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God's Joust, God's Justice: The Revelations of Legal History

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I. CONFESSION AND PROFESSION

IN THE SPRING of 1995, I visited the great Saxon capital of Dresden. I stood on the banks of the Elbe River at the site of the *Frauenkirche*—the monumental domed Church of Our Lady—consecrated in 1734, graced by one of Johann Sebastian Bach's greatest organ concerts in 1736, and celebrated in German music, art, and literature ever since.

It was a sobering moment. For the great church lay in ruins. A guide explained that the church did not survive the fire bombing of Dresden near the end of World War II. On February 13 and 14, 1945, 773 Allied bombers emptied their payloads on Dresden. No bombs hit the church directly. But the fires were enough. First the art, the woodwork, the pulpit, the organ, and the altars were consumed. As the fires penetrated more deeply, scores of people hidden in the church's catacombs were burned to death. Eventually, the intense heat of the fires weakened the church so much that it simply collapsed under its own weight. Large chunks of the dome, charred and cracked, still lay where they had fallen some fifty years before. A large piece of the steeple still protruded from the ground at a grim angle. Only one wall of the nave still stood, its top jagged and pocked where the roof had torn away.

It was also an exhilarating moment. For stretching out from the wall of the nave in all directions were hundreds of rows of scaffolding, where workers were storing the 10,000 odd pieces of stone that had been collected from the rubble of the fallen church. The *Frauenkirche*, the guide informed me, would be reconstructed, using as many of the original stones as possible. A giant blueprint assigned each of the recovered stones to its original place in the structure. New stones were being collected from the same quarry that had been mined for the original construction. A massive outpouring of charity had made this reconstruction possible.

I have often given thanks for that brief moment on the banks of the Elbe River. For this small frame captured several themes that are at the center of my life—as a Christian believer and as a legal historian.

The story of the Dresden church is a metaphor of life. Construction,

destruction, and reconstruction. Work, judgment, and purgation. Birth, death, and resurrection. Creation, fall, and redemption. These are the stages of life. These are the passages of faith. The old must pass away so that the new may come forth. We must die so that we can be reborn. Our bodies must be buried so that they can be resurrected. Our works must be burned so that they can be purified. Our bonds must be broken so that we can be reconciled. This is the nature of biblical religion. It gives life its power. It gives pain its purpose. It gives time its pattern.

These basic biblical themes—that time has a pattern, that history has a purpose, that life has an end of reconciliation—inform my understanding of history. The Bible teaches that time is linear, not cyclical. Biblical history moves forward from a sin-trampled garden to a golden city, from a fallen world to a perfect end-time. Our lives move, circuitously but inevitably, toward a reconciliation with God, neighbor, and self—if not in this life, then in the life to come; if not with the true God, then with a false god; if not in the company of heaven, then in the crowds of hell.

Human history cannot be fully understood without reference to this divine mystery. God is beyond time, yet has chosen to reveal a part of himself within it. Through the creation and the Incarnation, God pours out a measure of his being and grace. Through the law and the gospel, God sets forth a measure of his Word and will. Through his miracles and messengers, God puts forth a measure of divine power and judgment.

We are within time, yet we are able in part to transcend it. Through our conscience and imagination, we gradually discover something of the meaning of God's plan for each creature. Through our creativity and experimentation, we slowly uncover something of the majesty of God's plan for the creation. Through our liturgies and epiphanies, we slowly uncover something of the mystery of God's Incarnation for the church. Through our texts and traditions, we gradually accumulate something of the wisdom of God's revelation for all people. To be sure, God's plan and our history are not identical. God's plan consists of much more than what God chooses to reveal to us or what we are able to discern of it. Much of what we see appears to be the work of a concealed God, even at times a seemingly capricious God. In Martin Luther's colorful image, history is "God's mummery and mystery," "God's joust and tourney."[1] History is God's theater, in which the play cannot be fully understood until it ends and until we exit. To equate one act or actor, one speech or text with the divine play itself is to cast a partial and premature judgment. To insist on one interpretation of the play before it ends is to

[1] *D. Martin Luthers Werke: Kritische Gesamtsausgabe* (Weimar, 1883–), 15:32, 50:383–4.

presume the power of eternal discernment. To judge the play on the basis of a few episodes is to insult the genius of the divine playwright.

Human history, in turn, consists of much more than our conscientious struggle to follow God's Word and will in our lives, to reflect God's image and immanence in our world. Much of what we see in our personal lives is the "war between our members," the struggle between the carnal and the spiritual, the sinner and the saint. Much of what we see in our collective lives is the sinful and savage excesses of corrupt creatures, the diverse and perverse choices of free human agents. But there is simply too much order in our world, too much constancy in our habits, too much justice in our norms for us to think that the course of human events is not somehow channeled by God's providential plan. God is thus both revealed and concealed in history. "All events," as John Calvin put it, "are governed by God's secret plan."[2] If God were completely revealed in history, there would no reason for faith. History would simply be a mechanical execution of a predetermined plan. There would no eternal mystery for which faith could yearn. But if God were completely concealed in history, there would also be no reason for faith. History would simply be a random and rudderless exercise of chaos. There would be no eternal justice in which faith could trust. "Somewhere between those two the Christian has to find his [or her] own balance between concealment and revelation."[3]

