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Published in William Schweiker et al. eds., *The Impact of Academic Research on Character Formation, Ethical Education, and the Communication of Values in Late Modern Pluralistic Societies* (Leipzig: Evangelishe Verlagsanstalt GmbH, 2021), 67-98

The Educational Values of Law and Religion Study

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Abstract

This chapter sketches the historical flow and ebb of the study of law and religion in Western universities. Before the nineteenth century, the faculties of medicine, law, and theology dominated Western universities – focused on the body, mind, and soul respectively. The modern rise of positivism and disciplinary specialization eventually separated law and theology from each other and from the broader university. But in recent decades, this positivist paradigm has given way to more holistic forms of interdisciplinary study, including the study of law and religion. Many scholars are now exploring the religious dimensions of law, the legal dimensions of religion, and the interaction of legal and religious ideas and institutions, methods and practices -- historically and today, in the West and well beyond.

Keywords: law and religion; Western history; Western university; positivism; specialization; interdisciplinary studies

Introduction

Since the 1980s, a major new field of study in law and religion has emerged in the academy, now involving more than fifteen hundred scholars around the globe. These scholars are studying the religious dimensions of law, the legal dimensions of religion, and the interaction of legal and religious ideas and institutions, methods and practices – historically and today, at home and abroad. From different perspectives, these scholars have shown that religion gives law its spirit and inspires its adherence to ritual, tradition, and justice. Law gives religion its structure and encourages its devotion to order, organization, and orthodoxy. Law and religion share such concepts as fault, obligation, and covenant and such methods as ethics, rhetoric, and hermeneutics. They also balance each other by counterposing justice and mercy, rule and equity, discipline and love. This dialectical interaction gives these two disciplines and two dimensions of life their vitality and strength. Without law at its backbone, religion slowly slides into

shallow spiritualism. Without religion at its heart, law gradually recedes into empty, and sometimes brutal, formalism.

In the United States, the study of law and religion has drawn a substantial scholarly guild of some four hundred American law professors and many more scholars from the humanities and social sciences. More than one hundred twenty American law schools now have at least one basic course on religious liberty or religion-state relations as part of their basic legal curriculum, and some schools also offer courses in Christian canon law, Jewish law, Islamic law, and natural law. Many legal scholars now include serious consideration of law-and-religion materials in their treatments of legal ethics, legal history, jurisprudence, law and literature, legal anthropology, comparative law, family law, human rights, and other basic law courses. Two dozen American universities have interdisciplinary programs or concentrations in law, religion, and ethics, several with specialty journals, websites, and blogs. More scholars of law and religion work in university departments of religion, philosophy, political science, history, anthropology, and regional studies. The American Academy of Religion, the American Political Science Association, the American Anthropological Association, and the Society of Christian Ethics now all have dedicated programs or sections on law and religion.

Around the globe, some fifty centers, institutes, and programs in law and religion have popped up on university campuses – in Europe, sub-Saharan Africa, Latin America, Australia, New Zealand, India, Indonesia, Hong Kong, and South Korea. These groups are further integrated by international and regional consortia of law-and-religion study and by dozens of periodicals and blogs. More than seventeen-hundred books on law and religion were published worldwide in English alone over the past twenty-five years. Several new book series and concentrations in law and religion are now on offer from major publishers at Ashgate, Brill, Cambridge, Catholic, Eerdmans, Mohr Siebeck, Notre Dame, Oxford, Routledge, and Springer. The study of law and religion is no longer just the hobbyhorse of isolated and peculiar professors principally in their twilight years and suddenly concerned about their eternal destiny. It is no longer just the preoccupation of universities that were explicitly founded on Christian, Jewish, Muslim, or other religious premises. Religion now stands alongside economics, philosophy, literature, politics, history, and other disciplines as a valid and valuable conversation partner with law.

