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# The Study of Law and Religion in the United States: An Interim Report

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*The study of law and religion has exploded around the world. This article, prepared in celebration of the silver jubilee of the Ecclesiastical Law Society, traces the development of law and religion study in the United States. Despite its long tradition of strict separation of Church and state, and despite its long allegiance to legal positivism and intellectual secularisation, the United States has emerged as a world leader of the new interdisciplinary field of law and religion. Hundreds of American scholars, from different confessions and professions, are now at work in this field, and two dozen major research centres and journals have been established at American law schools. After canvassing some of the main themes and trends in American law and religion scholarship today, this article concludes with a brief reflection on some of the main challenges before Christian scholars who work in the field of ecclesiastical law.<sup>1</sup>*

## INTRODUCTION

Over the past two generations, a new interdisciplinary movement has emerged in the United States dedicated to the study of the religious dimensions of law, the legal dimensions of religion and the interaction of legal and religious ideas and institutions, norms and practices. This study is predicated on the assumptions that religion gives law its spirit and inspires its adherence to ritual and justice. Law gives religion its structure and encourages its devotion to order and organisation. Law and religion share such ideas as fault, obligation and covenant and such methods as ethics, rhetoric and textual interpretation. Law and religion also balance each other by counterpoising justice and mercy,

- 1 This article is an expansion of my lecture at the Silver Jubilee Conference of the Ecclesiastical Law Society held at Emmanuel College, Cambridge, on 3 March 2012. I am grateful to Professor Mark Hill QC and the Reverend Dr Will Adam for their editorial direction, and to fellow lecturers Professors Silvio Ferrari and Julian Rivers for their exquisite lectures and the learned conversation among the three of us. The material for this article is drawn in part from the following volumes, each of which provide more detailed footnotes: J Witte and F Alexander (eds), *Christianity and Law: an introduction* (Cambridge, 2008); J Witte and F Alexander (eds), *Modern Christian Teachings on Law, Politics, and Human Nature* (2 vols, New York, 2006); J Witte and J Nichols, *Religion and the American Constitutional Experiment* (third edition, Boulder, CO, 2010); J Witte, *God's Joust, God's Justice: law and religion in the Western tradition* (Grand Rapids, MI, 2006).

rule and equity, discipline and love. This dialectical interaction gives these two disciplines and dimensions of life their vitality and their strength.

Of course, most scholars acknowledge that the spheres and sciences of law and religion have, on occasion, both converged and contradicted each other. Every major religious tradition has known both theonomism and antinomianism – the excessive legalisation and the excessive spiritualisation of religion. Every major legal tradition has known both theocracy and totalitarianism – the excessive sacralisation and the excessive secularisation of law. But many scholars argue that the dominant reality in most eras and most cultures is that law and religion relate dialectically. Every major religious tradition strives to come to terms with law by striking a balance between the rational and the mystical, the prophetic and the priestly, the structural and the spiritual. Every major legal tradition struggles to link its formal structures and processes with the beliefs and ideals of its people. Law and religion are distinct spheres and sciences of human life, but they exist in dialectical interaction, constantly crossing over and cross-fertilising each other.<sup>2</sup>

It is these points of cross-over and cross-fertilisation that are the special province of the scholarly field of law and religion. How do legal and religious ideas and institutions, methods and mechanisms, beliefs and believers influence each other – for better and for worse, in the past, present and future? These are the cardinal questions that this burgeoning field of study has set out to answer. And over the past two generations, scholars of various confessions and professions have addressed them with growing alacrity.

In the United States, law and religion is now a substantial scholarly guild. The Association of American Law Schools, the principal scholarly group to which most American law professors belong, has a large section of members on law and religion and growing sections on Jewish law and Christian law as well – collectively involving nearly 500 American law professors. Law and religion themes are also becoming more prominent in the Association's other sections – and in parallel legal societies – on legal history, constitutional law, comparative law, international law, law and society and jurisprudence. The American Political Science Association has some 450 members in its Religion and Politics Section, drawn principally from university departments of politics and government, with a few legal scholars involved as well. And the Society of Christian Ethics has an informal group of some 150 members, several of them with legal training, who have stated interests in the interaction of law, religion and ethics.

