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Introduction

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Abstract

This chapter offers a moving picture of the Western legal tradition -- rooted in the ancient civilizations of Israel, Greece, and Rome, and nourished for nearly two millennia by Christianity and for more than two centuries by the Enlightenment. This Western legal tradition has developed enduring postulates about justice and mercy, rule and equity, nature and custom, canon and commandment. It has featured evolving ideas about authority and power, rights and liberties, individuals and associations, public and private. It has developed distinctive methods of legislation and adjudication, of negotiation and litigation, of legal rhetoric and textual interpretation, of legal science and legal philosophy. The precise shape and balance of the Western legal tradition at any period has been determined, in part, by the Western religious tradition. And when the prevailing ideas, officials, symbols, and methods of the Western religious tradition have changed, the shape and balance of the Western legal tradition have changed as well. Four major shifts in the Western religious tradition have triggered the most massive transformations of the Western legal tradition: (1) the Christian conversion of the Roman Empire in the fourth through sixth centuries; (2) the Papal Revolution of the late eleventh to thirteenth centuries; (3) the Protestant Reformation of the sixteenth century; and (4) the Enlightenment movements of the eighteenth and nineteenth centuries.

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Introduction

Over the past two generations, a new interdisciplinary movement has emerged dedicated to the study of the religious dimensions of law, the legal dimensions of

religion, and the interaction of legal and religious ideas and institutions, norms and practices. This study is predicated on the assumptions that religion gives law its spirit and inspires its adherence to ritual and justice. Law gives religion its structure and encourages its devotion to order and organization. Law and religion share such ideas as fault, obligation, and covenant and such methods as ethics, rhetoric, and textual interpretation. Law and religion also balance each other by counterpoising justice and mercy, rule and equity, discipline and love. This dialectical interaction gives these two disciplines and dimensions of life their vitality and their strength.

To be sure, the spheres and sciences of law and religion have, on occasion, both converged and contradicted each other. Every major religious tradition has known both theonomism and antinomianism -- the excessive legalization and the excessive spiritualization of religion. Every major 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 most cultures, many scholars now argue, is that law and religion relate dialectically. 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 major 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.¹

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

¹ See esp. the early anchor text in this field by Harold J. Berman, *The Interaction of Law and Religion* (Nashville, TN: Abingdon Press, 1974), updated in Harold J. Berman, *Faith and Order: The Reconciliation of Law and Religion* (Grand Rapids, MI: Wm. B. Eerdmans Publishing Co., 1993). See further Howard O. Hunter, ed., *The Integrative Jurisprudence of Harold J. Berman* (Boulder, CO: Westview Press, 1996).

two generations, scholars of various confessions and professions throughout the world have addressed these questions with growing alacrity.²

This volume surveys and maps one part of the broad field of law and religion – law and Christianity in the Western tradition. Using the “binocular of law and religion,” the chapters that follow view afresh many familiar ideas and institutions that traditionally were studied through the “monocular of law” or the “monocular of religion” alone.³ In the opening chapters herein, David Novak and Luke Johnson mine the Ur texts of Western law and religion, the Hebrew Bible and the New Testament, both viewed in classical and cultural context, and both the subjects of enormous bodies of juridical learning in the Jewish and Christian traditions respectively. R.H. Helmholz analyzes the Christian church’s own internal laws that were built on these biblical and classical foundations – the two millennium-old canon law of the Catholic tradition, and the more recent Protestant church orders and ordinances. Brian Tierney analyzes the Western tradition’s perennial attachment to concepts of natural law, and its development of a distinctive understanding of natural rights and liberties. Kent Greenwalt takes up one important form of natural law, the law of conscience, and how it has informed Western understandings of conscientious objection, civil disobedience, and resistance. The natural law in various biblical and rational forms, Harold Berman and Mathias Schmoeckel show, has also been critical to guide and to govern the words of testimony and evidence used in judicial proceedings and the words of promise and contract used in social and economic life. Among the most important such words, Don Browning shows, are those that form the marriage contract, an institution of such critical importance in the Western tradition that the church has elevated it to a covenant or sacrament as well. Another vital institution, embraced from the start, is that of property.

² See, e.g., F.C. DeCoste and Lillian MacPhearson, *Law, Religion, Theology: A Selective Annotated Bibliography* (West Cornwall, CT: Locust Press, 1997); “Reviews on New Books in Law and Religion,” *Journal of Law and Religion* 16 (2001): 249-1035 and 17 (2002): 97-459, and ongoing scholarship reflected and reviewed in such specialty journals as the *Ecclesiastical Law Journal*, *Studia Canonica*, *Bulletin of the Medieval Canon Law Society*, *Zeitschrift der Savigny-Stiftung (Kanonisches Abteilung)*, *Ius Commune*, *Journal of Law and Religion*, *Journal of Church and State*, and others.

³ The phrase is from Jaroslav Pelikan, “Foreword,” to John Witte, Jr. and Frank S. Alexander, eds., *The Weightier Matters of the Law: Essays on Law and Religion in Tribute to Harold J. Berman* (Atlanta: Scholars Press, 1988), xi-xii.

Frank Alexander shows how property shapes our identity, power, and relationships in modern society, and carries with it the primeval commandments of dominion and stewardship – “to dress and keep the Garden” (Genesis 2:15). One critical use of property for Christians, Brian Pullan reminds us, is to relieve the plight of the poor and needy, and Christians over the centuries have elaborated structures and programs to discharge their obligations of charity and love to the “least” in society (Matthew 25:40). Christian love extends beyond the poor and needy, Michael Perry reminds us. The Bible commands us to love all others as ourselves, and this universal love command is a critical foundation of our modern understanding of human dignity and human rights. Christians are called to love even their enemies, and Jeffrie Murphy shows how this startling ethic must work to transform our understanding of punishment of one such enemy, the criminal.

The concluding chapters of the volume shift to issues of religious liberty, and to the relations of churches and other associations to the state. David Little maps the Christian foundations and modern institutions of religious liberty for individuals and for groups, showing how these norms have both captured and challenged national and international law today. Norman Doe and William Bassett describe the complex internal legal structures of modern churches, and show how these institutions interact with, and sometimes conflict with, the modern state. The institutional church, of course, is only of many associations recognized at law. The law recognized countless associations for other things – not only families, charities, schools, and the like, as we have seen, but also corporations, partnerships, unions, and other groups focused on commerce and business. For many centuries, David Skeel shows, the church chartered and Christians ran many of the business associations of the West, and defined a good bit of the law of associations that governed these institutions. Today, business corporations are governed by complex state laws, which modern Christians have largely accepted, albeit with some critique of corporate excesses and exploitation.

The balance of this Introduction seeks to contextualize these chapters a bit more. I set “the binocular of law and religion” at its most panoramic setting to survey the grand civilizational pictures of law and Christianity in Western history. My argument is that there is a distinctive Western legal tradition -- rooted in the ancient civilizations of Israel, Greece, and Rome. This Western legal tradition was nourished for nearly two millennia by Christianity and for more than two centuries by the Enlightenment. It has developed enduring postulates about justice and mercy, rule and equity, nature and custom, canon and commandment. It has featured evolving ideas about authority and power, rights and liberties, individuals and associations, public and private. It has developed distinctive methods of legislation and adjudication, of negotiation and litigation, of legal rhetoric and textual interpretation, of legal science and legal philosophy. The precise shape and balance of the Western legal tradition at any period has been determined, in

part, by the Western religious tradition. And when the prevailing ideas, officials, symbols, and methods of the Western religious tradition have changed, the shape and balance of the Western legal tradition have changed as well.