This is the balance I try to find in my work as a Christian historian. For me, history is more than a series of tricks that we play on the dead, or that the dead play on us. History is more than simply an arid and accidental chronology of first one thing happening, and then another. For me, history is also a source of revelation, a collection of wisdom. The archive is a treasure trove. Old books are windows on truth. The challenge of the Christian historian is to search within the wisdom of the ages for some indication of the eternal wisdom of God. It is to try to seek God's revelation and judgment over time without presuming the power of divine judgment. It is to try to discern God's justice within God's joust.

II. The "Binocular" of Law and Religion

These basic convictions about history inform my work on the interaction of law and religion in Western history, and they have been informed by the same.

[2] *Institutes of the Christian Religion* (1559), 1.16.2.
[3] E. Harris Harbison, *Christianity and History* (Princeton: Princeton University Press, 1964), 102.

I start with the assumption that God is both hidden and revealed in human laws, and that human laws in turn both reflect and deflect something of the divine. The patterns of human laws over time reflect something of the meaning of religious truth. The patterns of religious truth over time are reflected somewhat in the measures of human laws. Law reveals a religious dimension. Religion reveals a legal dimension.

Western history bears out these assumptions. In the Western tradition, systems of law and systems of religion have coexisted almost from the beginning. The contents of these legal and religious systems, of course, have differed dramatically over time and across cultures. At points, they have converged or contradicted each other. Every religious tradition in the West 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 the West is that law and religion stand not in monistic unity, nor in dualistic antinomy, but in dialectical harmony. Every community struggles to balance law and religion by counterpoising justice and mercy, rule and equity, discipline and love. Every 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 legal tradition struggles to link its formal structures and processes with the beliefs and ideals of its people. Law and religion thus serve, in Jaroslav Pelikan's apt phrase, as a "binocular" to view afresh many familiar ideas and institutions that have been studied principally through the "monocular of law" or the "monocular of religion" alone.[4] This binocular is available to scholars of many disciplines and many convictions who work within and beyond the Western tradition. Indeed, some of the best work in law and religion of late has come from Hindu, Muslim, and Jewish scholars working on Asia, Africa, and the Middle East.[5]

I use this interdisciplinary binocular as a Christian legal historian working primarily within the Western tradition. The binocular reveals a number of different types of pictures of the interaction of law and religion in Western history. I would like to introduce and illustrate two types: (1) grand civilizational pictures; and (2) narrower denominational pictures.

[4] Jaroslav Pelikan, "Foreword," to John Witte, Jr. and Frank S. Alexander, eds., *The Weightier Matters of the Law: Essays on Law and Religion* (Atlanta: Scholars Press, 1988), xii.

[5] See, e.g., F. C. DeCoste and Lillian MacPhearson, *Law, Religion, Theology: A Selective Annotated Bibliography* (West Cornwall, CT: Locust, 1997).

Civilizational Pictures

At its most panoramic setting, the binocular reveals grand civilizational pictures of law and religion in western history. Here, the focus is on the interaction between the dominant belief-systems of a civilization and the major forms and norms of its dominant legal system. What are the dominant beliefs and values, myths and metaphors that inform this legal system? What happens to the legal system when those beliefs and values change, especially abruptly through revolution or conquest?

My great mentor, Harold J. Berman, offers a splendid example of viewing Western law and religion at this panoramic setting. There is a distinct Western legal tradition, Berman argues, a continuity of legal ideas and institutions which have evolved by accretion and adaptation over the centuries. The exact shape of these legal ideas and institutions at any given time is determined, in part, by the underlying belief systems of the people ruling and being ruled. Six great revolutions, however, have punctuated the gradual evolution of the Western legal tradition: the Papal Revolution of 1075, the German Lutheran Revolution of 1517, the English Puritan Revolution of 1640, and the respective American, French, and Russian Revolutions of 1776, 1789, and 1917. These revolutions were, in part, rebellions against a legal and political order that had become outmoded and ossified, arbitrary and abusive. But, more fundamentally, these revolutions were products of radical shifts in the dominant metaphors, in the dominant belief systems of the people—shifts from Catholicism to Protestantism to Deism to Marxist-Leninism. Each of these new belief systems offered a new eschatology, a new apocalyptic vision of the perfect end-time, whether that be the second coming of Christ, the arrival of the heavenly city of the Enlightenment philosophers, or the withering away of the state. Each of these revolutions triggered massive changes in prevailing legal forms and norms—movements from canon law to civil law to common law, from the supremacy of the church to the supremacy of the state to the supremacy of the individual and to that of the collective. Each of these revolutions, in its radical phase, sought the death of an old legal order to bring forth a new order that would survive its understanding of the Last Judgment. Eventually, each of these revolutions settled down and introduced fundamental legal changes that were ultimately subsumed in and accommodated to the Western legal tradition. Today, this Western legal tradition has been drawn into increasing cooperation and competition with other legal traditions from around the globe, in the struggle to define a new common law and a new legal language for the world order.[6]

