

264. LR

Draft

Published as "Afterword," to Russell Sandberg, ed., *Leading Works in Law and Religion* (London: Routledge, 2019), 197-205

### Afterword

John Witte, Jr.

This is a British Isles book. I mean that as a compliment. It's not just because the chapters herein sparkle with the elegant prose that still typifies much British and Irish academic work -- much to the envy of us colonists. It's not just because the editor, Russell Sandberg, has rapidly emerged as the British Isles' brightest new academic star in the field of Law and Religion study -- much to the delight of us veterans. It's also a compliment because many of 'the leading works in Law and Religion' featured in these pages are very much country-specific books. To be sure, Harold J. Berman's *Law and Revolution*, translated into a dozen languages, is a top tier title anywhere. Legal historians will know F.W. Maitland's name, if not his classic title, *Roman Canon Law in the Church of England* featured herein. A few left-wing scholars might have heard of Winnifred Sullivan's *The Impossibility of Religious Freedom*. A few legal pluralists will know Ayelet Shachar's pioneering work on *Multicultural Jurisdictions*, especially given Archbishop Rowan Williams's controversial comment in 2007 about the 'unavoidable' need for English courts to accommodate Shari'a and other faith-based family laws. Some comparative religious liberty experts will know Carolyn Evans' pioneering work on religion freedom in the European Convention of Human Rights, especially since the Strasbourg Court has become so active on these questions of late. But the rest of the scholarly names and titles featured on the foregoing pages -- Kevin Boyle, Sir John Robilliard, Francis Lyall, David Maxwell Fyfe, Jean Baubérot, Lucy Vickers, The Right Rev. Christopher Hill, and others -- are rather too little known outside the British Isles, although the chapter authors work hard to show how and why they should be part of the Law and Religion canon.

Calling this a very British and Irish book is also a compliment to the emerging global field of Law and Religion scholarship, which is now developed and diverse enough to have distinct national and regional accents, authors, and literatures. The study of Law and Religion is relatively new in modern research universities in the West. A century ago, it was only a tiny boutique area of scholarship, focused mostly on religious laws, church-state relations, and religious freedom. Most universities had, if any, only a specialist or two scattered among the faculties of History, Divinity, Law, Politics or Anthropology. A half century ago, even these early scholarly lights seemed to be dimming as university campuses came under the thrall of the 'secularist hypothesis' that the spread of reason and science would slowly eclipse the sense of the sacred and restore the sensibilities of the superstitious. Liberalism, Marxism, and various new critical philosophies were regnant on many university campuses. Even

divinity schools and seminaries were arguing that 'God is dead' and organized religion is dying.

No longer. Over the past quarter century, another great awakening of religion has broken upon us — now global in its sweep, startling in its diversity, and frightening in its power. Even if the Global North and Global West now feature more Nones, Neins, and Nyets on organized religion than ever before, the Global Middle and Global South have seen powerful new religious upsurges of old and new religions. Globalized media, migration, marketing, and mission work have brought these religions to the Global North and West, too, sometimes with a vengeance. And they have brought with them a whole alphabet of new law and religion challenges -- Apostasy, Blasphemy, Conversion, Defamation, Evangelism, Fundamentalism, Genocide, Hate Crimes, ISIS, Jihad, Kosovo, Migration, Neo-Paganism, Ostracism, Populism, Queer Rights, Refugees, Shari'a, Theocracy, Universal Rights, Value-Voters, Warfare, and Xenophobia. This alphabet of new challenges sits alongside an alphabet of more benign topics whose legal and religious dimensions are more familiar to Western readers but pressing again for more attention: Adoption, Baptism, Charity, Dignity, Education, Forgiveness, Grace, Hospitality, Intervention, Justice, Kindness, Love, Ministry, Negotiation, Obedience, Pastoral Care, Reconciliation, Sanctuary, Toleration, Uprightness, Virtues, Welfare, and more.