Four major shifts in the Western religious tradition have triggered the most massive transformations of the Western legal tradition: (1) the Christian conversion of the Roman Empire in the fourth through sixth centuries; (2) the Papal Revolution of the late eleventh to thirteenth centuries; (3) the Protestant Reformation of the sixteenth century; and (4) the Enlightenment movements of the eighteenth and nineteenth centuries. The Western legal tradition was hardly static between these four watershed periods. Regional and national movements -- from the ninth century Carolingian Renaissance to the Russian Revolution of 1917 -- had ample ripple effects on the tradition. But these were the four watershed periods, the civilizational moments and movements that permanently redirected the Western legal tradition. What follows is a quick sketch of the interactions of law and Christianity in these four watershed eras, which sets up the more refined and colorful portraits of individual topics offered in the succeeding chapters.⁴

Law and Christianity in the Roman Empire

The first watershed period came with the Christian conversion of the Roman emperor and empire in the fourth through sixth centuries C.E. Prior to that time, Roman law reigned supreme throughout much of the West. Roman law defined the status of persons and associations and the legal actions and procedures available to them. It proscribed delicts (torts) and crimes. It governed marriage and divorce, households and children, property and inheritance, contracts and commerce, slavery and labor. It protected the public property and welfare of the Roman state, and created the vast hierarchies of government that allowed Rome to rule its far-flung Empire for centuries.⁵

⁴ The following section is distilled in part from my *God's Joust, God's Justice: Law and Religion in the Western Tradition* (Grand Rapids, MI: Wm. B. Eerdmans Publishing Co., 2006).

⁵ See the chapter by Luke Timothy Johnson herein.

A refined legal theory began to emerge in Rome at the dawn of the new millennium, built in part on Greek prototypes. The Roman Stoics, Cicero (106-43 B.C.E) and Seneca (d. 65 C.E.), among other Roman philosophers, cast in legal terms the topical methods of reasoning, rhetoric, and interpretation inherited from the Greek philosopher, Aristotle (384-322 B.C.E.). They also greatly expanded the concepts of natural, distributive, and commutative justice developed by Aristotle and Plato (ca. 426-387 B.C.E.). The Roman jurists, Gaius (d. ca. 180 C.E.), Ulpian (ca. 160-228 C.E), and others drew what would become classic Western distinctions among: (1) civil law (*ius civile*), the statutes and procedures of a particular community to be applied strictly or with equity; (2) the law of nations (*ius gentium*), the principles and customs common to several communities and often the basis for treaties; and (3) natural law (*ius naturale*), the immutable principles of right reason, which are supreme in authority and divinity and must prevail in cases of conflict with civil or common laws. The Roman jurists also began to develop the rudiments of a concept of subjective rights (*iura*), freedoms (*libertates*), and capacities (*facultates*) in private and public law.

Roman law also established the imperial cult. Rome was to be revered as the eternal city, ordained by the gods and celebrated in its altars, forum, and basilicas. The Roman emperor was to be worshipped as a god and king in the rituals of the imperial court and in the festivals of the public square. The Roman law itself was sometimes viewed as the embodiment of an immutable divine law, appropriated and applied through the sacred legal science of imperial pontiffs and jurists. The Roman imperial cult claimed no monopoly; each of the conquered peoples in the Empire could maintain their own religious faith and practices, so long as they remained peaceable and so long as they accepted the basic requirements of the imperial cult that were prescribed by Roman law.

The early Christian Church stood largely opposed to this Roman law and culture -- as had the Jewish communities in which the church was born.⁶ Early Christians certainly adopted a number of Roman legal institutions and practices – putting “a complex spin or twist on them,” in Don Browning’s apt phrase, in light of Gospel

⁶ On Judaism, see the chapter by David Novak herein.

narratives and imperatives.⁷ But early Christians could not easily accept the Roman imperial cult nor readily partake of the pagan rituals required for participation in commerce, litigation, military life, and other public forums and activities. Emulating the sophisticated legal communities of Judaism, the early churches thus organized themselves into separate communities, largely withdrawn from official Roman society, and increasingly dissociated from Jewish communities as well. Early church constitutions, such as the *Didaché* (ca. 90-120), set forth internal rules for church organization, clerical life, ecclesiastical discipline, charity, education, family, and property relations, and these laws were amply augmented by legislation and decrees by bishops and church councils from the later second century onward.⁸ Early Christian leaders -- building on biblical injunctions to “render to Caesar the things that are Caesar’s” (Matthew 22:21) and to “honor the authorities” (Romans 13:1; 1 Peter 2:13-17) -- taught the faithful to pay their taxes, to register their properties, and to obey the Roman rulers up to the limits of Christian conscience and commandment.⁹ But these early Christian leaders also urged their Roman rulers to reform the law in accordance with their new teachings – to respect liberty of conscience and worship, to outlaw concubinage and infanticide, to limit easy divorce, to expand charity and education, to curb military violence, to mitigate criminal punishments, to emancipate slaves, and more. Such legal independence and reformist agitation eventually brought forth firm imperial edicts which condemned Christianity as an “illicit religion” and exposed Christians to intermittent waves of brutal persecution.

The Christian conversion of Emperor Constantine in 312 and the formal establishment by law of Trinitarian Christianity as the official religion of the Roman Empire in 380 ultimately fused these Roman and Christian laws and beliefs. The Roman Empire was now understood as the universal body of Christ on earth, embracing all persons and all things. The Roman emperor was viewed as both pope and king, who reigned supreme in spiritual and temporal matters. The Roman law was viewed as the pristine instrument of natural law and Christian morality. This new convergence of Roman and Christian beliefs allowed the Christian Church to imbue the

⁷ See the chapter by Don Browning herein, with further examples of early adaptation in the chapters by Luke Johnson, Brian Tierney, R.H. Helmholz, Mathias Schmoeckel, and David Skeel herein.

⁸ See chapters by Luke Johnson and R.H. Helmholz herein.

⁹ See chapter by Kent Greenawalt herein.

Roman law with a number of its basic teachings, and to have those enforced throughout much of the Empire -- notably and brutally against such heretics as Arians, Apollonarians, and Manicheans. Particularly in the great synthetic texts of Roman law that have survived -- the *Codex Theodosianus* (438) and the *Corpus Iuris Civilis* (529-534) -- Christian teachings on the Trinity, the sacraments, liturgy, holy days, the Sabbath Day, sexual ethics, charity, education, and much else were copiously defined and regulated at law. The Roman law also provided special immunities, exemptions, and subsidies for Christian ministers, missionaries, and monastics, who thrived under this new patronage and eventually extended the church's reach to the farthest corners of the Roman Empire. The legal establishment of Trinitarian Christianity contributed enormously both to its precocious expansion throughout the West and to its canonical preservation for later centuries.

This new syncretism of Roman and Christian beliefs, however, also subordinated the church to imperial rule. Christianity was now, in effect, the new imperial cult of Rome, presided over by the Roman emperor. The Christian clergy were, in effect, the new pontiffs of the Christian imperial cult, hierarchically organized and ultimately subordinate to imperial authority. The church's property was, in effect, the new public property of the empire, subject both to its protection and to its control. Thus the Roman emperors and their delegates convoked many of the church councils and major synods; appointed, disciplined, and removed the high clergy; administered many of the church's parishes, monasteries, and charities; and legally controlled the acquisition, maintenance, and disposition of much church property.