[6] See Harold J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Cambridge: Harvard University Press, 1983); *Faith and Order: The Reconciliation of Law and*

Berman's is but one grand civilizational picture of law and religion in the West. The German jurist, Otto von Gierke (1841–1921), offered a quite different picture based on shifting images of the individual and the collective, the *Volk* and the *Volksgeist*, the citizen and the association (*Genossenschaft*). The English legal historian, Sir Henry Maine (1822–1888), offered another grand civilizational picture in elaborating his thesis about the millennium-long shifts in the West from status to contract, from equity to legislation, from custom to code. The Dutch philosopher, Herman Dooyeweerd (1894–1977), offered still another grand picture based on the founding religious motifs of each legal age—contrasting the Greek form-matter, Catholic grace-nature, Protestant creation-fall-redemption, and Enlightenment nature-freedom motifs, and their concrete manifestation in legal, political, and cultural life. Dozens of other such grand accounts, written over the past two centuries, grace and bend the shelves of our libraries.

The civilizational picture that I see through our interdisciplinary binocular builds on these prototypes. There is a distinct Western legal tradition—rooted in the ancient civilizations of Israel, Greece, and Rome, nourished for nearly two millennia by Christianity, and for more than two centuries by the Enlightenment. The Western legal tradition has been built on enduring postulates about justice and mercy, rule and equity, nature and custom, canon and commandment. It has featured evolving ideas about authority and power, rights and liberties, individuals and associations, public and private. It has developed distinctive methods of legislation and adjudication, of negotiation and litigation, of legal rhetoric and textual interpretation, of juridical science and legal systematics. The precise shape and balance of the Western legal tradition at any period has been determined, in part, by the Western religious tradition. When the prevailing ideas, officials, symbols, and methods of the Western religious tradition have changed, the shape and balance of the Western legal tradition have changed as well.

Four major shifts in the Western religious tradition have triggered the most massive transformations of the Western legal tradition: (1) the Christian conversion of the Roman Empire in the fourth through sixth centuries; (2) the Papal Revolution of the late eleventh and twelfth centuries; (3) the Protestant Reformation of the sixteenth century; and (4) the Enlightenment movements of the eighteenth and nineteenth centuries. The Western legal tradition was hardly static between these four watershed periods. Regional and national movements—from the ninth-century Carolingian Renaissance to the Russian

Religion (Atlanta: Scholars Press, 1993). See further Howard O. Hunter, ed., *The Integrative Jurisprudence of Harold J. Berman* (Boulder/Oxford: Westview, 1996).

Revolution of 1917—had ample ripple effects on the tradition. But these were the four watershed periods, the civilizational moments and movements that permanently redirected the Western legal tradition.

The first watershed period came with the Christian conversion of the Roman emperor and empire in the fourth through sixth centuries. Prior to that time, Roman law reigned supreme throughout the known West. Roman law defined the status of persons and associations and the legal actions and procedures available to them. It proscribed delicts and crimes. It protected the public property and welfare of the Roman state. It regulated private property, commerce, slavery, inheritance, and the household. Roman law also established the imperial cult: Rome was to be revered as the eternal city, ordained by the gods and celebrated in its altars and basilicas. The Roman emperor was to be worshipped as a god and king in the rituals of the imperial court and in the festivals of the public square. The Roman law itself was viewed as the embodiment of an immutable divine law, appropriated and applied through the sacred legal science of imperial pontiffs and jurists.

A refined jurisprudence emerged after the first century A.D., built in part on Greek prototypes. Cicero, Seneca, and other Roman philosophers cast in legal terms Aristotle's topical methods of reasoning, rhetoric, and interpretation as well as his concepts of natural, distributive, and commutative justice. Gaius, Ulpian, and other Roman jurists drew what would become classic Western distinctions among: (1) civil law, the statutes and procedures of a particular community to be applied strictly or with equity; (2) common law, the principles, customs, and rights common to several communities and often the basis for treaties; and (3) natural law, the immutable principles of right reason, which are supreme in authority and divinity and must prevail in cases of conflict with civil or common laws.

The early Christian church stood largely opposed to this Roman legal system, as had the Jewish communities in which the church was born. Christians could not accept the established imperial cult or participate in the pagan rituals required for participation in the military, commerce, litigation, and other public forums. The early church thus organized itself into separate communities, largely withdrawn from official Roman society. Early church constitutions, such as the Didache, (c. 120) and Didascalia Apostolorum (c. 250), set forth rules for church organization and offices, clerical life, ecclesiastical discipline, charity, education, family, and property relations. Early Christian leaders, building on the injunctions of Christ and St. Paul, generally taught obedience to the political authorities up to the limits of Christian conscience. The clergy also urged upon their Roman rulers political

and legal reforms consonant with Christian teachings. Such legal independence and legal advocacy by the church brought forth firm imperial edicts from the late first century onward, condemning Christians to intermittent waves of brutal persecution.

