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Introduction to Legal Studies Section

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Abstract

This article analyzes the shifting concepts of law in Western law and thought in early modern times and today. It first shows how the modern movement of interdisciplinary legal studies emerged as a corrective to the narrow positivist concepts of law that prevailed before the 1960s. It then shows how, in anticipation of modern methods, earlier Protestant legal thinkers had already worked hard to reconcile biblical and human laws, natural and positive laws, canon and civil laws, cases and legal codes in pursuit of a more integrated jurisprudence.

Keywords: Protestantism; natural law; legal positivism; canon law; civil law; legal codes; Harold Berman; Christoph Strohm; Mathias Schmoeckel; H.L.A. Hart; Immanuel Kant

“The jurists are still trying to define the law.”

-- Immanuel Kant, *Critique of Pure Reason* (1781)

“Few questions concerning human society have been asked with such persistence and answered by serious [legal] thinkers in so many diverse, strange, and even paradoxical ways as the question ‘What is law?’”

-- H.L.A. Hart, *The Concept of Law* (1961)

These two quotations -- by the leading German philosopher of the eighteenth century and the leading English jurist of the twentieth -- might surprise some readers of this volume. One would think that jurists would have a decided advantage over theologians, scientists, and philosophers in defining law. Law, after all, is their specialty, and it has been for a very long time. A special professional class of jurists has been at work in the West for more than two millennia. Separate faculties of law have been in place in Western universities for nearly a millennium. Distinct systems of civil law, canon law, and common

law have been operating side by side in the West for almost as long. Comprehensive national codes of public, private, penal, and procedural law have been in place for some two centuries. Substantial international conventions, covenants, and treaties are now emerging on various global legal issues. Surely, after all this time and experience, one would think that Western jurists would have worked out a clear, crisp, and concise definition of law. But the exact opposite is true. Just because of its lengthy pedigree and just because of its sprawling complexity, the law studied by jurists has always resisted easy definition and universal conceptualization. Jurists have thus, for many centuries, depended on theological, philosophical, and scientific teachings on law for inspiration and instruction.

In the two centuries between Kant and Hart, many Western jurists worked hard to break themselves of this traditional interdisciplinary dependence and to establish law as an autonomous scientific discipline. Their effort was part and product of the new positivist theories of knowledge that were sweeping over Western universities in the nineteenth and early twentieth centuries – theories that were designed, in part, to replace earlier epistemologies that gave law, theology, and philosophy a much more prominent place. Positivism aimed to subdivide all of human learning into a series of discrete scientific disciplines and to reduce each discipline to its most basic inner logic and method. Traditional disciplines that had no distinctive core logic and method would have to be abandoned or subsumed.

In law, the turn to positivism proceeded in two stages. The first stage was scientific. Inspired by the successes of the early modern scientific revolution, from Copernicus to Newton,¹ jurists in Europe and North America set out to create a method and concept of law that was every bit as scientific and rigorous as that of the new mathematics and the new physics. This scientific movement in law was not merely an exercise in professional rivalry. It was an earnest attempt – even a desperate attempt in some universities -- to show that law has an autonomous place in the cadre of positive sciences, that it could not and should not be subsumed by theology, philosophy, government, or political economy. In testimony to this claim, later eighteenth- and nineteenth-century jurists poured forth a staggering number of new legal codes, constitutions, encyclopedias, dictionaries, textbooks, and other legal syntheses that still grace, and bow, the shelves of our law libraries.

The second stage of the positivist turn in law was philosophical. A new movement—known variously as legal positivism, legal formalism, and analytical jurisprudence—sought to reduce the subject matter of law to its most essential core. If physics could be reduced to “matter in motion” and biology to “survival of the fittest,” then surely law and legal study could be reduced to a core subject as

¹ See the chapters herein by John Polkinghorne and Jörg Hüffner.

well. The positivist formula was produced in the nineteenth century—most famously by Jeremy Bentham and John Austin in England and Christopher Columbus Langdell and Oliver Wendell Holmes, Jr. in America. Law, they said, is simply the concrete rules and procedures “posited” by the political sovereign and enforced by the courts. Many other institutions and practices might be normative and important for social coherence and political concordance. But they are not law. They are the subjects of theology, ethics, economics, politics, psychology, sociology, anthropology, and other humane disciplines and social sciences. They stand, as John Austin put it, beyond “the province of jurisprudence properly determined.”²