The Historical Flow and Ebb of Law and Religion Study

The modern study of law and religion is, in no small measure, a return to millennium-old forms of education. When the first Western universities were founded in the eleventh century, the faculties of theology, law, and medicine were dominant. Together, these three faculties were thought to provide a complete education about the soul, mind, and body respectively. In preparation, younger students were first trained in the seven liberal arts – the trivium of grammar, logic, and rhetoric, and the quadrivium of geometry, arithmetic, astronomy, and music. The best students then went on for

advanced study in theology, law, or medicine, sometimes in combination. It was common for law students to earn at least a dual doctorate in the canon law of the church and the civil or common law of the state – the *doctor iuris utriusque* on the Continent, the LLD in England and its colonies. It was also common for advanced students to combine the study of law with the study of theology. Indeed, bishops, deans, abbots, and other church leaders customarily had legal training alongside their theological formation, and many judges, law professors, and other legal professionals were ranking ecclesiastics.

Until the eighteenth century, this interlacing of legal and theological education and professional life was considered normal for Western societies that routinely established Christianity by law. As part of these religious establishments, Catholic hierarchs and, later, Protestant rulers chartered most of the major universities and professional guilds of the West. They further licensed the professors, clergy, and jurists, and in return expected their allegiance and defense of the locally established church and state. In 1667, German polymath Gottfried Leibniz could still say easily that in his day, "theology is a certain species of jurisprudence," and "law remains in no small part a handmaiden of theology."[1] In 1676, England's chief judge, Sir Matthew Hale, could declare confidently from the King's Bench that "Christianity is part of the common law."[2] In 1780, American jurist and future U.S. president John Adams could still write into the preamble of the Massachusetts Constitution that the people of his state

> acknowledg[e] with grateful hearts, the goodness of the Great Legislator of the Universe, in affording us, in the course of his Providence, an opportunity . . . o[f] entering into an Original, explicit, and Solemn Compact with each other; and of forming a New Constitution of Civil Government for ourselves and

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[1] Gottfried Wilhelm Leibniz, *Nova methodus discendae docendaeque iurisprudentiae* (1667), with translat**ions in** Christopher Johns, *The Science of Right in Leibniz's Moral and Political Philosophy* (London: Bloomsbury, 2013), Appendix, 149–50 and in Gottfried Wilhelm Leibniz, *The* ***New Method of Learning and Teaching Jurisprudence According to the Principles of the Didactic Art Premised in the General Part and in the Light of Experience*****, trans. Carmello Massimo de Iuliis (Clark, NJ: Talbot Publishers, 2017), 121–24. I am grateful to Eric Enlow for introducing me to these insights. See Eric Enlow, "Mosaic Commands for Legal Theology,"** ***Journal of Law and Religion*** **32 (2017): 26–32.**

[2] *Taylor's Case*, 1 Vent. 293, 86 Eng. Rep. 189 (K.B. 1676). See the continued use of this legal adage in Stuart Banner, "When Christianity Was Part of the Common Law," *Law and History Review* 16 (1998): 27–62.

> Posterity; and devoutly imploring His direction in so interesting a Design.[3]

From the mid-eighteenth century onward, this centuries-long integration of law and theology gradually broke down under mounting new pressures. Strong Enlightenment philosophical attacks on traditional Christian teachings, together with violent attacks on churches and their clergy in some quarters, shook Western Christendom to its foundations. New constitutional reforms, starting in America, led to the legal disestablishment of religion and to separation of church and state and *laïcité* movements in many Western lands. Comprehensive legal codification movements, starting on the Continent, transformed Western state laws and separated these laws from many traditional religious, moral, and customary norms and institutions. New secular universities, both public and private, sprung up throughout nineteenth- and twentieth-century Europe and the Americas devoted to scientific methodology, free academic inquiry, and rigorous debate about all subjects. New (social) scientific and sometimes skeptical forms of religious study became ever more acceptable in state universities – and led, in the United States, to strong divisions between public state schools and universities and private religious schools, colleges, and seminaries. New positivist theories of knowledge separated higher education into growing numbers of increasingly specialized forms of exact, humane, and social sciences, each with its own language, methods, literature, libraries, faculty, and students, and each equipping professional specialists for the workplace. The proverbial renaissance man, praised for wide learning in various fields including the classic liberal arts, theology, law, and medicine, gave way to the scientific and technical specialist.