2 See especially the early anchor text in this field by H Berman, *The Interaction of Law and Religion* (Nashville, TN, 1974), updated in H Berman, *Faith and Order: the reconciliation of law and religion* (Grand Rapids, MI, 1993); H Berman *et al*, *The Nature and Functions of Law* (fifth edition, Westbury, NY, 2006); H Berman, *Law and Language: effective symbols of community* (Cambridge, 2013, forthcoming). See further H Hunter (ed), *The Integrative Jurisprudence of Harold J. Berman* (Boulder, CO, 1996).

Some 110 American law schools now have at least one basic course on religious liberty or Church–state relations as part of their basic legal curriculum, and a growing number of law schools also offer courses in Christian canon law, Jewish law, Islamic law and natural law. Many 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. Some two dozen American law schools have interdisciplinary programmes or concentrations in law, religion and ethics, several with specialised journals, websites and blogs on law and religion, or with significant law and religion content in their general law journals.<sup>3</sup> Some 750 books and 5000 articles on law and religion themes were published in America from 1985 to 2010.<sup>4</sup> 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 law schools that were explicitly founded on catholic, protestant, evangelical, Mormon or Jewish beliefs. Religion now stands alongside economics, philosophy, literature, politics, history and other disciplines as a valid and valuable conversation partner with law.

Half a century ago, even the most optimistic forecaster could have not predicted such a precocious growth of law and religion study in America. In the 1960s and 1970s, American universities were still in the thrall of the secularist hypothesis that the spread of Enlightenment reason and science would slowly eclipse the sense of the sacred and restore the sensibilities of the superstitious.<sup>5</sup> Liberalism, Marxism and various new critical philosophies were regnant on many American university campuses and even divinity schools and seminaries were arguing that ‘God is dead’ and that organised religion was dying. In this same period, American law schools sat comfortably in the embrace of a legal positivist philosophy that viewed law as an autonomous

3 The following American law schools have structured law and religion programmes with joint degrees, cross-listed courses, research projects, public lectures and conferences and/or print, digital and social media offerings: Brigham Young, Campbell, Catholic, DePaul, Detroit, Duke, Emory, Faulkner, Fordham, George Washington, Hofstra, Notre Dame, Pepperdine, Regent, Rutgers, Seton Hall, St John’s, St Mary’s, St Thomas, Touro, Valparaiso, Vanderbilt, Villanova, Wake Forest.

4 See, eg, F DeCoste and L MacPhearson, *Law, Religion, Theology: a selective annotated bibliography* (West Cornwall, CT, 1997); ‘Reviews on new books in law and religion’, (2001) 16 *Journal of Law and Religion* 249–1035 and (2002) 17 *Journal of Law and Religion* 97–459; as well as ongoing scholarship reflected and reviewed in such specialised journals as the *Ecclesiastical Law Journal*, *Studia Canonica*, the *Bulletin of the Medieval Canon Law Society*, *Zeitschrift der Savigny-Stiftung (Kanonisches Abteilung)*, *Ius Commune*, the *Journal of Law and Religion*, the *Journal of Church and State*, the *Oxford Journal of Law and Religion*, *Rutgers Journal of Law and Religion* and others.

5 For parallel secularisation movements in Europe, see, in this issue, S Ferrari, ‘Law and religion in a secular world: a European perspective’, (2012) 14 *Ecc LJ* 355–370, and J Rivers, *The Law of Organized Religions: between establishment and secularism* (Oxford, 2010).

science which had no place for religion, morality or any other non-legal perspective. And the United States Supreme Court was hard at work building up a 'high and impregnable wall of separation' between Church and state and striking down laws that did not have a 'secular purpose' or primary secular effect. Nothing in the intellectual, professional and constitutional climate of the mid-twentieth century seemed conducive to the growth of law and religion study.