Scholars of Law, Religion, Politics, History, Ethics, Philosophy, and other social and humane sciences have taken note of these new movements and developments. More than 1500 serious scholars worldwide are now part of a rapidly growing scholarly guild of Law and Religion study. Some 50 centres and institutes of law and religion have popped up on campuses around the globe – more than half in the United States, but with growing numbers as well in Europe, the Mediterranean basin, sub-Saharan Africa, Central and Latin America, Australia, New Zealand, Southeast Asia, and several lands on the Pacific Rim. These groups are being further integrated by international and regional consortia of Law and Religion studies and by dozens of periodicals and blogs on Law and Religion newly available. More than 1700 books on Law and Religion were published in English alone world-wide over the past 25 years, and several new Law and Religion book series have been established by leading publishers.

While the global movement of Law and Religion study is collectively impressive in its sweep, the slower pace of the Law and Religion movement in the British Isles, noted by several authors herein, is quite typical of other lands. So is the preoccupation with some of the largely local concerns illustrated by these chapters, like the ecclesiastical laws of burial, the clashes between Continental laïcité and Anglican establishment, or the tensions between the ECHR and common law jurisprudence. This has not been the case in the United States, with its stronger religious adherence and its longer tradition of interdisciplinary legal study in Law Schools. Today, more than American 200 Law Schools offer at least a basic course on religious liberty or religion-state relations. A growing number of Law Schools now also teach courses in Christian canon law, Jewish law, Islamic law, and natural law, and include serious consideration of religious materials in their treatment of Legal Ethics, Legal History, Jurisprudence,

Law and Literature, Legal Anthropology, Comparative Law, Environmental Law, Family Law, Human Rights, and other basic courses. Religion is no longer just the hobbyhorse of isolated and peculiar professors - principally in their twilight years and suddenly concerned about eternal life. It is no longer just the preoccupation of religiously-chartered Catholic, Protestant, Evangelical, Mormon, or Jewish Law Schools. Religion now stands alongside Economics, Philosophy, Literature, Politics, History, and other disciplines as a valid and valuable conversation partner with Law.

For the past few years, I have been periodically mapping the main themes in law and religion scholarship around the globe, at least as the work appears in Romance languages.<sup>1</sup> Herewith an updated map that will help situate the 'leading works in law and religion' featured in this volume:

First, by far the largest body of Law and Religion scholarship is devoted to issues of religious freedom and religion-state relations in national and international contexts. This topic courses through more than half the chapters in this volume, anchored by the religious freedom and non-discrimination provisions of the Human Rights Act 1998 and the European Convention on Human Rights, Article 9. In the United States, this is in part the law of the First Amendment guarantees of no establishment and free exercise of religion and related statutes. In other lands, these questions are topics of special constitutional provisions, concordats, treaties, statutes, regulations, and cases. Several international human rights instruments also include religious freedom norms, not least Article 18 in both the 1948 Universal Declaration of Rights and 1966 International Covenant on Civil and Political Rights, the 1981 UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion and Belief, and the 1989 Vienna Concluding Document, Principles 16 and 17.

The legal, theological, cultural, and personal issues arising under such provisions are perennial, profound, and ever more pressing today. How to manage religious pluralism and protect religious and cultural minorities--particularly groups like Jews, Muslims, Mormons, Jehovah's Witnesses, Scientologists, and Indigenous Peoples who often bring charges of private and state-based discrimination. How to define and set limits on religious and anti-religious exercises and expressions that cause offense or harm to others or elicit charges of blasphemy, defamation, or sacrilege. How to adjudicate challenges that a state's laws run directly counter to a party's core claims of conscience or cardinal commandments of the faith. How to balance private and public exercises of religion, including the liberty of conscience of one party to be left alone and the free exercise right of another to proselytize. How to balance conflicts between the rights of parents to bring up their children in the faith and the duties of the state to protect the best interest of the child. How to discern the proper place of religion in public state schools, and the proper place of government in private religious schools. How to protect the distinct religious needs of prisoners, soldiers, refugees, and others

---

<sup>1</sup> See, e.g., J Witte Jr, 'The Study of Law and Religion in the United States: An Interim Report,' (2012) 14 *Ecclesiastical Law Journal* 327; J Witte Jr, 'The Interdisciplinary Growth of Law and Religion' in F Cranmer et al (eds), *The Confluence of Law and Religion: Interdisciplinary Reflections on the Work of Norman Doe* (Cambridge University Press, 2016) 247.

who do not enjoy ready access to traditional forms and forums of religious worship and expression.