These modern movements undercut the traditional prestige and integration of theology and law in the Western academy. Theology, once the proud "queen of the sciences" that produced the coveted clerical leaders of society, was slowly reduced to just another discipline in the university, yielding ministers with shrinking cultural privilege and intellectual prerogative. Religion was now "a separate department of knowledge," Thomas Jefferson wrote in 1815, alongside physics, astronomy, law, government, economy, business, and medicine. Preachers became the specialists in religion who had to devote their professional time and energy to soulcraft alone, not bothering with matters beyond their ken.

> Whenever, therefore, preachers, instead of a lesson in religion, put them off with a discourse on the Copernican system, on chemical affinities, on the construction of government, or the characters of those administering it, it is a

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[3] Reprinted in Francis Thorpe, ed., *The Federal and State Constitutions,* 7 vols. (Washington, DC: Government Printing Office, 1909), 3:1888–89. For further such sentiments in early American constitutional law, see John Witte Jr. and Joel A. Nichols, *Religion and the American Constitutional Experiment,* 4th ed. (New York: Oxford University Press, 2016).

> breach of contract, depriving their audience of the kind of service for which they were salaried.[4]

Church historian Brooks Holifield has documented the "irresistible decline" of authority of theology and the clergy that followed from such early sentiments, even in religiously observant modern America: "[P]riests and ministers no longer have the control over education, the voice in government, or the moral monopoly" they enjoyed in earlier centuries. "They no longer formulate legal enactments, discipline the merchants, dominate the printing presses, or regulate the universities as they did. . . . On many

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[4] [Draft] Letter of Thomas Jefferson to P. H. Wendover (March 13, 1815), https://founders.archives.gov/documents/Jefferson/03-08-02-0270-0002. See also Supreme Court Justice, David H. Brewer, who pronounced from the bench that America "is a Christian nation." See *Church of the Holy Trinity v. United States,* 143 U.S. 457, 471 (1892) and David H. Brewer, *The United States a Christian Nation* (Philadelphia: J.C. Winston, 1905) See further Linda Przybyszewski, "Judicial Conservatism and the Protestant Faith," in *Great Christian Jurists in American History,* eds. Daniel L. Dreisbach and Mark David Hall (Cambridge: Cambridge University Press, 2019), 194-207. Nonetheless, in a speech at Yale Divinity School, Brewer sounded much like Jefferson in calling on clergy to remain focused on their specialty of soulcraft and not get involved in broader social or political affairs: "[T]he great law of labor and business and professional life today is specialty. The specialist is the successful man. And this law of specialization affects the ministry. No longer can the minister pose as one possessed of all information and entitled to control outside the limits of his special work. The moment he steps into the domain of education, and says 'I know what is best therein, I can decree the limits beyond which science may not go, and no man must be permitted to teach unless he has passed through the gateway of the divinity school'; the moment he enters the arena of business life and says, 'I understand all about bonds and stocks and railroads, and I have a right to determine what is right and what is not'; the moment he presents himself in city hall, or where the legislature of a state is convened, or beneath the great dome of the Capitol where Congress meets to determine the welfare of the nation, and assumes to say that 'because I am a minister I have a right to prescribe the terms, the limits and the character of legislation, city, state or national,' *that* moment the common sense of the community says to him most emphatically, 'go back to your pulpit and leave matters of education and business and legislation to those who are trained therefor.' […] And if in the future the ministry is to remain a welcome and acknowledged power it can do so only as it stays in the pulpit. The moment it goes outside of that, it jostles with everybody, and has no right to complain if everybody gives it a kick." David H. Brewer, *The Pew to the Pulpit: Suggestions to the Ministry from the Viewpoint of a Layman* (New York/Chicago: Fleming H. Revell Co., 1897), 24-25. My thanks to Justin Latterell for alerting me to this interesting text.

matters, clergy appear to have ceded jurisdiction to physicians and psychiatrists, social workers and sociologists, scientists and the gurus of technology."[5]