This positivist theory of law, which swept over many Western universities at the turn of the twentieth century, rendered legal study increasingly narrow and insular. Law was simply the political sovereign's rules. Legal study was simply the analysis of the rules that were posited, and their procedural application in particular cases. Why these rules were posited, whether their positing was for good or ill, how these rules affected society, politics, or morality were not relevant questions for legal study. By the early twentieth century, it was rather common to read in legal textbooks that law is an autonomous science, that its doctrines, language, and methods are self-sufficient, that its study is self-contained. It was common to think that law has the engines of change within itself; that, through its own design and dynamic, law marches teleologically through time “from trespass to case to negligence, from contract to quasi-contract to implied warranty.”³

U.S. Supreme Court Justice Oliver Wendell Holmes, Jr. was an early champion of legal positivism, and he used it to rebuke traditional legal theories that privileged Christian and other religious theories of law. We have now entered into a new “age of faith in law,” Holmes declared, to replace an earlier age of faith dominated by the church and the clergy. The confession of this new age of faith is that society is “ruled by laws, not by men.” Its catechism is the new case law method of the law school classroom. Its canon is the new concordance of legal codes. Its church is the courtroom where the rituals of judicial formalism and due process yield legal truth. Its church council is the Supreme Court which issued its opinions with as much dogmatic confidence as the divines of Nicea, Augsburg, and Trent.⁴

Holmes rebuked traditional views of law with a series of aphorisms that are still often quoted today. Against those who insisted that the legal tradition was more than simply a product of pragmatic evolution, he wrote: “The life of the law is not logic but experience.” Against those who appealed to a higher natural

² 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* (London: J. Murray 1861-63).

³ Barbara Shapiro, “Law and Science in Seventeenth-Century England,” *Stanford Law Review* 21 (1969): 728.

⁴ Grant Gilmore, *The Ages of American Law* (New Haven: Yale University Press, 1977), 41-67.

law to guide the positive law of the state, Holmes cracked: “There is no such brooding omnipresence in the sky.” Against those who argued for a more principled jurisprudence, Holmes retorted: “General principles do not decide concrete cases.” Against those who insisted that law needs basic moral premises to be cogent, Holmes mused: “I should be glad if we could get rid of the whole moral phraseology which I think has tended to distort the law.”⁵

Despite its new prominence in Western legal circles, legal positivism was not without its ample detractors. Already in the 1920s and 1930s, sociologists of law argued that the nature and purpose of law and politics cannot be understood without reference to the spirit of a people and their times—of a *Volksgeist und Zeitgeist* as various German jurists put it, building on the earlier insights of the historical school of jurisprudence developed by Otto von Gierke and Friedrich Karl von Savigny. The legal realist movement of the 1930s and 1940s used the new insights of psychology and anthropology to cast doubt on the immutability and ineluctability of judicial reasoning. The revived natural law movement of the 1940s and 1950s saw in the horrors of Hitler’s Holocaust and Stalin’s gulags, the perils of constructing a legal system without transcendent checks and balances. The international human rights movement of the 1950s and 1960s pressed the law to address more directly the sources and sanctions of civil, political, social, cultural, and economic rights. Critical Marxist, feminist, and neo-Kantian movements in the 1960s and 1970s used linguistic and structural critiques to expose the fallacies and false equalities of many traditional legal and political doctrines. It was this swelling tide of “diverse, strange, and even paradoxical” perspectives on law that H.L.A. Hart was lamenting in the introduction to his monumental tract on *The Concept of Law*.⁶

Spurred on by Hart, a number of distinguished jurists – Harold Berman, Lon Fuller, Karl Llewellyn, Jerome Hall, David Daube, and others – began to return to a broader interdisciplinary concept and definition of law. The efforts of the late Harold J. Berman from 1950-2000 were particularly powerful, and his chapter in this volume provides a crisp distillation of his views. Of course, Berman and other critics said in concurrence with legal positivists, law consists of rules—the black letter rules of contracts, torts (delicts), property, corporations, criminal law, administrative law, constitutional law, and sundry other familiar legal subjects. Of course, law draws to itself a distinct legal science -- a distinct method of analysis, argument, and adversarial dispute resolution, a distinct

⁵ Oliver Wendell Holmes, Jr., *The Common Law* (Boston: Little, Brown and Company, 1881), 1; *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J. dissenting); *Lochner v. New York*, 198 U.S. 45, 76 (1905); Oliver Wendell Holmes, Jr., “Letter to Sir Frederick Pollock (May 30, 1927),” in Mark DeWolfe Howe, ed., *Holmes-Pollock Letters: The Correspondence of Mr. Justice Holmes and Sir Frederick Pollock, 1874–1932*, 2 vols. (Cambridge, MA: Harvard University Press 1941), 2:200. See further Albert W. Alschuler, *Life Without Values: The Life, Work and Legacy of Justice Holmes* (Chicago: University of Chicago Press, 2000).