This "caesaropapist" pattern of substantive influence but procedural subordination of the church to the state, and of the Christian religion to secular law, met with some resistance by strong clerics, such as Bishop Ambrose of Milan (339-397), Pope Gelasius (d. 496), Pope Gregory the Great (ca. 540-604). In several bold pronouncements, they insisted on the maintenance of two powers, if not "two swords" (Luke 22:38), to govern the affairs of Western Christendom -- one held by the spiritual authorities, the other by the temporal authorities. But the more enduring political formulation came from St. Augustine (354-430), who saw in this new imperial arrangement a means to balance the spiritual and temporal dimensions and powers of the earthly life. In his famous political tract, *City of God*, Augustine contrasted the city of God with the city of man that coexist on this earth. The city of God consists of all those who are predestined to salvation, bound by the love of God, and devoted to a life of Christian piety, morality, and worship led by the clergy. The city of man consists of all the things of this sinful world, and the legal, political, and social institutions that God had created to maintain a modicum of order and peace on the earth. Augustine sometimes depicted this dualism as two walled cities separated from each other -- particularly when he was describing the sequestered life and discipline of monasticism, or the earlier

plight of the Christian churches under pagan Roman persecution. But Augustine's more dominant teaching was that, in the Christianized Roman Empire, these two cities overlapped in responsibility and membership. Christians would remain dual citizens until these two cities were fully and finally separated on the Return of Christ and at the Last Judgment of God. A Christian remained bound by the sinful habits of the world, even if he aspired to greater purity of the Gospel. A Christian remained subject to the power of both cities, even if she aspired to be a citizen of the city of God alone. If the rulers of the city of man favored Christians instead of persecuting them, so much the better.¹⁰

This Roman imperial understanding of law and Christianity largely continued in the West after the fall of Rome to various Germanic tribes in the fifth century. Before their conversion, many of the pagan Germanic rulers were considered to be divine and were the cult leaders as well as the military leaders of their people. Upon their conversion to Christianity, they lost their divinity, yet continued as sacral rulers of the Christian churches within their territories. They found in Christianity an important source of authority in their efforts to extend their rule over the diverse peoples that made up their regimes. The clergy not only supported the Germanic Christian kings in the suppression of pagan tribal religions, but many of them also looked upon such leaders as the Frankish Emperor Charlemagne (r. 768–814) and the Anglo-Saxon King Alfred (r. 871–899) as their spiritual leaders. Those Germanic rulers who converted to Christianity, in turn, supported the clergy in their struggle against heresies and gave them military protection, political patronage, and material support, as the Christian Roman emperors before them had done. Feudal lords within these Germanic domains further patronized the church, by donating lands and other properties for pious causes in return for the power to appoint and control the priests, abbots, and abbesses who occupied and used these new church properties.

¹⁰ On Augustine, see further the chapters by Brian Tierney, Kent Greenawalt, Jeffrie Murphy, and David Little herein.

Law and Medieval Catholicism

The second watershed period of the Western legal tradition came with the Papal Revolution or Gregorian Reform of the late eleventh through thirteenth centuries. Building on the conflict over lay investiture of clergy, Pope Gregory VII (1015-1085) and his successors eventually threw off their civil rulers and established the Roman Catholic Church as an autonomous legal and political corporation within Western Christendom. This event was part and product of an enormous transformation of Western society in the late eleventh to thirteenth centuries. The West was renewed through the rediscovery and study of the ancient texts of Roman law, Greek philosophy, and Patristic theology. The first modern Western universities were established in Bologna, Rome, and Paris with their core faculties of theology, law, and medicine. A number of small towns were transformed into burgeoning city-states. Trade and commerce boomed. A new dialogue was opened between Christianity and the sophisticated cultures of Judaism and Islam. Great advances were made in the natural sciences, in mechanics, in literature, in art, music, and architecture. And Western law, particularly the law of the church, was transformed.¹¹

From the twelfth to fifteenth centuries, the Catholic Church claimed a vast new jurisdiction -- literally the power "to speak the law" (*jus dicere*). The church claimed personal jurisdiction over clerics, pilgrims, students, the poor, heretics, Jews, and Muslims. It claimed subject matter jurisdiction over doctrine and liturgy; ecclesiastical property, polity, and patronage; sex, marriage and family life; education, charity, and inheritance; oral promises, oaths, and various contracts; and all manner of moral, ideological, and sexual crimes. The church also claimed temporal jurisdiction over subjects and persons that also fell within the concurrent jurisdiction of one or more civil authorities.

Medieval writers pressed four main arguments in support of these jurisdictional claims. First, this new jurisdiction was seen as a simple extension of the church's traditional authority to govern the seven sacraments -- baptism, confirmation, penance, eucharist, marriage, ordination, and extreme unction. By the fifteenth century, the sacraments supported whole bodies of sophisticated church law, called "canon law."

¹¹ See the chapter by Harold J. Berman herein.

The sacrament of marriage supported the canon law of sex, marriage, and family life.¹² The sacrament of penance supported the canon law of crimes and torts (delicts) and, indirectly, the canon law of contracts, oaths, charity, and inheritance.¹³ The sacrament of penance and extreme unction also supported a sophisticated canon law of charity and poor relief, and a vast network of church-based guilds, foundations, hospitals, and other institutions that served the *personae miserabiles* of Western society.¹⁴ The sacrament of ordination became the foundation for a refined canon law of corporate rights and duties of the clergy and monastics, and an intricate network of corporations and associations that they formed. The sacraments of baptism and confirmation supported a new constitutional law of natural rights and duties of Christian believers.

Second, church leaders predicated their jurisdictional claims on Christ's famous delegation to the Apostle Peter: "I will give you the keys of the kingdom of heaven, and whatever you bind on earth shall be bound in heaven, and whatever you loose on earth shall be loosed in heaven" (Matthew 16:19). According to conventional medieval lore, Christ had conferred on St. Peter two keys -- a key of knowledge to discern God's word and will, and a key of power to implement and enforce that word and will throughout the church. St. Peter had used these keys to help define the doctrine and discipline of the apostolic church. Through apostolic succession, the pope and his clergy had inherited these keys to define the doctrine and discipline of the contemporary church. This inheritance, the canonists believed, conferred on the pope and his clergy a legal power, a power to make and enforce canon laws. This argument of the keys readily supported the church's claims to subject matter jurisdiction over core spiritual matters of doctrine and liturgy -- the purpose and timing of the mass, baptism, eucharist, confession, and the like. The key of knowledge, after all, gave the pope and his clergy access to the mysteries of divine revelation, which, by use of the key of power, they communicated to all believers through the canon law. The argument of the keys, however, could be easily extended. Even the most mundane of human affairs ultimately have spiritual and moral dimensions. Resolution of a boundary line dispute between neighbors implicates the commandment to love one's neighbor. Unaccountable failure to pay one's civil

¹² See the chapter by Don Browning herein.

¹³ See the chapter by Harold J. Berman herein.

¹⁴ See the chapter by Brian Pullan herein.

taxes or feudal dues is a breach of the spiritual duty to honor those in authority. Printing or reading a censored book is a sin. Strong clergy, therefore, readily used the argument of the keys to extend the subject matter jurisdiction of the church to matters with more attenuated spiritual and moral dimensions, particularly in jurisdictions where they had no strong civil rivals.

Third, medieval writers argued that the Church's canon law was the true source of Christian equity -- "the mother of exceptions," "the epitome of the law of love," and "the mother of justice," as they variously called it. As the mother of exceptions, canon law was flexible, reasonable, and fair, capable either of bending the rigor of a rule in an individual case through dispensations and injunctions, or punctiliously insisting on the letter of an agreement through orders of specific performance or reformation of documents. As the epitome of love, canon law afforded special care for the disadvantaged -- widows, orphans, the poor, the handicapped, abused wives, neglected children, maltreated servants, and the like. It provided them with standing to press claims in church courts, competence to testify against their superiors without their permission, methods to gain succor and shelter from abuse and want, opportunities to pursue pious and protected careers in the cloister. As the mother of justice, canon law provided a method whereby the individual believer could be reconciled to God, neighbor, and self at once. Church courts treated both the legality and the morality of the conflicts before them. Their remedies enabled litigants to become righteous and just not only in their relationships with opposing parties and the rest of the community, but also in their relationship to God. This was one reason for the enormous popularity and success of the church courts in much of medieval Christendom. Church courts treated both the legality and the morality of the conflicts before them. Their remedies enabled litigants to become "righteous" and "just" not only in their relationships with opposing parties and the rest of the community, but also in their relationship to God.¹⁵

Fourth, some writers reworked the traditional "two swords" theory to support claims that the church's jurisdiction was superior to that of secular authorities. In its high medieval form, the two swords theory taught that the pope was the vicar of Christ on earth, in whom Christ vested the plenitude of his authority. This authority was

¹⁵ See the chapter by Mathias Schmoeckel herein.

symbolized in the “two swords” discussed in the Bible (Luke 22:38), a spiritual sword and a temporal sword. Christ had metaphorically handed these two swords to the highest being in the human world -- the pope, the vicar of Christ. The pope and lower clergy wielded the spiritual sword, in part by establishing canon law rules for the governance of all Christendom. The clergy, however, were too holy to wield the temporal sword. They thus delegated this temporal sword to those authorities below the spiritual realm -- emperors, kings, dukes, and their civil retainues, who held their swords “of” and “for” the church. These civil magistrates were to promulgate and enforce civil laws in a manner consistent with canon law. Under this two swords theory, civil law was by its nature inferior to canon law. Civil jurisdiction was subordinate to ecclesiastical jurisdiction. The state answered to the church.