The aim of this article is briefly to analyse how we got from there to here – from a system of American law and legal education in the 1960s and 1970s that had little place for religion to the current system that embraces religion as an important source and dimension of law, politics and society. The first part traces the implosion of legal positivism and the rise of interdisciplinary legal study in American law schools, including the study of law and religion. The second part explores the erosion of the wall of separation between Church and state in constitutional law and the new constitutional pattern of granting equal treatment to religion and non-religion alike. The third part surveys some of the main themes of law and religion scholarship in the United States today. The final part indicates a few of the main challenges that will face the principally Christian readership of this journal over the next 25 years, as we prepare for the golden jubilee of the Ecclesiastical Law Society.

#### FROM LEGAL POSITIVISM TO INTERDISCIPLINARY LEGAL STUDY

The better the society, the less law there will be. In Heaven there will be no law and the lion will lie down with the lamb ... In Hell there will be nothing but law and due process will be meticulously observed.<sup>6</sup>

So wrote Yale law professor Grant Gilmore, to conclude his *Ages of American Law*. The book was published in 1974, just at the end of the 'age' of legal positivism. Gilmore crafted this catchy couplet to capture the pessimistic view of law, politics and society made popular by the American jurist and Supreme Court Justice Oliver Wendell Holmes Jr (1841–1935). Contrary to the conventional portrait of Holmes as the sage and sartorial 'Yankee from Olympus',<sup>7</sup> Gilmore portrayed him as a 'harsh and cruel' man, chastened and charred by the savagery of the American Civil War and by the gluttony of the Industrial Revolution. These experiences, Gilmore argued, had made Holmes 'a bitter and lifelong pessimist who saw in the course of human life nothing but a continuing struggle in which

6 G Gilmore, *The Ages of American Law* (New Haven, CT, 1977), pp 110–111.

7 C Bowen, *Yankee from Olympus: Justice Holmes and his family* (Boston, MA, 1944).

the rich and powerful impose their will on the poor and the weak'.<sup>8</sup> The cruel excesses of the Bolshevik Revolution, the First World War and the Great Depression in the first third of the twentieth century only confirmed Holmes in his pessimism that human life was 'without values'.<sup>9</sup>

This bleak view of human nature shaped Holmes' bleak view of law, politics and society. He regarded law principally as a barrier against human depravity – a means to check the proverbial 'bad man' against his worst instincts and to make him pay dearly if he yielded to temptation.<sup>10</sup> Holmes also regarded law as a buffer against human suffering – a means to protect the vulnerable against the worst exploitation by corporations, churches and Congress. For Holmes, there was no higher law in heaven to guide the law below. There was no path of legal virtue up which a man should go. He saw the 'path of the law' as cutting a horizontal line between heaven and hell, between human sanctity and depravity. Law served to keep society and its members from sliding into the abyss of hell; but it could do nothing to guide its members in their ascent to heaven.

Holmes was the 'high priest' of a new 'age of faith' in American law, Gilmore wrote with intentional irony, which replaced an earlier era dominated by the Church and the clergy.<sup>11</sup> The confession of this new age of faith was that America was a land 'ruled by laws, not by men'. Its catechism was the new case law method of the law school classroom. Its canon was the new concordance of legal codes, amply augmented by New Deal legislation. Its church was the common law court, where the rituals of judicial formalism and due process would yield legal truth. Its church council was the Supreme Court, which now issued opinions with as much dogmatic confidence as the divines of Nicea, Augsburg and Trent.