Many religious freedom issues also involve religious groups, for whom the right to organize as a legal entity with juridical personality is itself often the most critical first issue. But here, too, myriad other questions have reached national high courts and international tribunals: How to negotiate the complex needs and norms of religious groups without according them too much sovereignty over their members or too little relief from secular courts in the event of fundamental rights violations by religious officials. How to balance the rights of religious groups to self-determination and self-governance with the guarantees of freedom from discrimination based on religion, gender, culture, and sexual orientation. How to balance competing religious groups who each claim access to a common holy site, or a single religious or cultural group whose sacred site is threatened with desecration, development, or disaster. How to protect the relations between local religious communities and their foreign co-religionists. How to adjudicate intra- or interreligious disputes over property, contracts, employment, or torts that come before secular tribunals for resolution. How to determine the proper levels of state cooperation with and support of religious officials and institutions in the delivery of child care, medical services, disaster relief, or humanitarian aid. How to define the lines of cooperation and jurisdiction between religious and political officials over fundamental institutions like the family, school and charity that have both spiritual and secular dimensions for many citizens.

Second, and related, various scholars now focus on the (contested) place of religion and religious freedom in the human rights pantheon. Several leading critical scholars today – jurists, historians, anthropologists, political theorists, and philosophers alike – argue that religion is too dangerous, divisive, and diverse in its demands to be accorded special protection. Freedom of conscience claimants, they argue, unfairly demand the right to be a law unto themselves, to the detriment of general laws and to the endangerment of other people’s fundamental rights and legitimate interests. Institutional religious autonomy is too often just a special cover for abuses of power and forms of prejudice that should not be countenanced in any organization - religious or not. Religious liberty claims are too often proxies for political or social agendas that deserve no more protection than any other agenda. Religion, these critics thus conclude, should be viewed as just another category of liberty or association, with no more preference or privilege than its secular counterparts. Religion should be treated as just another form of expression, subject to the same rules of rational democratic deliberation that govern other ideas and values. To accord religion any special protection or exemption discriminates against the nonreligious. To afford religion a special seat at the table of public deliberation or a special role in the implementation of government programs invites religious self-dealing.

By sharp contrast, a number of leading scholars argue that religion is a cornerstone of human rights and that religious freedom is indispensable to constitutional order. Even in today’s liberal societies, committed to policies of secularism, neutrality, or laïcité, religions still help to define the meanings and measures of shame and regret,

restraint and respect, responsibility and restitution that a human rights regime presupposes. They help to lay out and tie down the fundamentals of human dignity and human community, and the essentials of human nature, human capacities, and human needs upon which human rights are built. Moreover, religious organizations stand alongside the state and other institutions in helping to implement and protect the rights of a person and community—especially at times when the state is weak, distracted, divided, cash-strapped, transitioning, or corrupt. Religious communities can create the conditions (sometimes the prototypes) for the realization of civil and political rights of speech, press, assembly, and more. They can provide a critical (sometimes the principal) means of vindicating rights to education, health care, childcare, labor organizations, employment, and artistic opportunities, among other things. And they offer some of the deepest insights into duties of stewardship and servanthood that lie at the heart of environmental care and the rights of nature. Several detailed empirical studies have shown that the protection of ‘religious freedom in a country is strongly associated with other freedoms, including civil and political liberty, press freedom, and economic freedom, as well as with multiple measures of well-being’—less warfare and violence, better healthcare, higher levels of income, and better educational and social opportunities, especially for women, children, the disabled, and the poor. By contrast, where religious freedom is low, communities tend to suffer and struggle, and human rights protection dramatically decline across the board.<sup>2</sup> This topic, too, comes through in some of these chapters.