While each of these four arguments had its detractors, together they provided the Catholic Church with a formidable claim to a sweeping jurisdiction. By the later twelfth century, church officials emerged as both the new legislators and new judges of Western Christendom. Church authorities issued a steady stream of new canon laws through papal decretals and bulls, conciliar and synodical decrees and edicts, and more discrete orders by local bishops and abbots. Church courts adjudicated cases in accordance with the substantive and procedural rules of the canon law. Periodically, the pope or a strong bishop would deploy itinerant ecclesiastical judges, called *inquisitores*, with original jurisdiction over discrete questions that would normally lie within the competence of the church courts. The pope also sent out his legates who could exercise a variety of judicial and administrative powers in the name of the pope. Cases could be appealed up the hierarchy of church courts, ultimately to the papal rota. Cases raising novel questions could be referred to distinguished canonists or law faculties called assessors, whose learned opinions (*consilia*) on the questions were often taken by the church court as edifying if not binding.¹⁶

Alongside these legislative and judicial functions, the church developed a vast network of ecclesiastical officials, who presided over the church's executive and administrative functions. The medieval church registered its citizens through baptism. It taxed them through tithes. It conscripted them through crusades. It educated them

¹⁶ See the chapter by Mathias Schmoeckel herein.

through schools. It nurtured them through cloisters, monasteries, chantries, foundations, and guilds. The medieval Church was, in F.W. Maitland's famous phrase, "the first true state in the West." Its medieval canon law was the first international law of the West since the eclipse of the classical Roman law half a millennium before.

From the twelfth century onward, the jurists of the canon law, called "canonists," began to systematize this vast new body of law, using the popular dialectical methods of the day. Thousands of legal and ethical teachings drawn from the apostolic constitutions, patristic writings, and Christianized Roman law of the first millennium were collated and harmonized in the famous *Decretum Gratiani* (ca. 1140), the anchor text of medieval canon law. The *Decretum* was then heavily supplemented by collections of papal and conciliar legislation and juridical glosses and commentaries. All these texts were later integrated in the five-volume *Corpus Iuris Canonici* published in the 1580s, and in hundreds of important canon law texts on discrete legal topics that emerged with alacrity after the invention of the printing press in the early fifteenth century.¹⁷

This complex new legal system of the church also attracted sophisticated new legal and political theories. The most original formulations came from such medieval jurists as John of Salisbury (d. 1180), Hostiensis (1200-1271) and Baldus de Ubaldis (c. 1327-1400) and such medieval theologians and philosophers as Hugh of St. Victor (ca. 1096-1141), Thomas Aquinas (1225-1274), John of Paris (ca. 1240-1306) and William of Ockham (ca. 1280-ca. 1349). These scholars reclassified the sources and forms of law, ultimately distinguishing: (1) the eternal law of the creation order; (2) the natural laws of the Bible, reason, and conscience; (3) the positive canon laws of the church; (4) the positive civil laws of the imperial, royal, princely, ducal, manorial and other authorities that comprised the medieval state; (5) the common laws of all nations and peoples; and (6) the customary laws of local communities.¹⁸ These scholars also developed enduring rules for the resolution of conflicts among these types of laws, and contests of jurisdiction among their authors and authorities. They developed refined concepts of legislation, adjudication, and executive administration, and core constitutional concepts of sovereignty, election, and representation. They developed a

¹⁷ See chapter by R.H. Helmholz herein.

¹⁸ See chapter by Brian Tierney herein.

good deal of the Western theory and law of chartered corporations, private associations, foundations, and trusts, built in part on early Roman law and later civil law prototypes.¹⁹

In these juridical writings, the language and concept of rights (*iura*, the plural of *ius*) became increasingly common. Medieval writers differentiated all manner of rights (*iura*) and liberties (*libertates*), and associated them variously with a power (*facultas*) inhering in rational human nature and with the property (*dominium*) of a person or the power (*potestas*) of an office of authority (*officium*). Particularly the canonists worked out a whole complex latticework of what we now call rights, freedoms, powers, immunities, protections, and capacities for different groups and persons.²⁰ Most important were the rights that protected the “freedom of the church” (*libertas ecclesiae*) from the intrusions and control of secular authorities. Medieval writers specified in great detail the rights of the church and its clergy to make its own laws, to maintain its own courts, to define its own doctrines and liturgies, to elect and remove its own clergy. They also stipulated the exemptions of church property from civil taxation and takings, and the right of the clergy to control and use church property without interference or encumbrance from secular authorities. They also guaranteed the immunity of the clergy from civil prosecution, military service, and compulsory testimony, and the rights of church entities like parishes, monasteries, charities, and guilds to form and dissolve, to accept and reject members, and to establish order and discipline. In later twelfth- and thirteenth-century decrees, the canon law defined the rights of church councils and synods to participate in the election and discipline of bishops, abbots, and other clergy. It defined the rights of the lower clergy vis-à-vis their superiors. It defined the rights of the laity to worship, evangelize, maintain religious symbols, participate in the sacraments, travel on religious pilgrimages, and educate their children. It defined the rights of the poor, widows, and needy to seek solace, succor, and sanctuary within the church. It defined the rights of husbands and wives, parents and children, masters and servants within the household. The canon law even defined the (truncated) rights that Orthodox Christians, Jews, Muslims, and heretics had in Western Christendom.

¹⁹ See chapters by Brian Pullan and David Skeel herein.

²⁰ See chapter by Brian Tierney herein.

These medieval canon law formulations of rights and liberties had parallels in later medieval common law and civil law. Particularly notable sources were the thousands of medieval treaties, concordats, charters, and other constitutional texts that were issued by religious and secular authorities. These were often detailed, and sometimes very flowery, statements of the rights and liberties to be enjoyed by various groups of clergy, nobles, barons, knights, urban councils, citizens, universities, monasteries, and others. These were often highly localized instruments, but occasionally they applied to whole territories and nations. A familiar example of the latter type of instrument was the Magna Carta (1215), the great charter issued by the English Crown at the behest of the church and barons of England. The Magna Carta guaranteed that “the Church of England shall be free (*libera*) and shall have all her whole rights (*iura*) and liberties (*libertates*) inviolable” and that all “free-men” (*liberis hominibus*) were to enjoy their various “liberties” (*libertates*). These liberties included sundry rights to property, marriage, and inheritance, to freedom from undue military service, and to freedom to pay one’s debts and taxes from the property of one’s own choosing. The Magna Carta also set out various rights and powers of towns and of local justices and their tribunals, various rights and prerogatives of the king and of the royal courts, and various procedural rights in these courts (including the right to jury trial). These charters of rights, which were common throughout the medieval West, became important prototypes on which early modern Catholic, Protestant, and Enlightenment-based revolutionaries would later call to justify their revolts against tyrannical authorities.