This new age of faith in American law was in part the product of a new faith in the positivist theory of knowledge that swept over America in the later nineteenth and twentieth centuries, eclipsing earlier theories of knowledge that gave religion and the Church a more prominent place. In law, the turn to positivism proceeded in two stages. The first stage was scientific: inspired by the successes of the early modern scientific revolution – from Copernicus to Newton – nineteenth-century American jurists set out to create a method of law that was every bit as scientific and rigorous as that of the new mathematics and the new physics. This scientific movement in law was not merely an exercise in professional rivalry. It was an earnest attempt to show that law had an autonomous place in the cadre of positive sciences, that it could not and should not be

8 Gilmore, *Ages of American Law*, pp 48–56, 110 and 147 n 12.

9 A Alschuler, *Life Without Values: the life, work and legacy of Justice Holmes* (Chicago, 2000).

10 O Wendell Holmes, 'The path of the law (1897)', in O Wendell Holmes, *Collected Legal Papers* (New York, 1920), p 170.

11 Gilmore, *Ages of American Law*, pp 41–67.

subsumed by theology, philosophy or political economy. In testimony to this claim, American jurists in this period poured forth a staggering number of new legal codes, constitutions, legal encyclopaedias, dictionaries, textbooks and other legal syntheses that still grace, and bow, the shelves of our law libraries.

The second stage of the positivist turn in law was philosophical. A new movement – known variously as legal positivism, legal formalism and analytical jurisprudence – sought to reduce the subject matter of law to its most essential core. If physics could be reduced to ‘matter in motion’ and biology to ‘survival of the fittest’, then surely law and legal study could be reduced to a core subject as well. The formula was produced in the mid-nineteenth century, most famously by John Austin (1790–1859) in England and Christopher Columbus Langdell (1826–1906) in the United States: law is simply the concrete rules and procedures posited by the sovereign and enforced by the courts. Many other institutions and practices might be normative and important for social coherence and political concordance, but they are not law. They are the subjects of theology, ethics, economics, politics, psychology, sociology, anthropology and other human disciplines. They stand, in Austin’s apt phrase, beyond ‘the province of jurisprudence properly determined’.<sup>12</sup>

This positivist theory of law, which swept over American law schools from the 1890s onward, rendered legal study increasingly narrow and insular. Law was simply the sovereign’s rules, and legal study was simply the analysis of the rules that were posited and their application in particular cases. Why these rules were posited, whether their positing was for good or ill, how these rules affected society, politics or morality were not relevant questions for legal study. By the early twentieth century, it was common to find American law schools separated from other parts of the university with their own faculties, facilities and libraries. It was common to read in legal textbooks that law is an autonomous science, that its doctrines, language and methods are self-sufficient, that its study is self-contained.<sup>13</sup> It was common to think that law has the engines of change within itself; that, through its own design and dynamic, law marches teleologically through time, ‘from trespass to case to negligence, from contract to quasi-contract to implied warranty’.<sup>14</sup>

Holmes was an early champion of this positivist theory of law and legal development. He rebuked more traditional views with a series of famous aphorisms

- 12 See especially J Austin, *The Province of Jurisprudence Determined* (ed W Rumble, Cambridge, 1995); C Langdell, *A Selection of Cases on the Law of Contracts* (Boston, MA, 1879), preface; C Langdell, ‘Harvard celebration speeches’, (1887) 3 LQR 123–125.
- 13 See, eg, J Wigmore, ‘Nova methodus discendae docendaeque jurisprudentiae’, (1917) 30 *Harvard Law Review* 812–829; O Wendell Holmes, ‘Learning and science’, and ‘Law in science, science in law’, in Wendell Holmes, *Collected Legal Papers*, pp 135–141 at 139, 210–243 at 231; R Stevens, *Law School: legal education in America from the 1850s to 1980s* (Chapel Hill, NC, 1983).
- 14 B Shapiro, ‘Law and science in seventeenth-century England’, (1969) 21 *Stanford Law Review* 728.

that are still often quoted today. Against those who insisted that the legal tradition was more than simply a product of pragmatic evolution, he wrote, ‘The life of the law is not logic but experience’.<sup>15</sup> Against those who appealed to a higher natural law to guide the positive law of the state, he cracked, ‘There is no such brooding omnipresence in the sky’.<sup>16</sup> Against those who argued for a more principled jurisprudence, he retorted, ‘General principles do not decide concrete cases’.<sup>17</sup> Against those who insisted that law needed basic moral premises to be cogent, he mused,