⁶ (Oxford: Oxford University Press, 1961), 1.

manner of moving from principle to precept, from precedent to prescription, from evidence to judgment. But, as Berman's chapter argues, law is much more than the rules of the state and how we apply and analyze them in concrete cases. Law is also the social activity by which certain norms are formulated by legitimate authorities and actualized by persons subject to those authorities. The process of legal formulation involves legislating, adjudicating, administering, and other conduct by legitimate officials. The process of "legal actualization," as Berman calls it, involves obeying, negotiating, litigating, and other conduct by legal subjects. Law is rules, plus the social and political activities and processes of formulating, enforcing, and responding to those rules.

While rules sometimes do get formulated and posited by a sovereign, often times that comes after a long and gradual social process: habits become patterns, patterns become customs, customs become rules, rules become statutes, statutes become codes, codes become constitutions, constitutions become universal declarations. Numerous other institutions, besides the state, are involved in this legal process. The rules, customs, and processes of churches, colleges, corporations, clubs, charities, and other non-state associations are just as much a part of a society's legal system as those of the state. Numerous other norms, besides formal legal rules, are involved in the legal process. Each person's legal activities of ruling and obeying, arguing and defending, negotiating and judging are shaped by a complex blend of personal attributes – their class, gender, culture, experience, virtue, ideology, bias, faith, and more.

Legal positivism could not, by itself, come to terms with law understood in this broader sense. After 1970, Western jurists thus began to (re)turn with increasing alacrity to the methods and insights of other disciplines to enhance their formulations. This was the birthing process of the movement of interdisciplinary legal study that now dominates Western law schools. The movement was born to enhance the province and purview of legal study, to refigure the roots and routes of legal analysis, to render more holistic and realistic our appreciation of law in community, in context, in concert with other disciplines. In the 1970s, a number of interdisciplinary approaches began to enter the mainstream of the legal curriculum—combining legal study with the study of history, philosophy, economics, health, medicine, politics, and sociology. In the 1980s and 1990s, new interdisciplinary legal approaches were born in rapid succession—the study of law coupled with the study of anthropology, literature, race, environmental science, urban studies, women's studies, gay-lesbian studies, and more. And, importantly for our purposes, the study of law was also recombined with the study of religion, including the very Christianity that legal positivists like Holmes had sought to banish from the study of law.

Christians and other religious scholars who study law and religion today focus on the religious dimensions of law, the legal dimensions of religion, and the interaction of legal and religious ideas and institutions, norms and practices.

They believe that religion gives law its spirit and inspires its adherence to tradition, ritual, and justice. Law gives religion its structure and encourages its devotion to order, organization, and orthodoxy. Law and religion share such ideas as fault, obligation, and covenant and such methods as ethics, rhetoric, and hermeneutics. 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.⁷

The three chapters, beyond Berman's, gathered in this "legal studies" section of the volume focus on one small corner of this new field of law and religion study: namely, the place of law in the Protestant tradition, particularly the Lutheran (Evangelical) and Calvinist (Reformed) traditions. This is a neglected subject – and rightly so, it would seem. After all, Martin Luther's most famous legal acts were burning the medieval canon law books, condemning jurists as "bad Christians," and dividing Law from Gospel. His most famous political act was to divest the Catholic Church of its vast power, privilege, and prerogatives and to place all this rather perilously in the hands of magistrates. A number of later Protestant groups in Europe and North America repeated Luther's example, eventually transmitting their views to African and Asian colonies as well. Various Anabaptists went further and withdrew themselves from society altogether, and called for a "wall of separation" between church and state, religion and politics, conscience and law. Given these realities, even sympathetic scholars have thus tended to pass over historical Protestantism in favor of the legal teachings of the

⁷ See esp. Harold J. Berman, *The Interaction of Law and Religion* (Nashville, TN: Abingdon Press, 1974); id. *Law and Revolution: The Formation of the Western Legal Tradition* (Cambridge, Mass.: Harvard University Press, 1983); id., *Faith and Order: The Reconciliation of Law and Religion* (Grand Rapids, MI: Wm. B. Eerdmans Publishing Co., 1993). See samples of later views in John Witte, Jr. and Frank S. Alexander, eds., *Christianity and Law: An Introduction* (Cambridge: Cambridge University Press, 2009); id., *Modern Christian Teachings on Law, Politics, and Human Nature*, 2 vols. (New York: Columbia University Press, 2006).