The study of law, too, became more narrow, specialized, and isolated in the later nineteenth and twentieth centuries. In both Europe and North America, legal education became focused on local national law rather than the entire legal system viewed in full intellectual context. In Europe and England, law became an undergraduate department, with apprenticeships to follow for budding lawyers. In the United States, legal study was sequestered into new separate professional schools often at the edge of campus and heavily focused on legal practice. By the early twentieth century, most Western legal academies adopted a philosophy of legal positivism that reduced the study of law to the concrete rules and procedures posited by the political sovereign and enforced by the courts. While many other institutions and practices might be normative and important for social coherence and political concordance, they were considered beyond "the province of jurisprudence properly determined."[6] This narrowing of legal study eventually caused a "spiritual crisis," a "crisis of morale" within the legal profession, lamented Yale Law School dean Anthony Kronman in 1993: "the collapse" of the traditional "set of values that prizes good judgment above technical competence and encourages a public-spirited devotion to the law" and allegiance to "wisdom and character as professional virtues."[7] Indeed, Kronman continued in a later book, "under the influence of the modern research ideal, our colleges and universities [altogether] have expelled this question [of what living is for] from their classrooms, judging it unfit for organized study."[8]

In this modern academic environment, the traditionally vibrant interdisciplinary study of law and religion was reduced to a tiny boutique area of scholarship at best. Until the 1980s, most Western universities had, if any, only a specialist or two in law-and-religion study sprinkled among the faculties of history, divinity, law, politics, or anthropology and focused mostly on religious laws, church-state relations, and religious freedom. Even these small scholarly lights seemed to be fading, as university campuses

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[5] E. Brooks Holifield, *God's Ambassadors: A History of the Christian Clergy in America* (Grand Rapids, MI: Eerdmans, 2007), 3-4. Holifield, however, goes on to warn against exaggerating the cultural and educational authority of religion and the clergy in earlier centuries as well as the modern decline of religion and clerical authority, which he shows still lives on in many traditional and novel quarters in the United States and other Western societies. On the latter, see further Michael Welker et al., eds., *The Impact of Religion on Character Formation, Ethical Education, and the Communication of Values in Late Modern Pluralistic Societies* (Leipzig: Evangelische Verlagsanstalt GmbH, 2020).

[6] John Austin, *The Province of Jurisprudence Determined* (London: John Murray, 1832).

[7] Anthony Kronman, The Lost Lawyer: Failing Ideas of the Legal Profession (Cambridge, MA: Harvard University Press, 1993), 1–3. See also Mary Ann Glendon, A Nation under Lawyers: How the Crisis of the Legal Profession Is Transforming American Society (Cambridge, MA: Harvard University Press, 1999).

[8] Anthony Kronman, Education's End: Why Our Colleges and Universities Have Given up on the Meaning of Life (New Haven, CT: Yale University Press, 2008).

remained 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 other new critical philosophies were regnant on many university campuses, including in law schools. Even divinity schools and seminaries were arguing that "God is dead" and organized religion is dying.

No longer! Over the past three decades, another great awakening of religion has broken – now global in its sweep, vast in its diversity, and sometimes frightening in its power. Even if the Global North now features more Nones, Neins, and Nyets on organized religion than ever before, the Global Middle and Global South have seen powerful new upsurges of old and new religions. Globalized media, migration, marketing, and mission work have brought these religions, and their special needs and challenges, to the North and West, too. In its newly awakened form, religion has presented the Western academy with a whole alphabet of new challenges that now occupy our global headlines – Apostasy, Blasphemy, Conversion, Defamation, Evangelism, Fundamentalism, Genocide, Hate Crimes, Immigration, Jihad, Klansmen, Liberalism, Migration, Neo-Paganism, Ostracism, Polygamy, Queer Rights, Refugees, Sharia, Theocracy, Universal Rights, Value-Voters, Warfare, Xenophobia, Yazidis, and Zealotry.