The Christian conversion of Emperor Constantine in 312 and the formal establishment of trinitarian Christianity as the official religion of the Roman Empire in 380 ultimately fused these Roman and Christian laws and beliefs. The Roman Empire was now understood as the universal body of Christ on earth, embracing all persons and all things. The Roman emperor was viewed as both pope and king, who reigned supreme in spiritual and temporal matters. The Roman law was viewed as the pristine instrument of natural law and Christian mortality. This new syncretism of Roman and Christian beliefs allowed the Christian church to imbue the Roman law with a number of its basic teachings, and to have those enforced throughout much of the empire, often forcibly enforced against Christian heresies. Particularly in the great Roman law syntheses, the Codex Theodosianus (438) and the Corpus Iuris Civilis (534), orthodox Christian teachings on the Trinity, the sacraments, liturgy, holy days, sabbath day observance, sexual ethics, charity, education, and much else were copiously defined and regulated. This firm legal establishment of trinitarian Christianity contributed enormously both to its precocious expansion throughout the West and to its canonical preservation for later centuries.

This new syncretism of Roman and Christian beliefs, however, also subordinated the church to imperial rule. Not only was the Rome Christianized, the church was Romanized as well. Christianity was now, in effect, the new imperial cult of Rome, presided over by the Roman emperor. The Christian clergy were, in effect, the new pontiffs of the cult, hierarchically organized and subordinated to imperial authority. The church's property was, in effect, the new public property of the empire, subject to its protection and its control. Thus, Roman rulers convoked many of the church councils and major synods; appointed, disciplined, and removed the higher clergy; administered many of the church's parishes, monasteries, and charities; and, legally controlled the acquisition, maintenance, and disposition of church property. This "caesaropapist" pattern of substantive influence but procedural subordination of the church to the state, and of religion to law, persisted with ample variations throughout much of the West after the sixth century.

The second watershed period came with the Papal Revolution of the late eleventh through thirteenth centuries. Beginning in 1075, the clergy, led by Pope Gregory VII, threw off their civil rulers and established the church as an autonomous legal and political corporation within Western Christendom.

The church now claimed a new and exclusive jurisdiction—a power literally "to speak the law" (*jus dicere*) for the West. The church claimed personal jurisdiction over clerics, pilgrims, students, the poor, heretics, Jews, and Muslims. It claimed subject matter jurisdiction over doctrine and liturgy; ecclesiastical property, polity, and patronage; sex, marriage and family life; education, charity, and inheritance; oral promises, oaths, and various contracts; and all manner of moral and ideological crimes. The church predicated these claims of jurisdiction on its traditional authority over the sacraments. It also predicated these claims on the papal power of the keys, bequeathed by Christ to St. Peter (Luke 22:38; Matt 16:18–19)—a key of knowledge to discern God's Word and will and a key of power to implement and enforce that Word and will throughout Christendom.

The church developed an elaborate pan-Western system of laws, called canon laws, to support these jurisdictional claims. The early church constitutions and christianized Roman law provisions were collated and integrated, and then heavily supplemented by new papal and conciliar laws and juridical commentaries. A hierarchy of church courts and officials administered this canon law in accordance with new rules of procedure and evidence. A 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, its canon law the first true international law.

The church's canon lawyers, together with scholastic theologians and philosophers, imbued individual doctrines of public, private, and criminal law with cardinal Christian beliefs. They reclassified the sources of law, now distinguishing: (1) the eternal law of the creation order; (2) the natural laws of the Bible, reason, and conscience; (3) the positive canon laws of the church; (4) the positive civil laws of the state; (5) the common laws of all nations and peoples; and (6) the customary laws of local communities. They developed enduring rules for the resolution of conflicts among these types of laws, and contests of jurisdiction among their authors. They developed a refined hermeneutic for the equitable application of statutes and treaties. They developed refined concepts of legislation, adjudication, and executive administration, and core constitutional concepts of sovereignty, election, and representation. They developed a good deal of the Western theory and law of chartered corporations, private associations, and trusts as well as new doctrines of individual and corporate rights and liberties.

Though the medieval church's canon law was not considered to be divine, it was the preeminent law of the West in the twelfth through fifteenth centuries. Private parties preferred to litigate their claims in church courts rather than in

civil tribunals. Civil authorities readily appropriated the substance and science of the canon law in their own regimes. For the canon law was considered to be a true Christian law. It treated both the legality and the morality of a Christian's conduct. Compliance with it enabled the believer to be reconciled with God, neighbor, and self. Violation of the canon law was a sin; obedience to it was conducive to salvation.