Bible and the Church Fathers, of sundry medieval Catholic and neo-scholastic canonists and philosophers, and of various modern Christian legal thinkers and political movements.

The reality, however, is that the Protestant tradition -- while legally and politically weak in many quarters today -- has long made monumental contributions to Western ideas and institutions of law. The sixteenth-century Protestant Reformation itself was a reform of both church and state, theology and law. Its leaders were not only great theologians but also great jurists. Protestant theologians and jurists worked together to craft new laws and polities. For every new Protestant catechism in the early modern era there were a hundred new legal ordinances, for every fresh confession of faith, fifty new bills of rights. Early modern Protestants believed in law – as a deterrent against sin, an inducement to grace, a teacher of Christian virtue. They also believed in the rule of law – structuring their churches and states alike to minimize the sinful excesses of their rulers and to maximize the liberties of their subjects. They extended their legal reforms to marriage, charity, and education as well, making fundamental legal changes that continue to influence us today. And they engineered new experiments in federalism, civic republicanism, human rights protection, and social contract theory that remain at the heart of Western liberalism, albeit now in secularized forms.⁸

Early modern Protestants built these reforms of law, politics, and society on the strength of new jurisprudential theories of law and authority, justice and equity, rights and liberties, codes and constitutions. These theories are the special focus of the chapters that follow by Christoph Strohm, Mathias Schmoeckel, and the undersigned. Together, these three chapters address four main questions of law that occupied Protestants from the sixteenth to nineteenth centuries.

One critical question, raised early by Luther, was the place of the Mosaic law in Christian churches, states, and societies. This had been a perennial question of Christian theology, as several other chapters in have already shown.⁹

⁸ This is the thesis of my volumes, *Law and Protestantism: The Legal Teachings of the Lutheran Reformation* (Cambridge: Cambridge University Press, 2002); *The Reformation of Rights: Law, Religion, and Human Rights in Early Modern Calvinism* (Cambridge: Cambridge University Press, 2007). See also the monumental studies of Christoph Strohm, *Calvinismus und Recht* (Tübingen: Mohr Siebeck, 2008); Harold J. Berman, *Law and Revolution II: The Impact of the Protestant Reformations on the Western Legal Tradition* (Cambridge, Mass.: Harvard University Press, 2003); Mathias Schmoeckel, "Metanoia: Die Reformation und der Strafzweck der Besserung," in Reiner Schulze, et al., eds., *Strafzweck und Strafform zwischen religiöser und weltlicher Wertevermittlung* (Kempen: Rhema, 2008); id., "François Connan (1508-1551), das Synallagma und die Föderaltheologie," in Bernard d' Alteroche, et al., eds., *Mélanges en l'Honneur d'Anne Lefebvre-Teillard* (Paris: Éditions Panthéon-Assas, 2009), 963-89.

⁹ See the excellent chapters herein by Konrad Schmid, Michael Welker, Patrick Miller, Gregor Etzelmüller, and Christiane Tietz.

But it was raised with new urgency in early Protestant communities that resolved to live “by the Bible alone” (*sola Scriptura*). Christ said he had come not to “abolish” the law, but to “fulfill” it (Matt. 5:17), and both Christ and St. Paul offered many examples of how to live by the spirit and letter of the law.¹⁰ But what then was the place of the 613 commandments of the Torah for modern day Christians? The Church Fathers and medieval Catholics had divided the Mosaic dispensation into “moral laws” (like the Decalogue) that were still binding, “juridical laws” (like rules of tithing or sanctuary) that were merely instructive, and ceremonial laws (on diet, sacrifice, and temple life) that were now dispensable. Were these divisions still apt, and if so, what Torah commandments went into what category? Professor Strohm lays out the range of Protestant theological answers to these questions from the sixteenth to the nineteenth centuries – from early rejections of the Mosaic law in favor of the Gospel to gradual accommodations of its enduring moral and juridical lessons for church and state alike. Professor Schmoeckel and I further show how Protestant jurists made use of Mosaic laws as illustrations and applications of the law that God has “written on the hearts of all men” (Rom. 2:14-15).