Law and Protestantism

The third watershed period in the Western legal tradition came with the transformation of canon law and civil law, and of church and state, in the Protestant Reformation. The Protestant Reformation was inaugurated by Martin Luther (1483-1546) of Wittenberg in his famous posting of the Ninety-Five Theses in 1517 and his burning of the canon law and confessional books in 1520. It ultimately erupted in various quarters of Western Europe in the early sixteenth century, settling into Lutheran, Anglican, Calvinist, and Free Church (or Anabaptist) branches.

The early Protestant reformers -- Luther, John Calvin (1509-1564), Menno Simons (1496-1561), Thomas Cranmer (1489-1556), and others – all taught that salvation comes through faith in the Gospel, not by works of law. Each individual stands directly before God, seeks God's gracious forgiveness of sin, and conducts life in accordance with the Bible and Christian conscience. To the Protestant reformers, the medieval Catholic canon law obstructed the individual's relationship with God and obscured simple biblical norms for right living. The early Protestant reformers further taught that the church is at heart a community of saints, not a corporation of politics. Its

cardinal signs and callings are to preach the Word, to administer the sacraments, to catechize the young, to care for the needy. To the reformers, the Catholic clergy's legal rule in Christendom obstructed the church's divine mission and usurped the state's role as God's vice-regent. To be sure, the church must have internal rules of order to govern its own polity, teaching, and discipline. The church must critique legal injustice and combat political illegitimacy. But, according to classic Protestant lore, law is primarily the province of the state not of the church, of the magistrate not of the minister.

These new Protestant teachings helped to transform Western law in the sixteenth and seventeenth centuries. The Protestant Reformation permanently broke the international rule of the Catholic Church and the canon law, splintering Western Christendom into competing nations and territories. Each of these polities had its own (often conjoined) religious and political rulers, many of whom fought violently with each other in a century of blood religious warfare that finally ended with the Peace of Westphalia (1648). The Protestant Reformation also triggered a massive shift of power, property, and prerogative from the church to the state. Political rulers now assumed jurisdiction over numerous subjects previously governed principally by the Catholic Church and its canon law -- marriage and family life, property and testamentary matters, charity and education, contracts and oaths, moral and ideological crimes. Particularly in Lutheran and Anglican polities, political authorities also came to exercise considerable control over the clergy, polity, and property of the church -- in self-conscious emulation of the laws and practices of Christianized Rome, and in implementation of the budding new Christian theories of absolute monarchy developed by Niccolò Machiavelli (1469-1527), Jean Bodin (1530-1596), Robert Filmer (d. 1653), and others.

These massive shifts in legal power and property from cleric to magistrate and from church to state did not separate Western law from its Christian foundations. Catholic canon law remained part of a good deal of early modern Western common law and civil law -- predictably so in Catholic lands, but also surprisingly so in many Protestant lands. Despite the loud condemnation of the canon law by several early reformers, Protestant magistrates and jurists readily plucked many legal provisions and procedures from the medieval canon law that they regarded as consonant with their new teachings. Moreover, in the Catholic regions of Eastern Europe and the Holy Roman Empire, as well as in France, Spain, Portugal, Italy and their many Latin and North American colonies, Catholic clerics and canonists continued to have a strong influence on the content and character of early modern state law. This influence was strengthened by the resurgence of refined legal learning in Spain and Portugal, led by such scholars as Thomas Vitoria (c. 1486-1546), Fernando Vázquez (b. 1512), Francisco Suarez (1548-1617), and Thomas Sanchez (1550-1610). This influence was further strengthened by the sweeping legal and theological reforms of the Council of Trent (1545-1563) and by the wave of early modern concordats and constitutions that

ensured the Catholic Church of a privileged, if not legally established, status in many Catholic nations and their colonies.

In the Protestant nations of early modern Europe and their later trans-Atlantic colonies, many new Protestant theological views came to direct and dramatic expression at state law. For example, Protestant theologians replaced the traditional sacramental understanding of marriage with a new idea of the marital household as a "social estate" or "covenantal association" of the earthly kingdom. On that basis, Protestant magistrates developed a new state law of marriage, featuring requirements of parental consent, state registration, church consecration, and peer presence for valid marital formation, a severely truncated law of impediments and annulment, and the introduction of absolute divorce on grounds of adultery, desertion, and other faults, with subsequent rights to remarry at least for the innocent party.²¹ Protestant theologians replaced the traditional understanding of education as a teaching office of the church with a new understanding of the public school as a "civic seminary" for all persons to prepare for their peculiar vocations. On that basis, Protestant magistrates replaced clerics as the chief rulers of education, state law replaced church law as the principal law of education, and the general callings of all Christians replaced the special calling of the clergy as the *raison d'être* of education.

Lutheranism. Beyond these common changes in Reformation Europe, each of the four original branches of Protestantism made its own distinctive contributions to Western law, politics, and society. The Lutheran Reformation of Germany and Scandinavia territorialized the Christian faith, and gave ample new political power to the local Christian magistrate. Luther replaced medieval teachings with a new two-kingdoms theory. The "invisible" church of the heavenly kingdom, he argued, was a perfect community of saints, where all stood equal in dignity before God, all enjoyed perfect Christian liberty, and all governed their affairs in accordance with the Gospel. The "visible" church of this earthly kingdom, however, embraced saints and sinners alike. Its members still stood directly before God and still enjoyed liberty of conscience, including the liberty to leave the visible church itself. But, unlike the invisible church, the visible church needed both the Gospel and human law to govern its members'

²¹ See chapter by Don Browning herein.

relationships with God and with fellow believers. The clergy must administer the Gospel. The magistrate must administer the law.

Luther and his followers regarded the local magistrate as God's vice-regent called to elaborate natural law and to reflect divine justice in his local domain. The best source and summary of natural law was the Ten Commandments and its elaboration in the moral principles of the Bible. The magistrate was to cast these general principles of natural law into specific precepts of human law, designed to fit local conditions. Luther and his followers also regarded the local magistrate as the "father of the community" (*Landesvater, paterpoliticus*). He was to care for his political subjects as if they were his children, and his political subjects were to "honor" him as if he were their parent. Like a loving father, the magistrate was to keep the peace and to protect his subjects in their persons, properties, and reputations. He was to deter his subjects from abusing themselves through drunkenness, sumptuousness, gambling, prostitution, and other vices. He was to nurture his subjects through the community chest, the public almshouse, the state-run hospice. He was to educate them through the public school, the public library, the public lectern. He was to see to their spiritual needs by supporting the ministry of the local church, and encouraging attendance and participation through civil laws of religious worship and tithing.

These twin metaphors of the Christian magistrate -- as the lofty vice-regent of God and as the loving father of the local community -- described the basics of Lutheran legal and political theory for the next three centuries. Political authority was divine in origin, but earthly in operation. It expressed God's harsh judgment against sin but also his tender mercy for sinners. It communicated the Law of God but also the lore of the local community. It depended upon the church for prophetic direction but it took over from the church all jurisdiction. Either metaphor of the Christian magistrate standing alone could be a recipe for abusive tyranny or officious paternalism. But both metaphors together provided Luther and his followers with the core ingredients of a robust Christian republicanism and budding Christian welfare state. These ideas were central to German and Scandinavian law and politics until modern times.

Anglicanism. Anglicanism pressed to more extreme national forms the Lutheran model of a unitary local Christian commonwealth under the final authority of the Christian magistrate. Building in part on Lutheran and Roman law precedents, King Henry VIII severed all legal and political ties between the Church in England and the pope. The Supremacy Act (1534) declared the monarch to be "Supreme Head" of the Church and Commonwealth of England as well as the Defender of the Faith. The English monarchs, through their Parliaments, established a uniform doctrine and liturgy and issued the Book of Common Prayer (1559), Thirty-Nine Articles (1576), and eventually the Authorized (King James) Version of the Bible (1611). They also

assumed jurisdiction over poor relief, education, and other activities that had previously been carried on under Catholic auspices, and dissolved the many monasteries, foundations, and guilds through which the church had administered its social ministry and welfare. Communicant status in the Church of England was rendered a condition for citizenship status in the Commonwealth of England. Contraventions of royal religious policy were punishable both as heresy and as treason.