Over the past three decades, the Western world has also seen a new great awakening of law. The fall of the Berlin Wall and the collapse of Communism; the strengthening of the European Union and Council of Europe; the consolidation and expansion of many branches of the United Nations; the new democratic movements in former colonial and authoritarian regimes in Africa and Latin America – all these seismic legal and political movements since the 1980s have triggered intense and innovative new forms and norms of constitutional ordering and lawmaking. Legal campaigns against terrorism and jihadism have further tested both the strength and the limits of international law and domestic law in Western democracies. Strong new anticorruption campaigns have again been mounted to shore up the rule of law and constitutional democracy against strong new populist authoritarianism in the United States, Mexico, Brazil, Poland, Hungary, and elsewhere in the West. And a vibrant new global-law movement has emerged to address pressing challenges like massive human rights violations, genocide, arms trafficking, refugees and migrants, sex trafficking, global disease, hunger, famine, poverty, global political and economic corruption, global climate and environmental challenges, and major (bio)technological issues – all of which are beyond the capacity or power of any national law or even international law to address fully.[9]

This new legal awakening, like the new religious awakening, has forced the Western legal academy to abandon its narrow legal positivist views of law. Legal scholars have come to see that law is much more than simply the rules and procedures

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[9] See Rafael Domingo, *The New Global Law* (Cambridge: Cambridge University Press, 2011); Rafael Domingo and John Witte, Jr., eds., *Christianity and Global Law* (London: Routledge, 2020).

of the state, and how we apply and analyze them. Law is also an inherently human and communal enterprise – a living system of legislating, adjudicating, administering, obeying, negotiating, litigating, and other legal conduct not only within the state but also within churches, colleges, corporations, clubs, charities, and other nonstate associations. Law and legal behavior, moreover, are exercised out of a complex blend of concerns, conditions, and character traits variously shaped by nature, class, race, gender, persuasion, piety, charisma, faith, virtue, and more. To be properly understood, therefore, law must be studied and taught in context, and in conversation with sundry other disciplines: economics, politics, literature, history, science, medicine, philosophy, psychology, anthropology – and notably, too, religion and theology.

Mapping the Modern Field of Law and Religion

This was the birthing process of modern interdisciplinary legal studies. And out of this movement, the modern study of law and religion has reemerged in the twenty-first-century Western academy. Today, it has become increasingly clear – as it was in prior centuries – that law and religion are two universal solvents of human living, two interlocking sources and systems of values and beliefs that have existed in all axial civilizations. Law and religion, Justice Harry Blackmun once wrote, "are an inherent part of the calculus of how a man should live" and how a society should run.[10] To be sure, the spheres and sciences of law and religion have, on occasion, both converged and contradicted each other. Every religious tradition has known both theonomism and antinomianism – the excessive legalization and the excessive spiritualization of religion. Every legal tradition has known both theocracy and totalitarianism – the excessive sacralization and the excessive secularization of law. But the dominant reality in most eras and cultures is that, while law and religion are distinct spheres and sciences of human life, they stand in a dialectical harmony, constantly crossing over and cross-fertilizing each other. Every major religious tradition strives to come to terms with law by striking a balance between the rational and the mystical, the priestly and the prophetic, the structural and the spiritual. Every legal tradition struggles to link its formal structures and processes with the beliefs and ideals of its people.

It is these points of crossover and cross-fertilization that are the special province of the interdisciplinary 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 has set out to answer. Nine major themes now dominate the academic study of law and religion.

First, by far the largest body of scholarship in law and religion is devoted to issues of religious freedom and religion-state relations in national and international contexts. This topic will continue to dominate the field in the foreseeable future. In the

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

United States, this is in part the law of the First Amendment – with its guarantees of no establishment and free exercise of religion – and related statutes. In other Western lands, these questions are topics of special constitutional provisions, concordats, treaties, statutes, regulations, and cases. Several international human rights instruments also include norms of religious freedom, not least the 1950 European Convention, the 1966 International Covenant on Civil and Political Rights, and the 1981 UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion and Belief.

The legal, theological, cultural, and personal issues arising under such provisions are perennial and profound. How to manage religious pluralism and protect religious and cultural minorities – particularly groups like Jews, Muslims, Jehovah's Witnesses, Baha'is, and Indigenous peoples who often bring charges of private and state-based discrimination. How to define and set limits on religious and antireligious 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 who do not enjoy ready access to traditional forms and forums of religious worship and expression.

Many issues of religious freedom 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, 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 childcare, 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.