The third watershed period came with the transformation of canon law and civil law, and of church and state, in the Protestant Reformation. The early Protestant reformers—Martin Luther, John Calvin, Menno Simons, and others—taught that salvation comes through faith in the gospel, not by works of law. Each individual stands directly before God, seeks God's gracious forgiveness of sin, and conducts life in accordance with the Bible and Christian conscience. To the reformers, the Catholic canon law obstructed the individual's relationship with God and obscured simple biblical norms for right living. The early Protestant reformers further taught that the church is at heart a community of saints, not a corporation of politics. Its cardinal signs and callings are to preach the Word, to administer the sacraments, to catechize the young, to care for the needy. To the reformers, the Catholic clergy's legal rule in Christendom obstructed the church's divine mission and usurped the state's role as God's vice-regent. To be sure, the church must have internal rules or order to govern its own polity, teaching, and discipline. The church must critique legal injustice and combat political illegitimacy. But, according to classic Protestant lore, law is primarily the province of the state not of the church, of the magistrate not of the minister.

These new Protestant teachings helped to transform Western law in the sixteenth and seventeenth centuries. The Protestant Reformation permanently broke the international rule of the Catholic Church and the canon law, splintering Western Christendom into competing nations and regions, each with its own religious and political rulers. State rulers now assumed jurisdiction over numerous subjects previously governed by the church and its canon law—marriage and family life, property and testamentary matters, education, charity, contracts, oaths, moral and ideological crimes. Particularly in Lutheran and Anglican polities, the state also came to exercise considerable control over the clergy, polity, and property of the church, emulating in part the laws and practices of Christianized Rome.

These massive shifts in jurisdiction from church to state did not suddenly deprive Western law of its dependence upon religion. Catholic canon law remained an ineradicable part of the common law of the West, in Catholic and Protestant polities alike. It was readily used both by church officials to

govern their internal religious affairs and by civil authorities to govern matters of state. Moreover, in Catholic polities of southern Europe and their Latin American colonies, the legal and moral pronouncements of the Catholic episcopacy still often had a strong influence on the content of civil law. In Protestant polities of northern Europe and their North American colonies, new Protestant theological views came to direct and dramatic legal manifestation. For example, Protestant teachings on Christian education, charity, and public vocation shaped the Western state's emerging social welfare laws. Protestant concepts of the deterrent, retributive, and educational "uses of law" transformed substantive and procedural criminal law. Protestant views of marriage as a social or covenantal estate transformed the civil law of marital formation and divorce. Protestant teachings of human dignity, equality, and vocation sparked the development of a variety of new constitutional doctrines of rights and liberties. Protestant teachings on the inherent depravity of political officials helped to inspire the creation of such constitutional restraints as separation of powers, limited terms of office, codification of laws, and restrictions on equity.

The fourth watershed period came with the Enlightenment movements of the eighteenth and nineteenth centuries. The Enlightenment offered a new secular theology of individualism, rationalism, and nationalism to supplement, if not supplant, traditional Christian beliefs. Exponents of the Enlightenment taught that the individual was no longer primarily a sinner seeking salvation in the life hereafter. Every individual was created equal in virtue and dignity, vested with inherent rights of life, liberty, and property, and capable of choosing his or her own means and measures of happiness. Reason was no longer the handmaiden of revelation, rational disputation no longer subordinate to homiletic declaration. The rational process, conducted privately by each person, and collectively in the open marketplace of ideas, was considered a sufficient source of private morality and public law. The nation-state was no longer identified with a national church or a divinely blessed covenant people. The nation-state was to be glorified in its own right. Its constitutions and laws were sacred texts reflecting the morals and mores of the collective national culture. Its officials were secular priests, representing the sovereignty and will of the people.

Such Enlightenment beliefs catalyzed a number of sweeping changes in western law in the eighteenth and nineteenth centuries—new national constitutions that created limited government and ample civil liberties, new criminal procedural protections and more benign forms of criminal punishment, new commercial, contractual, and other laws of the marketplace, new

protections of private property and inheritance. Especially in the twentieth century, core Enlightenment beliefs came to more direct legal expression: Individualism became increasingly manifest in legal doctrines of privacy and equal protection; rationalism in the doctrines of freedom of speech, press, and assembly; nationalism in the totalitarian laws and polities of socialist and democratic polities alike. In socialist polities, ambitious interpretation of the Enlightenment doctrine of separation of church and state led to campaigns to eradicate theistic religion altogether, a policy often manifest in the brutal martyrdom of the faithful and massive confiscations of religious property. In democratic polities, ambitious interpretation of the same separation of church and state doctrine has served to privatize theistic religion and to drive many religious communities from active participation in the legal and political process.

Though these modern reforms have largely removed traditional forms and forums of Christian legal influence, contemporary Western law still retains important connections with Christianity and other religions. For example, law and religion in the West remain conceptually related. They both embrace analogous doctrines of sin and crime, covenant and contract, righteousness and justice, redemption and rehabilitation that invariably bleed together in the mind of the legislator, judge, and juror. Law and religion remain methodologically related. They share overlapping hermeneutical methods of interpreting their authoritative texts, casuistic methods of converting principles to precepts, systematic methods of organizing their subject matters, pedagogical methods of teaching the science and substance of their craft. Law and religion remain institutionally related, through the complex interactions between political and religious officials and offices.