Third, the internal religious legal systems of the great world religions have also captured growing attention in Law and Religion scholarship – and worries, too, in some quarters. Each of these world religions, especially Christians, Jews, and Muslims, have long had their own internal legal specialists who have been part of the broader Law and Religion discourse. But these topics are now becoming more mainstream in Law, Religion, Sociology, History, and Anthropology departments of research universities and societies worldwide, with growing new attention to the place of law in various Asian and Indigenous traditions, too. Books are beginning to emerge offering intra- and interreligious perspectives on discrete legal topics – Human Rights, Family Law, Constitutional Law, Private Law, and more.

A major new issue that many Western democracies are now facing squarely is the place of faith-based laws, tribunals, and dispute resolution in secular legal regimes. How much deference do secular authorities owe to these religious authorities? How much involvement may secular authorities have in the adjudication of religious disputes and questions that come before them for resolution? These new questions join older questions about more overt state establishments of various forms of Christianity, Judaism, Islam, Shintoism, Confucianism, and other faith traditions. How do modern nations square their state establishment or privileging of one faith with the universal human rights claims to religious freedom and equality for all?

---

<sup>2</sup> B J. Grim, ‘Restrictions on Religion in the World: Measures and Implications’ in A Hertzke (ed), *The Future Of Religious Freedom: Global Challenges* (Oxford University Press, 2013), 86, 101.

Fourth, a small library of books has also emerged documenting the contributions of the world's religions and their religious legal systems to the secular legal systems around them, both historically and currently. Part of this inquiry concerns the exportation, transplantation, or accommodation of discrete internal religious rules or procedures in secular legal systems. But more of this inquiry concerns the influence of religious ideas and practices on the complex doctrines of public, private, penal, and procedural law of the state. In the Western tradition, numerous historians have documented the successive influences of Christianity on Roman law, Germanic law, medieval and early modern canon law, civil law, and the common law, and the eventual colonization of these efforts throughout the world. Similar work is now being done on the cross-cultural legal influences of the laws of Judaism, Hinduism, and Confucianism, and especially the tremendous influence of Islamic law on the secular laws of the 57 Muslim-majority states today and their political predecessors. The reality in many parts of the world, including in the secular West, is that religious ideas and institutions, norms and practices are part of the foundation and infrastructure of the positive laws of the state.

Fifth, as part of these last two points, a large body of literature has grown around the perennially contested issues of law, religion, and family life. Three new questions are now attracting a great deal of new scholarly attention, a bit of which is reflected in this volume, too. The first question concerns the growing contests between religious liberty and sexual liberty. May a state require a minister to marry a gay or interreligious couple, a medical doctor to perform an elective abortion or assisted-reproductive procedure, or a pharmacist to fill a contraceptive prescription -- when those required actions run counter to those parties' core claims of conscience or central commandments of their faith? May a religious organization dismiss or discipline an official or member because of their sexual orientation or practice, or because they had a divorce or abortion? These are major points of contestation and litigation on both sides of the Atlantic and with likely implications for the global law and religion field.

A second question concerns religiously-based polygamy. For nearly two millennia, the West has rejected polygamy, calling it a capital offense from the ninth to the nineteenth century. These issues are back, with various Muslims, Fundamentalist Mormons, and Traditional religions and cultures in Asia and Africa pressing their case for toleration if not recognition of polygamy on grounds of religious freedom, sexual autonomy, domestic privacy, and equal protection. This, too, has triggered a small avalanche of writing.

A final question in this law, religion, and family field concerns the growing call by religious minorities to opt out of the state's Family Law system and into their own religious legal systems. This is raising a lot of hard legal and cultural questions: What forms of marriage should citizens be able to choose, and what forums of religious marriage law should state governments be required to respect? How should religious minorities with distinct family norms and cultural practices be accommodated in a society dedicated to religious liberty and self-determination, and to religious equality and

non-discrimination? Is legal or normative pluralism necessary to protect religious believers who are conscientiously opposed to the values that inform modern state laws on sex, marriage, and family? Doesn't state accommodation or implementation of a faith-based family law system run the risk of higher gender discrimination, child abuse, coerced marriage, unchecked patriarchy, or worse, and how can these social tragedies be avoided? Won't the addition of a religious legal system encourage more forum shopping and legal manipulation by crafty litigants involved in domestic disputes, often pitting religious and state norms of family against each other? Does the very state recognition, accommodation, or implementation of a religious legal system erode the authority and compromise the integrity of those religious norms? Isn't strict separation of religious norms and state laws the best way to deal with the intimate questions of sex, marriage and family life? These hard questions are generating a great deal of important new scholarship. Comparable complex work can be found on the law and religion issues surrounding education, charity, poor relief, immigration, environmental care, sex trafficking, warfare, torture, terrorism, and more.