I should be glad if we could get rid of the whole moral phraseology which I think has tended to distort the law. In fact even in the domain of morals I think that it would be a gain, at least for the educated, to get rid of the word and notion [of] Sin.<sup>18</sup>

Despite its new prominence in the early twentieth century, American legal positivism was never without its detractors. As early as the 1920s and 1930s, sociologists of law were arguing that the nature and purpose of law and politics cannot be understood without reference to the spirit of a people and their times – of a *Volksgeist und Zeitgeist* as their German counterparts put it.<sup>19</sup> The legal realist movement of the 1930s and 1940s used the new insights of psychology and anthropology to cast doubt on the immutability and ineluctability of judicial reasoning.<sup>20</sup> The revived natural law movement of the 1940s and 1950s saw in the horrors of Hitler’s Holocaust and Stalin’s gulags the perils of constructing a legal system without transcendent checks and balances.<sup>21</sup> The international human rights movement of the 1950s and 1960s pressed the law to address more directly the sources and sanctions of civil, political, social, cultural and economic rights. And Marxist, feminist and neo-Kantian movements in the 1960s and 1970s used linguistic and structural critiques to expose the fallacies and false equalities of legal and political doctrines.

By the early 1970s, the confluence of these and other movements had exposed the limitations of a positivist definition of law standing alone. Leading jurists of

15 O Wendell Holmes, *The Common Law* (Boston, MA, 1881), p 1.

16 *Southern Pacific Co. v Jensen*, 244 US 205, 222 (1917) (Holmes J dissenting); see also M Hoffheimer, *Justice Holmes and the Natural Law* (New York, 1992).

17 *Lochner v New York*, 198 US 45, 76 (1905).

18 O Wendell Holmes, ‘Letter to Sir Frederick Pollock (May 30, 1927)’, in Mark DeWolfe Howe (ed), *Holmes–Pollock Letters: The Correspondence of Mr. Justice Holmes and Sir Frederick Pollock, 1874–1932*, vol 2 (Cambridge, MA, 1941), p 200.

19 See eg, J Stone, *The Province and Function of Law: law as logic, justice and social control* (London, 1947); G Radbruch, *Der Geist des englischen Recht* (Heidelberg, 1946).

20 W Fisher, M Horwitz and T Reed (eds), *American Legal Realism* (New York, 1993); W Rumble, *American Legal Realism: skepticism, reform and the judicial process* (Ithaca, NY, 1968).

21 C Haines, *The Revival of Natural Law Concepts* (New York, 1965); R Pound, *The Revival of Natural Law* (Notre Dame, IN, 1942). See further below notes 72–73 and accompanying text.



the day – Lon Fuller, Jerome Hall, Karl Llewellyn, Harold Berman and others – were pressing for a broader understanding and definition of law.<sup>22</sup> Of course, they said (in concurrence with legal positivists) that law consists of rules – the black-letter rules of contracts, torts, property, corporations and sundry other familiar subjects. Of course, law draws to itself a distinctive legal science, an ‘artificial reason’, as Sir Edward Coke (1552–1634) once put it.<sup>23</sup> But law is much more than the rules of the state and how we apply and analyse them. Law is also the social activity by which certain norms are formulated by legitimate authorities and actualised by persons subject to those authorities. The process of legal formulation involves legislating, adjudicating, administering and other conduct by legitimate officials. The process of legal actualisation involves obeying, negotiating, litigating and other conduct by legal subjects. Law is rules, but it is also the social and political processes of formulating, enforcing and responding to those rules.<sup>24</sup> Numerous other institutions, besides the state, are involved in this legal functionality. The rules, customs and processes of churches, colleges, corporations, clubs, charities and other non-state associations are just as much a part of a society’s legal system as those of the state. Numerous other norms, besides legal rules, are involved in the legal process. Rule and obedience, authority and liberty are exercised out of a complex blend of concerns, conditions and character traits – class, gender, persuasion, piety, charisma, clemency, courage, moderation, temperance, force, faith and more.

