. John Witte, Jr. and Michael Bourdeaux (Maryknoll, NY: Orbis Books, 1999), 51; id., "The Case for Orthodoxy," *The New Republic* (May 30, 1994), 24.

393 1625. That was the year that the father of international law, Hugo Grotius, uttered
394 the impious hypothesis that law, politics, and society would continue even if “we
395 should concede that which cannot be conceded without the utmost wickedness, that
396 there is no God, or that the affairs of men are of no concern to him.”⁵¹ While many
397 subsequent writers conceded Grotius’ hypothesis, and embarked on the great
398 secular projects of the Enlightenment, many great Christian writers did not. They
399 have been forgotten to all but specialists. Their thinking on law, politics, and society
400 needs to be retrieved, restudied, and reconstructed for our day.

401 A third challenge is to make these modern Christian teachings on law,
402 politics, and society more concrete. In centuries past, the Catholic, Protestant, and
403 Orthodox traditions alike produced massive codes of canon law and church
404 discipline that covered many areas of private and public life. They instituted
405 sophisticated tribunals for the equitable enforcement of these laws. They produced
406 massive works of political theology and theological jurisprudence, with ample
407 handholds in catechisms, creeds, and confessional books to guide the faithful.
408 Some of that sophisticated legal and political work still goes in parts of the Christian
409 church today. Modern Christian ethicists still take up some of the old questions.
410 Some Christian jurists have contributed ably and amply to current discussion of
411 human rights, family law, and religious liberty. But the legal structure and
412 sophistication of the modern Christian church as a whole is a pale shadow of what
413 went on before. It needs to be restored lest the church lose its capacity for Christian
414 self-rule, and its members lose their capacity to serve as responsible Christian
415 “prophets, priests, and kings.”

416 The intensity and complexity of the modern culture wars over family,
417 education, charity, religious liberty, constitutional order, just war, and other cardinal
418 issues demand this kind of fundamental inquiry. Too often of late, Christians have
419 marched to the culture wars without ammunition – substituting nostalgia for
420 engagement, acerbity for prophecy, platitudes for principled argument. Too often of
421 late, Christians have been content to focus on small battles like prayers in schools
422 and Decalogues on courthouses, without engaging the great domestic and
423 international soul wars that currently beset us. The Church needs to reengage
424 responsibly the great legal, social, and political issues of our age, and to help
425 individual Christians participate in the public square in a manner that is neither
426 dogmatically shrill nor naively nostalgic but fully equipped with the revitalized
427 resources of the Bible and the Christian tradition.

428 A fourth challenge is for modern Catholic, Protestant, and Orthodox
429 Christians to develop a rigorous ecumenical understanding of law, politics, and
430 society. This is a daunting task. It is only in the past three decades, with the

⁵¹ Hugo Grotius, *De Iure Belli ac Pacis* (1625), Prolegomena, 11, quoted and discussed in Oliver O’Donovan and Joan Lockwood O’Donovan, *From Irenaeus to Grotius: Christian Political Thought, 100-1625* (Grand Rapids, MI: Wm. B. Eerdmans Publishing Co., 1999); Brian Tierney, *The Idea of Natural Rights: Studies on Natural Rights, Natural Law, and Church Law, 1150-1625* (Atlanta: Scholars Press, 1997).

431 collapse of Communism and the rise of globalization, that these three ancient
432 warring sects of Christianity have begun to come together and have begun to
433 understand each other. It will take many generations more to work out the great
434 theological disputes over the nature of the Trinity or the doctrine of justification by
435 faith. But there is more confluence, than conflict, in Catholic, Protestant, and
436 Orthodox understandings of law, politics, and society, especially if they are viewed in
437 long and responsible historical perspective. Scholars from these three great
438 Christian traditions need to come together to work out a comprehensive new
439 ecumenical “concordance of discordant canons” that draws out the best of these
440 traditions, that is earnest about its ecumenism, and that is honest about the greatest
441 points of tension. Few studies would do more both to spur the great project of
442 Christian ecumenism and to drive modern churches to get their legal houses in
443 order.

444 A final, and perhaps the greatest, challenge of all will be to join the principally
445 Western Christian story of law, politics, and society known in North America with
446 comparable stories that are told in the rest of the Christian world. Over the past two
447 centuries, Christianity has become very much a world religion—claiming nearly two
448 billion souls. Strong new capitals and captains of Christianity now stand in the south
449 and the east—in Africa and the Middle East, in Korea, China, the Indian
450 subcontinent, and beyond. In some of these new zones of Christianity, the Western
451 Christian classics are still being read and studied. But rich new indigenous forms
452 and norms of law, politics, and society are also emerging, premised on very different
453 Christian understandings of theology and anthropology. It would take a special form
454 of cultural arrogance for Western and non-Western Christians to refuse to learn from
455 each other.

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