Sixth, natural law theory is becoming a topic of growing interest again, having once dominated patristic, medieval, and early modern Catholic, Protestant, and Enlightenment thought before giving way to modern legal positivism. The renaissance of natural law theory began already in the mid-twentieth century. The horrible excesses of Nazi Germany and Stalinist Russia catalyzed the modern international human rights revolution, which defined and defended the natural rights protections of human dignity and the natural law limits on state power. The rise of Catholic social teachings and the monumental reforms of the Second Vatican Council in 1962-1965 together gave further powerful impetus to Catholic natural law theories. A number of Jewish, Protestant, Eastern Orthodox, and Muslim scholars are now also resurrecting the rich natural law teachings of their own traditions and developing new natural law theories to address fundamental legal questions today in and on terms that others with different faith traditions can appreciate. And all these groups have found interesting overlaps with the burgeoning religion and science scholarship that is exposing some interesting natural foundations of human morality and sociability. Natural law theory, while still controversial, is becoming a promising new arena of interreligious and interdisciplinary dialogue.

Seventh, natural law arguments often inform a related area of continued importance in Law and Religion study: the topic of legal ethics, both by itself and in comparison with theological ethics, business ethics, medical ethics, and more. Legal and theological ethicists have long recognized the overlaps in form and function of the legal and religious professions. Both professions require extensive doctrinal training and maintain stringent admissions policies. Both have developed codes of professional ethics and internal structures of authority to enforce them. Both seek to promote cooperation, collegiality, and *esprit de corps*. There are close affinities between the mediation of the lawyer and the intercession of the cleric, between the adjudication of the court and the arbitration of the consistory, between the beneficence of the bar and the benevolence of the diaconate. Ideally, both professions serve and minister to society. Both professions seek to exemplify the ideals of calling and community.

Nonetheless, there can be strong tensions between one's legal professional duties and personal faith convictions as well. What does it mean to be a Christian, Jewish, Muslim, Hindu, or Buddhist lawyer at work in a secular legal system? These topics now have attracted a small cluster of important new scholarship.

Eighth, this last question — about the place of the religious believer in the legal profession — has raised the broader question of the place of overt religious arguments in legal discourse altogether. This is in part an epistemological question: whether legal and political argumentation can and should forgo religious and other comprehensive doctrines in the name of rationality and neutrality. In America, this is also in part a constitutional question: whether the First Amendment prohibition on establishment of religion requires that all laws be based on secular and neutral rationales in order to pass constitutional muster. In the heyday of secular liberalism and strict separationism in the 1960s and 1970s, it was common to insist that all political debates sound in terms of rationality and neutrality. Today, a number of scholars have argued that religious and other comprehensive doctrines are essential parts of an enduring legal and political morality.

Finally, questions of law and religious language, have also raised broader questions about the overlaps between legal and theological interpretation, translation, and hermeneutics. Legal historians have long been intrigued by the overlaps between the scholarly methods used to interpret the Bible and the constitution, a code and a creed, a consistory judgment and a judicial opinion. The rise of modern literary theory and of form-critical methods of biblical interpretation has heightened this scholarly interest in how to discern the original meaning and understanding of authoritative texts. And with the rise of globalization and the study of global law and world religions, a number of jurists have become keenly interested in the questions of translation, transplantation, and transmutation of legal and religious ideas across cultural, disciplinary, and denominational boundaries.

It will take a whole library to come to terms with these and related themes of Law and Religion scholarship. But the chapters herein provide a judicious and delicious sampling of the refined work that is now on offer in this growing field.