The Stuart monarchs moved slowly, through hard experience, toward greater toleration of religious pluralism and greater autonomy of local Protestant churches. From 1603-1640, King James I (1566-1625) and Charles I (1600-1649) persecuted Protestant non-conformists with a growing vengeance, driving tens of thousands of them to the Continent and often from there to North America. In 1640, the Protestants who remained led a revolution against King Charles, and ultimately deposed and executed him in 1649. They also passed laws that declared England a free Christian commonwealth, free from Anglican establishment and aristocratic privilege. This commonwealth experiment was short-lived. Royal rule and traditional Anglicanism were vigorously reestablished in 1660, and repression of Protestant and Catholic dissenters renewed. But when the dissenters again rose up in revolt, Parliament passed the Bill of Rights and Toleration Act in 1689 that guaranteed a measure of freedom of association, worship, self-government, and basic civil rights to all peaceable Protestant churches. Many of the remaining legal restrictions on Protestants fell into desuetude in the following century, though Catholicism and Judaism remained formally proscribed in England until the Emancipation Acts of 1829 and 1833.

Despite these intermittent waves of revolt, restoration, and constitutional reform, much English law remained rather strikingly traditional in the early modern period. Unlike other Protestant lands, England did not pass comprehensive new legal reformations that reflected and implemented its new Protestant faith. Armed with the conservative legal syntheses of Richard Hooker (1553-1600) and others, England chose to maintain a good deal of its traditional medieval common law and canon law, which was only gradually reformed over the centuries by piecemeal Parliamentary statutes and judicial precedents. Moreover, after divesting the church of its lands and jurisdiction during the early Reformation era, Queen Elizabeth I (1533-1603) and her successors turned anew to established Anglican church institutions to help administer the English laws of charity, education, domestic relations, and more.

Anabaptism. Contrary to Lutherans and Anglicans, early Anabaptists advocated the separation of the redeemed realm of religion and the church from the fallen realm of politics and the state. In their definitive Schleichtheim Confession (1527), the Anabaptists called for a return to the communitarian ideals of the New Testament and the ascetic principles of the apostolic church. The Anabaptists eventually splintered into

various groups of Amish, Brethren, Hutterites, Mennonites, and others. Some of these early splinter groups were politically radical or utopian, particularly those following Thomas Müntzer (1489-1525) of Germany. But most Anabaptist communities by the later sixteenth century had become quiet Christian separatists.

Anabaptist communities ascetically withdrew from civic life into small, self-sufficient, intensely democratic communities. When such communities grew too large or too divided, they deliberately colonized themselves, eventually spreading Anabaptists from Russia to Ireland to the furthest frontiers of North America. These communities were governed internally by biblical principles of discipleship, simplicity, charity, and non-resistance. They set their own internal standards of worship, liturgy, diet, discipline, dress, and education. They handled their own internal affairs of property, contracts, commerce, marriage, and inheritance – so far as possible by appeal to biblical laws and practices, not those of the state.

The state and its law, most Anabaptists believed, was part of the fallen world, which was to be avoided in accordance with biblical injunctions that Christians should “be in the world, but not of the world” or “conformed” to it (John 15:18-19, 17:14-16; Romans 12:2; 1 John 2:15-17). Once the perfect creation of God, the world was now a sinful regime that lay beyond “the perfection of Christ” and beyond the daily concern of the Christian believer. God had allowed the world to survive through his appointment of magistrates and laws who were empowered to use coercion and violence to maintain a modicum of order and peace. Christians should thus obey the laws of political authorities, so far as Scripture enjoined, such as in paying their taxes or registering their properties. But Christians should avoid active participation in and unnecessary interaction with the world and the state. Most early modern Anabaptists were pacifists, preferring derision, exile, or martyrdom to active participation in war. Most Anabaptists also refused to swear oaths, or to participate in political elections, civil litigation, or civic feasts and functions.²² This aversion to political and civic activities often earned Anabaptists severe reprisal and repression by Catholics and Protestants alike – violent martyrdom in many instances.

²² See chapter by Kent Greenawalt herein.

While unpopular in its genesis, Anabaptist theological separatism ultimately proved to be a vital source of later Western legal arguments for the separation of church and state and for the protection of the civil and religious liberties of minorities. Equally important for later legal reforms was the new Anabaptist doctrine of adult baptism. This doctrine gave new emphasis to religious voluntarism as opposed to traditional theories of birthright or predestined faith. In Anabaptist theology, each adult was called to make a conscious and conscientious choice to accept the faith -- metaphorically, to scale the wall of separation between the fallen world and the realm of religion to come within the perfection of Christ. In the later eighteenth century, Free Church followers, both in Europe and North America, converted this cardinal image into a powerful platform of liberty of conscience and free exercise of religion not only for Christians but eventually for all peaceable believers.²³

A number of these early Anabaptist ideas from Europe entered into the hearts and minds of American Evangelicals. Especially after the eighteenth- and early nineteenth-century Great Awakenings, American Evangelicals emphasized the act of Christian conversion, the necessary spiritual rebirth of each sinful individual. On that basis, they strongly advocated the liberty of conscience of each individual and the free speech and free press rights of missionaries to evangelize, both on the American frontier and abroad. Evangelicals had a high view of the Christian Bible as the infallible textbook for human living. On that basis, they celebrated the use of the Bible in public and private life, and they castigated Jews, Catholics, Mormons, and others for using what they considered to be partial, apocryphal, or surrogate scriptures. Evangelicals emphasized sanctification, the process of each individual becoming holier before God, neighbor, and self. On that basis, they underscored a robust ethic of spiritual and moral progress, education, and improvement of all.

Departing from their Anabaptist forebearers, many early American Evangelicals coupled this emphasis on personal conversion and sanctification with a concern for legal reform and moral improvement of the nation. Great numbers of Evangelicals joined mainline Protestants, Catholics, Jews, Quakers, and others in the national campaign to end slavery -- though this issue sharply divided their northern and southern

²³ See chapter by David Little herein.

constituents, especially during the Civil War (1861-1865). Nineteenth-century Evangelicals were more united in their support for successive campaigns concerning the laws of dueling, freemasonry, lotteries, drunkenness, Sunday mails, Sabbath-breaking, industrial exploitation, corporate corruption, and more. In the later nineteenth century, many Evangelicals also joined the struggle for the rights and plights of emancipated blacks, poor workers, women suffragists, and labor union organizers -- none more forcefully than Walter Rauschenbusch (1861-1918), the leader of the Social Gospel Movement. Though they engaged these big national issues, however, most American Evangelicals were generally suspicious of big government, especially federal government. Most prized federalism and the fostering of voluntary associations -- families, schools, clubs, charities, businesses, unions, corporations, learned societies, and more -- as essential forces and forums of law and order.²⁴

Calvinism. Calvinists charted a course between the Erastianism of Lutherans (and Anglicans) that subordinated the church to the state, and the asceticism of early Anabaptists that withdrew the church from the state and society. Like Lutherans, Calvinists insisted that each local polity be an overtly Christian commonwealth that adhered to the general principles of natural law and that translated them into detailed new positive laws of religious worship, Sabbath observance, public morality, marriage and family, crime and tort, contract and business, charity and education. Like Anabaptists, Calvinists insisted on the basic separation of the offices and operations of church and state, leaving the church to govern its own doctrine and liturgy, polity and property, without interference from the state. But, unlike these other Protestants, Calvinists stressed that both church and state officials were to play complementary roles in the creation of the local Christian commonwealth and in the cultivation of the Christian citizen.