Even in the modern West, every legitimate legal system still must have what Lon Fuller once called an "inner morality," a set of attributes that bespeak its justice, its fairness, its ultimate transcendence: Ideally, state laws, like divine laws, are publicly proclaimed and known, generally applicable, uniform, stable, understandable, nonretroactive, and consistently enforced.[7] Every legitimate legal system must also still have what Harold Berman once called an "inner sanctity," a set of attributes that command the obedience, respect, even reverence of both political officials and political subjects: Thus law, like religion, has authority—written or spoken sources, texts or oracles, which are considered to be decisive or obligatory in themselves. Law has tradition—a continuity of language, practice, and institutions, a respect for precedent and preservation. Law has liturgy—the ceremonial procedures of

[7] See Lon Fuller, *The Morality of Law*, rev. ed. (New Haven: Yale University Press, 1964).

the courtroom, the pageantry of the executive office, the ritualized language of legal documents and procedures that reflect and dramatize deep social feelings about the value and validity of the law.[8] Without religion, law decays into empty formalism.

Even in the modern West, religion maintains a legal dimension, an inner structure of legality, which gives religious lives and religious communities their coherence, order, and social form. Legal "habits of the heart" structure the inner spiritual life and discipline of religious believers, from the reclusive hermit to the aggressive zealot. Legal ideas of justice, order, atonement, restitution, obligation, responsibility, and others pervade the theological doctrines of countless religious traditions. Religious laws continue to govern the devotional and corporate lives of the faithful in all the great world religions today. Without law, religion decays into shallow spiritualism.

Denominational Pictures

At its panoramic setting, our interdisciplinary binocular reveals grand civilizational pictures of law and religion. It allows us to see the great movements and watershed moments in the Western legal tradition.

At a narrower setting, this interdisciplinary binocular reveals more discrete pictures of law and religion. Among them are discrete denominational pictures. These are focussed on how particular religious denominations have influenced Western law over time, across cultures, within and beyond their own denominational boundaries. Catholics, Protestants, and Enlightenment exponents—of various denominational stripes—have each left indelible marks on the Western legal tradition. A new literature is beginning to emerge which seeks to describe the legal contributions of sundry religious denominations—from Anabaptism to Zwinglianism.

A good example of a discrete denominational picture is the contribution of the mainline Protestant denominations to the Western law of human rights.[9] The sixteenth-century Protestant Reformation was, in no small part, a human-rights movement. Prior to the Reformation, as we saw, there was one universal Catholic faith and Church, one universal system of canon law and sacramental life, one universal hierarchy of courts and administrators centered in Rome that ruled throughout the West. Martin Luther, John Calvin,

[8] Berman, *Faith and Order*, chap. 1.

[9] For sources and discussion, see my *Religion and the American Constitutional Experiment* (Boulder/Oxford: Westview, 1999), chaps. 1–3 and my chapter, "The Spirit of the Laws, The Laws of the Spirit: Religion and Human Rights in a New Global Era," in *The Spirit of the Modern Authorities*, ed. Max L. Stackhouse (Harrisburg, PA, forthcoming).

Thomas Cranmer, Menno Simons, and other sixteenth-century Protestant reformers all began their movements with a call for freedom from this ecclesiastical regime—freedom of the individual conscience from intrusive canon laws and clerical controls, freedom of political officials from ecclesiastical power and privileges, freedom of the local clergy from central papal rule and oppressive princely controls. "Freedom of the Christian" became the rallying cry of the early Reformation. It drove theologians and jurists, clergy and laity, princes and peasants alike to denounce traditional canon laws and ecclesiastical authorities with unprecedented alacrity, and to urge radical constitutional reforms.

The Protestant Reformation permanently broke the unity of law and religion in Western Christendom, and thereby laid some of the foundation for the modern constitutional system of confessional pluralism.

The Anglican Reformation nationalized the faith through the famous Supremacy Act (1534) and the Act of Uniformity (1559) of the Church and Commonwealth of England. Citizens of the Commonwealth were required to be communicants of the Church of England, subject to the final ecclesiastical and political authority of the monarch. The Toleration Acts of 1689 and 1714 extended a modicum of rights to most Protestant dissenters. But it was not until the Jewish and Catholic Emancipation Acts of 1829 and 1833 that the constitutionalized national identity of the Church and Commonwealth of England was finally broken.

The Lutheran Reformation territorialized the faith through the principle of *cuius regio, eius religio* ("whose region, his religion") established by the Peace of Augsburg (1555). Under this principle, princes or city councils were authorized to prescribe the appropriate forms of Evangelical or Catholic doctrine, liturgy, and education for their polities—with religious dissenters granted the right to worship privately in their homes or to emigrate peaceably from the polity. After decades of bitter civil war, the Peace of Westphalia (1648) extended this privilege to Calvinists as well, rendering Germany and other parts of the Holy Roman Empire a veritable honeycomb of religious plurality for the next centuries.