Legal positivism could not, by itself, come to terms with law understood in this broader sense. As Grant Gilmore predicted in his 1974 title, a new interdisciplinary ‘age’ of American law was dawning. In the 1970s and thereafter, American jurists began to (re)turn with increasing alacrity to the methods and insights of other disciplines to enhance their formulations. This was the birthing process of the modern movement of interdisciplinary legal study. The movement was born to enhance the province and purview of legal study, to refigure the roots and routes of legal analysis, to render more holistic and realistic our appreciation of law in community, in context, in concert with the human, social and exact sciences.<sup>25</sup> In the 1970s, a number of interdisciplinary

22 K Llewellyn, *Jurisprudence* (Chicago, 1962); L Fuller, *The Morality of Law* (New Haven, CT, 1964); J Hall, *Studies in Jurisprudence and Criminal Theory* (New York, 1958); J Hall, *Foundations of Jurisprudence* (Indianapolis, IN, 1973); Berman, *The Interaction of Law and Religion*; H Berman, *Law and Revolution: the formation of the Western legal tradition* (Cambridge, MA, 1983).

23 A Lewis, ‘Sir Edward Coke (1552–1633): his theory of “artificial reason” as a context for modern basic legal theory’, (1968) 84 LQR 330–342.

24 Berman, *Law and Revolution*, pp 4ff; J Hall, *Comparative Law and Social Theory* (Baton Rouge, LA, 1963), pp 78ff.

25 See, eg, R Posner, ‘The present situation in legal scholarship’, (1981) 90 *Yale Law Journal* 1113–1130; R Clark, ‘The interdisciplinary study of legal evolution’, (1981) 90 *Yale Law Journal* 1238–1274; ‘Symposium: American legal scholarship: directions and dilemmas’, (1983) 33 *Journal of Legal Education* 403–458.



approaches began to enter mainstream American legal education, combining legal study with the study of philosophy, economics, medicine, politics and sociology. In the 1980s and 1990s, new interdisciplinary legal approaches were born in rapid succession: the study of law coupled with the study of anthropology, literature, environmental science, urban studies, women's studies, gay and lesbian studies and African-American studies. And, importantly for our purposes, the study of law was also recombined with the study of religion.

#### FROM STRICT SEPARATION TO EQUAL TREATMENT OF RELIGION

The rise of law and religion study in America coincided not only with the gradual implosion of legal positivism but also with the gradual erosion of the wall of separation between Church and state. The American positivist ideal of strict separation of law and religion had been one of the foundations of the American constitutional ideal of strict separation of Church and state. As legal positivism became stronger in the first two-thirds of the twentieth century, the wall of separation between Church and state rose higher in constitutional and cultural importance. As legal positivism declined after the 1970s, the wall of separation gradually crumbled, too.

The wall of separation metaphor had many early champions in American history, but it was especially the writings of America's founder Thomas Jefferson (1743–1826) that would prove to be the most prescient and influential in the twentieth century.<sup>26</sup> In a series of writings from the 1770s to the 1820s, Jefferson argued that true religious liberty could be achieved only by privatising religion and secularising politics. Religion must be 'a concern purely between our God and our consciences', he wrote in 1802. Politics must be conducted with 'a wall of separation between church and state'. 'Public religion' is a threat to private religion and must thus be discouraged. 'Political ministry' is a menace to political integrity and must thus be outlawed. Religious privatisation is the bargain we must strike to attain religious freedom for all. A wall of separation is the barrier we must build to contain religious bigotry for good.<sup>27</sup>

Jefferson read this understanding of religious liberty directly into the new 1791 constitutional guarantee of the First Amendment: 'Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof'. On the one hand, he argued, the state must protect the liberty of conscience and free exercise of all its peaceable subjects – however impious or impish their

26 See D Dreisbach, *Thomas Jefferson and the Wall of Separation* (New York, 2002); see also P Hamburger, *Separation of Church and State* (Cambridge, MA, 2002).