Calvinists emphasized more fully than other Protestants the educational use of the natural and positive law. Lutherans stressed the “civil” and “theological” uses of the natural law -- the need for law to deter sinners from their sinful excesses and to drive them to repentance. Calvinists emphasized the educational use of the natural law as well -- the need to teach persons both the letter and the spirit of the law, both the civil

²⁴ See chapter by David Skeel herein.

morality of common human duty and the spiritual morality of special Christian aspiration. While Lutheran followers of Philip Melanchthon (1497-1560) had included this educational use of the natural law in their theology, Calvinists made it an integral part of their politics as well. They further insisted that not only the natural law of God but also the positive law of the state could achieve these three civil, theological, and educational uses.

Calvinists also emphasized more fully than other Protestants the legal role of the church in a Christian commonwealth. Lutherans, after the first two generations, left law largely to the Christian magistrate. Anabaptists gave the church a strong legal role, but only for voluntary members of the ascetically withdrawn Christian community. By contrast, Calvinists, from the start, drew local church officials directly into the enforcement of law for the entire Christian commonwealth and for all citizens, regardless of their church affiliation. In Calvin's Geneva, this political responsibility of the church fell largely to the consistory, an elected body of civil and religious officials, with original jurisdiction over cases of marriage and family life, charity and social welfare, worship and public morality. Among most later Calvinists -- French Huguenots, Dutch Pietists, Scottish Presbyterians, German and Hungarian Reformed, and English and American Puritans and Congregationalists -- the Genevan-style consistory was transformed into the body of pastors, elders, deacons, and teachers that governed each local church congregation, and played a less structured political and legal role in the broader Christian commonwealth. But local clergy still had a strong role in advising magistrates on the positive law of the local community. Local churches and their consistories also generally enjoyed autonomy in administering their own doctrine, liturgy, charity, polity, and property and in administering ecclesiastical discipline over their members.

Later Calvinists also laid some of the foundations for Western theories of democracy and human rights.²⁵ One technique, developed by Calvinist writers like Christopher Goodman (c. 1530-1603), Theodore Beza (1519-1605), and Johannes Althusius (1557-1638), was to ground rights in the duties of the Decalogue and other biblical moral teachings. The First Table of the Decalogue prescribes duties of love that

²⁵ See the chapter by David Little herein.

each person owes to God -- to honor God and God's name, to observe the Sabbath day and to worship, to avoid false gods and false swearing. The Second Table prescribes duties of love that each person owes to neighbors -- to honor one's parents and other authorities, not to kill, not to commit adultery, not to steal, not to bear false witness, not to covet. The reformers cast the person's duties toward God as a set of rights that others could not obstruct -- the right to religious exercise: the right to honor God and God's name, the right to rest and worship on one's Sabbath, the right to be free from false gods and false oaths. They cast a person's duties towards a neighbor, in turn, as the neighbor's right to have that duty discharged. One person's duties not to kill, to commit adultery, to steal, or to bear false witness thus gives rise to another person's rights to life, property, fidelity, and reputation.

Another technique, developed especially by English and New England Puritans, was to draw out the legal and political implications of the signature Reformation teaching, coined by Luther, that a person is at once sinner and saint (*simul justus et peccatur*). On the one hand, they argued, every person is created in the image of God and justified by faith in God. Every person is called to a distinct vocation, which stands equal in dignity and sanctity to all others. Every person is a prophet, priest and king, and responsible to exhort, to minister, and to rule in the community. Every person thus stands equal before God and before his or her neighbor. Every person is vested with a natural liberty to live, to believe, to love and serve God and neighbor. Every person is entitled to the vernacular Scripture, to education, to work in a vocation.

On the other hand, Protestants argued, every person is sinful and prone to evil and egoism. Every person needs the restraint of the law to deter him from evil, and to drive him to repentance. Every person needs the association of others to exhort, minister, and rule her with law and with love. Every person, therefore, is inherently a communal creature. Every person belongs to a family, a church, a political community.

These social institutions of family, church, and state, later Protestants argued, are divine in origin and human in organization. They are created by God and governed by godly ordinances. They stand equal before God and are called to discharge distinctive godly functions in the community. The family is called to rear and nurture children, to educate and discipline them, to exemplify love and cooperation. The church is called to preach the Word, administer the sacraments, educate the young, aid the needy. The state is called to protect order, punish crime, promote community. Though

divine in origin, these institutions are formed through human covenants.²⁶ Such covenants confirm the divine functions, the created offices, of these institutions. Such covenants also organize these offices so that they are protected from the sinful excesses of officials who occupy them. Family, church, and state are thus organized as public institutions, accessible and accountable to each other and to their members. Calvinists especially stressed that the church is to be organized as a democratic congregational polity, with a separation of ecclesiastical powers among pastors, elders, and deacons, election of officers to limited tenures of office, and ready participation of the congregation in the life and leadership of the church.

By the turn of the seventeenth century, Calvinists began to recast these theological doctrines into democratic norms and forms. Protestant doctrines of the person and society were cast into democratic social forms. Since all persons stand equal before God, they must stand equal before God's political agents in the state. Since God has vested all persons with natural liberties of life and belief, the state must ensure them of similar civil liberties. Since God has called all persons to be prophets, priests, and kings, the state must protect their constitutional freedoms to speak, to preach, and to rule in the community. Since God has created persons as social creatures, the state must promote and protect a plurality of social institutions, particularly the church and the family.

Protestant doctrines of sin, in turn, were cast into democratic political forms. The political office must be protected against the sinfulness of the political official. Political power, like ecclesiastical power, must be distributed among self-checking executive, legislative, and judicial branches. Officials must be elected to limited terms of office. Laws must be clearly codified, and discretion closely guarded. If officials abuse their office, they must be disobeyed. If they persist in their abuse, they must be removed, even if by revolutionary force and regicide. These Protestant teachings were among the driving ideological forces behind the revolts of the French Huguenots, Dutch Pietists, and Scottish Presbyterians against their monarchical oppressors in the later sixteenth and seventeenth centuries. They were critical weapons in the arsenal of the revolutionaries in England and America, and important sources of inspiration and

²⁶ See chapters by David Novak and Harold J. Berman herein.

instruction during the great age of democratic construction in later eighteenth and nineteenth century North America and Western Europe.

Law and Christianity in the Modern Age

The fourth watershed period in the Western legal tradition came with the Enlightenment of the eighteenth and nineteenth centuries. The Enlightenment was no single, unified movement, but a series of diverse ideological movements in various academic disciplines and social circles of Western Europe and North America. Enlightenment philosophers such as David Hume (1711-1776), Jean Jacques Rousseau (1712-1778), Thomas Jefferson (1743-1826), and others offered a new theology of individualism, rationalism, and nationalism to supplement, if not supplant, traditional Christian teachings. To Enlightenment exponents, the individual was no longer viewed primarily as a sinner seeking salvation in the life hereafter. Every individual was created equal in virtue and dignity, vested with inherent rights of life and liberty and capable of choosing his or her own means and measures of happiness. Reason was no longer the handmaiden of revelation, rational disputation no longer subordinate to homiletic declaration. The rational process, conducted privately by each person, and collectively in the open marketplace of ideas, was considered a sufficient source of private morality and public law. The nation-state was no longer identified with a national church or a divinely blessed covenant people. The nation-state was to be glorified in its own right. Its constitutions and laws were sacred texts reflecting the morals and mores of the collective national culture. Its officials were secular priests, representing the sovereignty and will of the people.

Such teachings transformed many modern Western legal systems. They helped shape new constitutional provisions for limited government and ample liberty, new injunctions to separate church and state, new criminal procedures and methods of criminal punishment, new commercial, contractual, and other laws of the private marketplace, new laws of private property and inheritance, shifts toward a fault-based law of delicts and torts, the ultimate expulsion of slavery in England and America, and the gradual removal of discrimination based on race, religion, culture, and gender.²⁷

²⁷ See chapters by David Little and Michael Perry herein.