The Anabaptist Reformation communalized the faith by introducing what Menno Simons once called the *Scheidingsmaurer*—the wall of separation between the redeemed realm of religion and the fallen realm of the world. Anabaptist religious communities were ascetically withdrawn from the world into small, self-sufficient, intensely democratic communities, governed internally by biblical principles of discipleship, simplicity, charity, and Christian obedience. When such Anabaptist communities grew too large or too divided,

they deliberately colonized themselves, eventually spreading their communities from Russia to Ireland to the farthest frontiers of North America.

The Calvinist Reformation congregationalized the faith by introducing rule by a democratically elected consistory of pastors, elders, and deacons. In John Calvin's day, the Geneva consistory was still appointed and held broad personal and subject matter jurisdiction over all members of the city. By the seventeenth century, most Calvinist communities in Europe and North America reduced the consistory to an elected, representative system of government within each church. These consistories featured separation among the offices of preaching, discipline, and charity, and a fluid, dialogical form of religious polity and policing centered around collective worship and the congregational meeting. In Presbyterian and some Reformed Calvinist circles, groups of congregations eventually were confederated into representative presbyteries and classes, and these in turn confederated into representative synods and general assemblies.

The Protestant Reformation also broke the primacy of corporate Christianity and gave new emphasis to the role of the individual believer in the economy of salvation and to the individual rights that should attach thereto. The Protestant Reformation did not invent the individual or the concept of individual rights, as too many writers still maintain. But the sixteenth-century Protestant reformers, more than their Catholic brethren, gave new emphasis to the (religious) rights and liberties of the individual in both religious law and civil law.

This was true even in the more intensely communitarian Protestant traditions of Anglicanism and Anabaptism. The Anglican *Book of Common Prayer* was designed, in the words of Thomas Cranmer, its principal author, as a "textbook of liberty." The daily office and its lectionary, together with the vernacular Bible, encouraged the exercise of private devotion outside the church. The choices among liturgical rites and prayers within the prayer book encouraged the exercise of at least some modest clerical innovation within the church—with such opportunities for variation and innovation increasing with the 1662 and the American 1789 editions.

The Anabaptist doctrine of adult baptism gave new emphasis to a voluntarist understanding of religion, as opposed to conventional notions of a birthright or predestined faith. The adult individual was now called to make a conscientious choice to accept the faith—metaphorically, to scale the wall of separation between the fallen world and the realm of religion to come within the perfection of Christ. Later Free-Church followers converted this cardinal image into a powerful platform of liberty of conscience, free exercise of

religion, and separation of church and state—not only for Christians but eventually for all peaceable believers. Their views had a great influence on the formation of constitutional protections of religious liberty in eighteenth and nineteenth century North America and Western Europe.

The Lutheran and Calvinist branches of the Reformation laid the anthropological basis for an even more expansive theory and law of rights. Classic Protestant theology teaches that a person is both saint and sinner. On the one hand, a person is created in the image of God and justified by faith in God. The person is called to a distinct vocation, which stands equal in dignity and sanctity to all others. The person is prophet, priest, and king and responsible to exhort, minister, and rule in the community. Every person, therefore, stands equal before God and before his or her neighbor. Every person is vested with a natural liberty to live, to believe, to serve God and neighbor. Every person is entitled to the vernacular scripture, to education, to work in a vocation. On the other hand, the person is sinful and prone to evil and egoism. He needs the restraint of the law to deter him from evil and to drive him to repentance. He needs the association of others to exhort, minister, and rule him with law and with love. Every person, therefore, is inherently a communal creature. Every person belongs to a family, a church, a political community.

These social institutions of family, church, and state, Protestants believe, are divine in origin and human in organization. They are created by God and governed by godly ordinances. They stand equal before God and are called to discharge distinctive godly functions in the community. The family is called to rear and nurture children, to educate and discipline them, to exemplify love and cooperation. The church is called to preach the Word, administer the sacraments, educate the young, aid the needy. The state is called to protect order, punish crime, promote community. Though divine in origin, these institutions are formed through human covenants. Such covenants confirm the divine functions, the created offices, of these institutions. Such covenants also organize these offices so that they are protected from the sinful excesses of officials who occupy them. Family, church, and state are thus organized as public institutions, accessible and accountable to each other and to their members.

Protestant groups in Europe and America cast these theological doctrines into democratic forms designed to protect human rights. Protestant doctrines of the person and society were cast into democratic social forms. Since all persons stand equal before God, they must stand equal before God's political agents in the state. Since God has vested all persons with natural liberties of

life and belief, the state must ensure them of similar civil liberties. Since God has called all persons to be prophets, priests, and kings, the state must protect their freedoms to speak, to preach, and to rule in the community. Since God has created persons as social creatures, the state must promote and protect a plurality of social institutions, particularly the church and the family. Protestant doctrines of sin were cast into democratic political forms. The political office must be protected against the sinfulness of the political official. Political power, like ecclesiastical power, must be distributed among self-checking executive, legislative, and judicial branches. Officials must be elected to limited terms of office. Laws must be clearly codified, and discretion closely guarded. If officials abuse their office, they must be disobeyed; if they persist in their abuse, they must be removed, even if by force.