This raised a second question for Protestants: what is the law of nature, and how can we Christians be sure of its contents – especially given our inability as sinful creatures to read clearly the law written on our hearts or even rewritten in Scripture. Protestants knew the traditional formula taught by medieval Catholics: that the natural law gives all persons an innate or natural knowledge of good and evil (called *synderesis*), that by exercising their reason persons can come to understand the norms of this natural law, and that by exercising their conscience they can learn to apply these norms equitably to concrete circumstances. But they also recognized that, throughout history, persons and peoples had reached very different formulations and applications of the natural law, as had various Protestants and Catholics in their own day. Protestants wanted more certainty about the contents of the natural law. They found it by comparing biblical laws with Roman laws, civil laws, canon laws, customary laws, and more. If all these legal systems independently embraced the same legal teachings, they concluded, that had to be evidence of the natural law in action.

Early Protestant natural law theories thus became exercises not only in biblical exegesis but also in comparative legal history. Particularly Lutheran scholars like Philip Melanchthon and Johann Oldendorp and Calvinist scholars like Theodore Beza and Johannes Althusius wandered freely over all manner of sources in search of common natural law principles and precepts. They published legal handbooks that put side-by-side various biblical and positive laws on sundry legal topics. On the strength of these collections, Melanchthon and Althusius early on worked out elaborate theories of natural law that integrated these sundry sources: my chapter herein analyzes Althusius’ contributions. John

¹⁰ See the chapters by Mathias Konradt and Michael Welker herein.

Calvin, too, developed an intricate new Reformed law for Geneva by sifting through biblical laws and rabbinic jurisprudence, Roman law and medieval civilian lore, canon law and scholastic philosophy, as well as local feudal, manorial, urban, and customary laws in search of what he thought was the most equitable and expedient formulation of any given legal topic. For Calvin, the Bible trumped when it gave clear direction. But Calvin, who was a well trained jurist, knew the Bible was no modern legal code that solved all modern legal questions. On many legal topics, a more eclectic and elaborated interpretation of core biblical principles and sundry positive laws was needed.

This gradual development of a “demonstrative theory of natural law,” as Danish Protestant jurist, Nicolaus Hemming called it,¹¹ helped to answer a third question that sharply divided Protestants: the place of Catholic canon law in Protestant communities. In the centuries before the Reformation, the medieval Catholic Church had claimed a vast jurisdiction -- literally the power "to speak the law" (*jus dicere*) for Western Christendom. It 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. The medieval church's canon law that emerged from these sweeping jurisdictional claims was systematized in the massive *Corpus Iuris Canonici*, and was taught in every law faculty in Europe. A vast hierarchy of church courts and officials administered the canon law in accordance with sophisticated new rules of procedure and evidence. A vast network of ecclesiastical officials presided over the church's executive and administrative functions. The medieval church was, in F.W. Maitland's famous phrase, the first true state in the West, the medieval canon law the first international law since the fall of Rome.¹²

Early Protestants declared anathema on this regime. 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 reformers, the Catholic canon law obstructed the individual's relationship with God, abridged their God-given freedom of conscience, 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

¹¹ Nicolaus Hemming, *De lege naturae apodicta methodus* (Wittenberg, 1563), reprinted in *D. Nicolai Hemming ... Opuscula Theologica* (Geneva, 1586).

¹² This is the central thesis of Harold J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Cambridge, Mass.: Harvard University Press, 1983).

usurped the state's role as God's vice-regent. Luther thus burned the canon law books in Wittenberg, and Henry VIII burned England's legal bridges with Rome. Many other Protestant communities banished the bishops and closed the canon law courts.