Many Western nations also developed elaborate new codes of public law and private law, transformed the curricula of their faculties of law, and radically reconfigured their legal professions.

The new theology of the Enlightenment penetrated Western legal philosophy. Spurred on by Hugo Grotius' (1583-1645) impious hypothesis that natural law could exist "even if there is no God," jurists offered a range of new legal philosophies -- often abstracted from or appended to earlier Christian and classical teachings. Many Enlightenment writers postulated a mythical state of nature that antedated and integrated human laws and natural rights. Nationalist myths were grafted onto this paradigm to unify and sanctify national legal traditions: Italian jurists appealed to their utopic Roman heritage; English jurists to their ancient constitution and Anglo-Saxon roots; French jurists to their Salic law; German jurists to their ancient constitutional liberties.

A triumvirate of new increasingly secular legal philosophies came to prominence in the later eighteenth and nineteenth centuries. Legal positivists such as John Austin (1790-1859) and Christopher Columbus Langdell (1826-1906) contended that the ultimate source of law lies in the will of the legislature and its ultimate sanction in political force. Natural law theorists as diverse as Immanuel Kant (1724-1804) and Adam Smith (1723-1790) sought the ultimate source of law in pure reason and its ultimate sanction in moral sentiment. Historical jurists such as Friedrich Karl von Savigny (1814-1875) and Otto von Gierke (1841-1921) contended that the ultimate source of law is the custom and character of the *Volk*, and its ultimate sanction is communal condemnation. These juxtaposed positivist, naturalist, and historical legal philosophies have lived on in sundry forms in the modern Western legal academy, now heavily supplemented by an array of realist, socialist, feminist, and various critical schools of legal thought and with a growing number of interdisciplinary approaches that study law in interaction with the methods and texts of economics, science, literature, psychology, sociology, and anthropology.

Though these recent reforms have removed most traditional norms and forms of Christian legal influence, contemporary Western law still retains important connections with Christian and other religious ideas and institutions. Even today, law and religion continue to cross-over and cross-fertilize each other. Law and religion remain conceptually related. They both draw upon prevailing concepts of the nature of being and order, the person and community, knowledge and truth. They both embrace closely analogous doctrines of sin and crime, covenant and contract, righteousness and justice

that invariably bleed together in the mind of the legislator, judge, and juror.²⁸ Law and religion are methodologically related. They share overlapping hermeneutical methods of interpreting authoritative texts, casuistic methods of converting principles to precepts, systematic methods of organizing their subject matters, pedagogical methods of transmitting the science and substance of their craft to students. Law and religion are institutionally related, through the multiple relationships between political and religious officials and the multiple institutions in which these officials serve.²⁹

Even today, the laws of the secular state retain strong moral and religious dimensions. These dimensions are reflected not only in the many substantive doctrines of public, private, and criminal law that were derived from earlier Christian theology and canon law. They are also reflected in the characteristic forms of contemporary legal systems in the West. Every legitimate legal system has what Lon L. Fuller called an "inner morality," a set of attributes that bespeak its justice and fairness. Like divine laws, human laws are generally applicable, publicly proclaimed and known, uniform, stable, understandable, non-retroactive, and consistently enforced. Every legitimate legal system also has what Harold J. Berman calls an "inner sanctity," a set of attributes that command the obedience, respect, and fear of both political authorities and their subjects. Like religion, law has authority -- written or spoken sources, texts or oracles, which are considered to be decisive or obligatory in themselves. Like religion, law has tradition -- a continuity of language, practice, and institutions, a theory of precedent and preservation. Like religion, law has liturgy and ritual -- the ceremonial procedures, decorum, and words of the legislature, the courtroom, and the legal document aimed to reflect and dramatize deep social feelings about the value and validity of the law.

Even today, Christianity and other forms of religion maintain a legal dimension, an inner structure of legality, which gives religious lives and religious communities their coherence, order, and social form. 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, dignity, atonement, restitution, responsibility, obligation, and others pervade the theological doctrines of countless

²⁸ See chapters by Jeffrie Murphy and Frank S. Alexander herein.

²⁹ See chapters by David Little, Norman Doe, and William Bassett herein.

religious traditions, not least Christianity.³⁰ Legal structures and processes, including Catholic and Orthodox canon law and Protestant forms of ecclesiastical discipline, continue to organize and govern religious communities and their distinctive beliefs and rituals, mores and morals.³¹ All these religious belief, values, and practices the modern Western state still protects, respects, and reflects in its law.

Moreover, in the twentieth and early twenty-first centuries, Western Christians have remained forceful and effective legal advocates -- albeit as minority voices in much of Europe and Canada today. Catholic legal and political advocacy has grown in depth and power over the past century. Beginning with Pope Leo XIII (1810-1903) and his successors, the Catholic Church has revived and reconstructed for modern use much of the religious, political, and legal thought of the thirteenth-century sage, Thomas Aquinas. This neo-Thomist movement, along with other revival movements within Catholicism, helped launch the early political experiments of the Christian Democratic Party in Europe, the rise of sophisticated subsidiarity theories of society and politics on both continents, and the powerful new natural law and natural rights theories of Jacques Maritain (1882-1973), John Courtney Murray (1904-1967), and their many students. It also helped pave the way for the Church's great Second Vatican Council (1962-1965) with its transforming vision of religious liberty, human dignity, and democracy and with its ambitious agenda to modernize the Catholic Church's legal, political, and social teachings on numerous subjects. A good deal of the energy and ingenuity of these earlier Catholic reform movements are now captured in legally sophisticated Catholic "social teachings" movements and in various schools of Catholic natural law theory. It has also helped to drive a whole cottage industry of legal and political activism: Catholic NGOs, news media, litigation and lobbying groups have become deeply embroiled in contested national and international legal issues of religious liberty, capital punishment, marriage, abortion, social welfare, education, and more.

Protestant teachings on law, politics, and society have also been influential, albeit less comprehensive and more focused in the United States. In the first half of the twentieth century, great Protestant figures like Abraham Kuyper (1827-1920), Karl Barth

³⁰ See chapters by Frank Alexander, Jeffrie Murphy, and Michael Perry herein.

³¹ See chapters by Norman Doe and William Bassett herein.

(1886-1968), Dietrich Bonhoeffer (1906-1945), and Reinhold Niebuhr (1892-1971) charted provocative new legal and political pathways for Protestantism, building on neo-Reformation models. But their successors have not developed a comprehensive legal and political program on the order of Roman Catholicism after the Second Vatican Council -- despite important advances made by the World Council of Churches and various world Evangelical gatherings. After World War II, most European Protestants tended to fade from legal influence, and many North American Protestants tended to focus on hot button political issues, like abortion or prayer in schools, without developing a broader legal theory or political program. There have been notable advances and achievements in recent times. One was the civil rights movement of the 1950s-1960s, led by the Baptist preacher Martin Luther King, Jr. and others, that helped to bring greater political and civil equality to African-Americans through a series of landmark statutes and cases. Another was the rise of the Christian right in America in the 1970s to 1990s -- a broad conservative political and cultural campaign designed to revitalize public religion, restore families, reform schools, reclaim unsafe neighborhoods, and support faith-based charities through new statutes and law suits. Another has been the recent energetic involvement of Protestant and other Christian intellectuals in campaigns of family law reform, human rights, environmental protection, and social welfare. Also promising has been the rise of articulate public intellectuals like Wolfgang Huber, Jürgen Habermas, and John Stott in Europe, and Robert Bellah, Jean Elshtain, Carl Henry, and Martin Marty in North America, who from various perspectives have called fellow Protestants to take up anew the great legal, political, and social questions of our day. Whether these recent movements are signposts for the development of a comprehensive new Protestant jurisprudence and political theology remains to be seen.

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