The second, and related, major theme in the field is the (contested) place of religion and religious freedom in the pantheon of human rights. 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. Those who claim freedom of conscience unfairly demand the right to be a law unto themselves, to the detriment of general laws and the endangerment of other people's fundamental rights and legitimate interests. Institutional religious autonomy, they say, 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. Claims of religious liberty 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. Religions 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 when the state is weak, distracted, divided, cash-strapped, transitioning, or corrupt. Religious communities can create the conditions (sometimes the prototypes) for realizing civil and political rights of speech, press, assembly, and more. They can provide a critical (sometimes the principal) means of education, healthcare, 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, Brian Grimm writes in a recent summary of this empirical literature, 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.[11] By contrast, where religious freedom is low, communities

[11] Brian J. Grim, "Restrictions on Religion in the World: Measures and Implications," in *The Future of Religious Freedom: Global Challenges,* ed. Allen D. Hertzke (New York: Oxford University Press, 2013), 86, 101.

tend to suffer and struggle, and protection of human rights dramatically declines across the board.

A third theme of law-and-religion study is the growing focus on internal religious legal systems of the great world religions; these are sources of worry, too, in some quarters. Each of these world religions, especially Christianity, Judaism, and Islam, has long had its own internal legal specialists and practitioners focused on canon law, Halacha, and Shari'a respectively. But study of these internal religious laws is now becoming more mainstream in departments of law, religion, sociology, history, and anthropology at research universities as well as in societies worldwide, along with growing new attention to the place of law in various Asian and Indigenous traditions. Cambridge University Press, for example, has inaugurated a series of fresh studies on law in relation to Christianity, Judaism, Islam, Hinduism, Buddhism, Confucianism, and Indigenous religions. Other books offer intra- and interreligious perspectives on discrete legal topics – human rights, family law, constitutionalism, private law, criminal law, economic law, and more.

A major new issue that many Western democracies now face 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 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 to religious freedom and equality?

A fourth theme has emerged in the small library of books 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 into 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 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 fifty-seven Muslim-majority nations 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, even if their overt religious pedigree and provenance has been shed or shrouded.

The fifth theme, arising from these last two points, fills a large body of literature that 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. The first 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 the 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 field of global law and religion.

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 centuries. 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 question, too, has triggered a small avalanche of writing.

A final question in this field of law, religion, and family concerns the growing call by religious minorities to opt out of the state's family-law system and into their own religious legal systems. The tension inherent in this interest raises 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 nondiscrimination? Is legal or normative pluralism necessary to protect religious believers who conscientiously oppose 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 questions are generating a great deal of important new scholarship. Comparable complex work can be found on issues of law and religion surrounding education, charity, poor relief, immigration, environmental care, sex trafficking, warfare, torture, terrorism, and more.

The sixth theme – natural-law theory – is 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 and other schools of legal thought. The renaissance of natural-law theory in some Western academies

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 1962–65 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 in terms that others with different faith traditions can understand, if not appreciate. All these groups have found interesting overlaps with the burgeoning scholarship in religion and science that is exposing the natural foundations of human behavior, morality, and sociability. Natural law theory, while still controversial, is becoming a promising new arena of interreligious and interdisciplinary dialogue.

In a seventh theme, natural-law arguments often inform a related area of continued importance in the study of law and religion: the topic of legal ethics, both by itself and in comparison with theological ethics, business ethics, medical ethics, and other specific norms of professional ethics. 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. 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.

The eighth theme – prompted by this question about the place of the religious believer in the legal profession – addresses 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 twentieth century, 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 in the different 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 form-critical methods of biblical interpretation has heightened this scholarly interest in how to discern the original meaning and understanding of authoritative texts. 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.

Summary and Conclusions

Religion has defied the wistful assumptions of the Western academy that the spread of Enlightenment reason and science would slowly eclipse the sense of the sacred and restore the sensibilities of the superstitious. In the last century, religion has also defied the evil assumptions of Nazis, fascists, and communists alike that gulags and death camps, iconoclasm and book burnings, propaganda and mind controls would inevitably drive religion into extinction. Religion has proved to be an ineradicable condition of human lives and communities – however forcefully a society might seek to repress or deny its value or validity, however cogently the academy might logically bracket it from its legal and political calculus. A new great awakening of religion is upon us, demanding attention from many quarters, not least from the Western academy.