But it soon became clear to Protestants that Catholic canon law, once purged of its abusive provisions, remained a valuable and sophisticated source of Christian law for church and state alike. Protestant theologians thus developed an innovative theory of the church to accommodate the canon law. The "invisible church" of the heavenly kingdom, they argued, might well be able to survive on the Bible alone, free from the accretions of the canon law. But the visible church of the earthly kingdom, filled as it is with both sinners and saints, requires both biblical and canonical rules and procedures to be governed properly. Medieval canon law, insofar as it extends biblical norms, is a proven norm for the governance of the visible church, and it should be used. Protestant jurists, in turn, offered an innovative theory of the state and the sources of civil law. The magistrate, as God's vice-regent of the community, is required to attend to both the civil and spiritual needs of his subjects. He is to rule using Christian and equitable laws. Again the canon law, as an exemplary form of Christian and equitable law, was an appropriate prototype on which to call. This new ecclesiology and jurisprudence, together, provided a sturdy rationale for the transplantation of canon law into Protestant lands and into Protestant law schools, where it remained until the twentieth century.

The debate over the utility of canon law raised a fourth and deeper question about the usefulness of any law – whether natural, biblical, civil, or canon law -- in a Christian society dedicated to the freedom of the Christian. The New Testament, after all, extols Christian freedom. "For freedom, Christ has set us free." "You were called to freedom." "Where the Spirit of the Lord is, there is freedom." "For the law of the Spirit of life in Christ has set [you] free from the law of sin and death." "You will know the truth, and the truth will make you free." "You will be free indeed." You all have been given "the law of freedom" in Christ, "the glorious liberty of the children of God." You must all now "live as free men" (Rom. 8:2, 21; John 8:32, 36, 1 Pet. 2:16). If Christians truly are free, hasn't all law been rendered useless? No, most Protestants insisted. Since even the most pious Christian remains sinner and saint, and since society embraces many who are more sinful than saintly, the law retains three important uses or functions for this life. Beginning with Melanchthon and Calvin, Christoph Strohm and Mathias Schmoeckel show, the reformers distinguished (1) a civil or political use; (2) a theological or spiritual use; and (3) an educational or pedagogical use.

First, the law has a *civil* use to restrain all persons from sinful and harmful conduct. Threatened by dire sanctions, even the most sinful of persons will obey the basic commandments of the law against murder, theft, adultery, perjury and the like, thus yielding at least a modicum of public morality, order, and peace. Second, the law has a *theological* use to condemn sinful persons for their

violations and their inability to obey the law. The law serves as a mirror to reflect on one's depravity and be induced to seek God's gracious help in faith. Third, the law has an *educational* use of teaching those who have already been saved the works that please God. The law teaches them not only the "public" or "external" morality" that is common to all persons, but also the "private" or "internal" morality that is becoming only of Christians. The law teaches not only its letter but also its spirit. It not only coerces persons against violence and violation, but also cultivates in them charity and love. It not only punishes harmful acts of killing, stealing, and adultery, but also prohibits evil thoughts of hatred, covetousness, and lust. Through the exercise of this private morality, the saints glorify God, exemplify God's law, and impel other sinners to seek God's grace.

To be effective, however, Professor Schmoeckel shows, each law for each community must be cast in "written, clear, and understandable codes" so that all members of that community "can use the law" to exercise "their freedom in a better way." This was an early inspiration not only for the many new civil ordinances and legal treatises that were published in Protestant lands. It was also one of the important catalysts for the legal codification movements of the nineteenth and twentieth centuries, engineered by Jeremy Bentham and others. Modern legal codification was not just a product of scientific legal positivism; it was also a product of Protestant views of the pedagogical uses of law.

It remains an open question whether modern-day Protestants can and will continue to engage legal questions of law with the same level of acuity as their forebearers, and whether they can contribute meaningfully to the emerging new interdisciplinary discussions among jurisprudence, theology, and science, following the exemplary efforts of Professor Welker in this volume. In the first half of the twentieth century, great Protestant figures like Abraham Kuyper, Karl Barth, Dietrich Bonhoeffer, and Reinhold Niebuhr did chart provocative new legal and political pathways for Protestantism, building on neo-Reformation models as well as the new scientific learning of their day. 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 direct legal influence and engagement, 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.

To be sure, Protestants have made some notable legal and political advances 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 Protestants and other Christian intellectuals on both sides of the Atlantic engaged in campaigns of family law reform, human rights, environmental protection, and social welfare. Another has been the rise of articulate public intellectuals like Wolfgang Huber and David Ford in Europe, and Robert Bellah and Jean Elshtain 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. Also promising has been the burgeoning new body of strong biblical exegesis and historical writing, exemplified in this volume, which aim to retrieve and reconstruct deep Protestant legal thinking. Whether these recent movements are signposts for the development of a comprehensive new Protestant jurisprudence and political theology remains to be seen.