These Protestant teachings helped to inspire many of the early modern revolutions fought in the name of human rights and democracy. They were the driving ideological forces behind the revolts of the French Huguenots, Dutch pietists, and Scottish Presbyterians against their monarchical oppressors in the later sixteenth and seventeenth centuries. They were critical weapons in the arsenal of the revolutionaries in England, America, and France, alongside emerging Enlightenment doctrines. They were important sources of the great age of democratic construction in later eighteenth and nineteenth-century America and Western Europe. In this century, Protestant ideas of human rights and democracy helped to drive the constitutional reformation of Europe in the postwar period, and some of the human rights and democratic movements against colonial autocracy in Africa and fascist revival in Latin America.

These cardinal Protestant teachings and practices still have much to offer to the regime of human rights. Protestant theology avoids the reductionist extremes of both libertarianism that sacrifices the community for the individual and totalitarianism that sacrifices the individual for the community. It avoids the limitless expansion of human rights claims by grounding these norms in the creation order, divine callings, and covenant relationships. And it avoids uncritical adoption of human rights by judging their "civil, theological, and educational uses" in the lives of both individuals and communities. On this foundation, Protestant theology strikes unique balances between liberty and responsibility, dignity and depravity, individuality and community, politics and pluralism.

This is just one example of how one religious denomination has shaped and can shape an important body of law. Numerous other such examples await discovery in the archives—involving Catholic, Orthodox, Jewish, Enlighten-

ment, and later Protestant denominations, and involving all manner of legal subjects, whether marriage and family, contract and obligation, property and trusts, fault and remedy, crime and punishment, citizens and corporations. Two or three centuries ago, it was rather common for theological textbooks to sketch out some of the legal implications of religious doctrines, and in turn for legal textbooks to describe the religious pedigree of discrete legal doctrines. Only in the past two or three decades has this habit of writing begun to return to fashion.

To bring to light the historical legal influence of these religious denominations is neither to wax nostalgic about a prior golden age of Western law, nor to write pedantic about arcane antiquities with no modern utility. We cannot delude ourselves with unduly romantic accounts of the Catholic, Protestant, or Enlightenment legal past. Nor can we seek uncritically to transpose its mores and morals into our day. To adduce these ancient sources is instead to point to a rich theological source and resource for law that is too little known and too little used today. Too much of contemporary society seems to have lost sight of the rich and diverse Western theological heritage of law and of the uncanny ability of the Western legal tradition to strike new balances between justice and mercy, rule and equity, principle and precept on the strength of enduring theological postulates. Too much of the contemporary Christian church seems to have lost sight of the ability of its forebears to translate their enduring and evolving theological perspectives into legal forms—both canonical and civil. There is a great deal more in those dusty old tomes and canons than idle antiquaria or dispensable memorabilia. These ancient sources ultimately hold the theological genetic code that has defined Western law for what it is—and what it can be.

III. A Final Meditation

We began our inquiry with the story of the Dresden church. Permit me to end our inquiry with a quotation about another church. The quotation, taken from a traveller's diary of circa 1415, reads thus:

> A traveller from Italy came to the French town of Chartres to see the great cathedral that was being built there. Arriving at the end of the day, the traveller went to the site of the cathedral just as the workmen were leaving for home. He asked one man, covered with dust, what he did there. The man replied that he was a stone mason. He spent his day carving rocks. Another man, when asked, said he was a glassblower, who spent his days making slabs of colored glass. Still another workman replied that he was a blacksmith who pounded iron for a living.

Wandering into the deepening gloom of this unfinished edifice, the traveller came upon an old widow, armed with a straw broom, sweeping up the stone chips, glass shards, and iron filings from the day's work. "And what are you doing?" he asked her. The woman paused, looked up, and said proudly: "Me? Why, I am building a cathedral to the glory of Almighty God."

The law is like a massive medieval cathedral, always under construction, always in need of new construction. It stands at the center of the city, at the center of matters spiritual and temporal, at the center of everyone's life. All live at times in the glory of this cathedral of the law. All live at times in its shadow. This cathedral of the law houses beautiful altars and hideous gargoyles, stain glass windows that capture the light of heaven, and bleak marble monuments that signal the darkness of death. Though always under construction, this cathedral of the law is always open to those who knock. Its officials are always available to those who have need.

We members of the legal profession are at once the masters and the servants of this cathedral of the law. Some of us build on the edifice, some of us tend its doors. Some of us are the Michelangelos who paint frescoes with fine feathered brushes, others of us are the widows who sweep the floors with crude straw brooms. But we all have a craft; we all have a calling; we all have a place for our tools and our talents in this cathedral of the law.

The ethic of the widow in Chartres must be our ethic in the legal profession. We must not grow too proud in our own craft, too lost in painting our own frescoes, too confident that our little chapels of study are equivalent to the cathedral itself. We must not be too contemptuous of the past by removing or remodelling too easily what earlier workers have done. We must not be too contemptuous of the future, by believing that our formulations are beyond amendment and emendation. And most of all, we must not forget why we are here in this cathedral of the law—to give glory to Almighty God and to give loving service to our neighbor.