Law, too, has moved beyond the skeptical and cynical attacks of its critics, not least law professors themselves. In the heyday of critical legal studies in the last century, legal skeptics assailed much that seemed sound, settled, and even sacred in the law. They dismissed legal doctrine as malleable, self-contradictory rhetoric. They depicted the law as an instrument of oppression and exploitation of women, minorities, the poor, the different. They derided the legal system for its promotion of the political purposes of the powerful and the propertied. This assault from within the law, and especially from within the legal academy, eventually sparked what Anthony Kronman called a “spiritual crisis” of the legal profession. It forced legal professionals to reform laws that did cause injustice, but also compelled them to return to the fundamentals of a just and sound legal order. This return to legal fundamentals has been further spurred by the seismic legal and political challenges of the new millennium, both at home and abroad. Western lawyers and legal academics alike have had to tend with renewed alacrity to the foundational values of rule of law, constitutional democracy, ordered liberty, and orderly pluralism.

This resurgence of focus on the fundamentals of religion and law, separately and together, has been a boon to the Western academy and to Western liberal societies. As the founders of the Western academy saw a millennium ago, religion and law are two universal solvents of human living, two interlocking sources and systems of values and beliefs that have existed, in dialectic tension, in all axial civilizations. Unlike a millennium

ago, when law and religion dominated the first Western universities, several other sources and systems of values now command close study, for they provide deep normative coding and direction for persons and peoples to navigate their lives. Included are the normative systems and institutions of families and friendships, markets and economies, charities and schools, science and research, healthcare and security systems, and more.

But all these modern spheres and institutions ultimately need law to guard and guide them. Aristotle saw this already when he wrote: "Just as man is the best of the animals when completed, when separated from law and adjudication he is the worst of all."[12] American founder James Madison saw it, too: "If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls . . . would be necessary . . . but experience has taught mankind the necessity of auxiliary precautions."[13] American Supreme Court Justice Oliver Wendell Holmes Jr. underscored this reality anew when he wrote: "All the great questions of theology and philosophy must ultimately come to law for their resolution."[14] Holmes's claim, while provocatively overstated, still has merit. While theologians and philosophers debate questions of the origin, nature, and purpose of life and society, it is jurists and judges who settle these questions and resolutions in codes and conventions, statutes and cases.

All of these modern spheres ultimately need religion to inspire and instruct them. Religion not only helps interpret "the law written on our hearts," to use the phrase of Saint Paul, but also helps apply the law written on the books. As Martin E. Marty has documented, religions deal uniquely with the deepest elements of individual and social life. Religions catalyze social, intellectual, and material exchanges among citizens. They trigger economic, charitable, and educational impulses in citizens. They provide valuable checks and counterpoints to social and individual excess. They help diffuse social and political crises and absolutisms by relativizing everyday life and its institutions. Religions provide prophecy, criticism, and exemplars for society. They force others to examine their presuppositions. They are distinct repositories of tradition, wisdom, and perspective. They counsel against apathy. They often represent practiced and durable sources and forms of community. They provide leadership and hope, especially in times of individual and social crisis. They contribute to the theory and practice of the common good. Religions represent the unrepresented, teach stewardship and preservation, provide fresh starts for the desperate, and exalt the

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[12] Aristotle, *Politics,* bk. 1, chap. 2.

[13] Federalist Paper, No. 51.

[14] **Albert W. Alschuler, *Law without Values: The Life, Work, and Legacy of Justice Holmes* (Chicago: University of Chicago Press, 2000), 54, 73.**

dignity and freedom of the individual.[15] No religion, of course, lives up to all these claims all the time. Some religions never do, and a few even work hard to destroy these goods. But these private and public goods offered by most organized religions argue strongly for the continued study of religion alongside law in shaping character, values, and morality in late modern differentiated societies.

[15] See Martin E. Marty and Jonathan Moore, Politics, Religion, and the Common Good: Advancing a Distinctly American Conversation About Religion's Role in Our Shared Life (San Francisco: Jossey-Bass, 2000).