27 See various drafts of this famous document in Dreisbach, *Thomas Jefferson*, pp 148ff; R Ketcham, 'James Madison, Thomas Jefferson and the meaning of "establishment of religion" in eighteenth-century Virginia' in J Gunn and J Witte (eds), *No Establishment of Religion: America's original contribution to religious liberty* (Oxford, 2012), pp 154–179.

religious beliefs and practices might appear: 'The Jew and the Gentile . . . the Mahometan, the Hindu and [the] Infidel of every denomination' is equally deserving of religious liberty.<sup>28</sup> 'Almighty God hath created the mind free', and thus

no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burthened in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief; but that all men shall be free to profess and by argument to maintain, their opinion in matters of religion and that the same shall in no wise diminish, enlarge, or affect their civil capacities.<sup>29</sup>

On the other hand, Jefferson said, the state should disestablish all religion. It should not give special aid, support, privilege or protection to religious doctrines or groups – through special tax appropriations and exemptions, special donations of goods and land or special laws of incorporation and criminal protection. The state should not direct its laws to religious purposes. It should not draw on the services of religious associations, nor seek to interfere in their order, organisation or orthodoxy.<sup>30</sup> Religion flourishes best if state officials leave it alone.

Jefferson continued by saying that the state, in turn, operates best if religious officials leave it alone. Church officials must respect the wall of separation as much as the state's officials. Clerics need to stick to their speciality of soulcraft rather than interfere in the speciality of statecraft. Religion is merely 'a separate department of knowledge', Jefferson wrote, echoing the new positivist philosophy of the Frenchman Auguste Comte (1798–1857).<sup>31</sup> Far from being queen of the sciences, as traditionally thought, religion is just one specialised discipline alongside physics, biology, law, politics, medicine and many other disciplines. Preachers are the specialists in religion and are hired by their congregants to devote their time and energy to this religious speciality alone.

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 breach of contract, depriving their audience of the kind of service for which they were salaried.<sup>32</sup>

28 S Padover (ed), *The Complete Jefferson* (New York, 1943), p 1147.

29 *Ibid*, pp 946–947.

30 *Ibid*, pp 518–519, 673–676, 946–947, 957–958. See further E Gaustad, *Sworn on the Altar of God: a religious biography of Thomas Jefferson* (Grand Rapids, MI, 1996).

31 See H Martineau (trans), *The Positive Philosophy of Auguste Comte* (London, 1853).

32 Letter from Thomas Jefferson to P H Wendover, 13 March 1815, quoted and discussed in Hamburger, *Separation of Church and State*, pp 152–154.

In his own day, Jefferson's call for a strict separation of Church and state was considered to be too radical to effect much constitutional change. But these separationist ideals gradually found their way into a number of state constitutions in the later nineteenth and early twentieth centuries.<sup>33</sup> And in the 1947 case of *Everson v Board of Education*, the United States Court read this Jeffersonian understanding of religious liberty directly into the First Amendment as well.<sup>34</sup> Justice Hugo Black wrote famously for the *Everson* Court:

Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups, or vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between church and state'.<sup>35</sup>

In its early First Amendment free exercise cases (and free speech cases on religion), the Supreme Court used this Jeffersonian logic to protect the private exercises of religion, even those of unpopular religious groups. The Court held repeatedly that religious proselytisers such as Jehovah's Witnesses could not be denied licences to preach, parade or pamphleteer just because they were unpopular.<sup>36</sup> Public school students could not be compelled to salute the flag or recite the pledge if they were conscientiously opposed.<sup>37</sup> Other parties with scruples of conscience could not be forced to swear oaths before receiving citizenship status, property tax exemptions, state bureaucratic positions or social welfare benefits, or standing in courts.<sup>38</sup> And religious organisations had

33 For different accounts, see Dreisbach, *Thomas Jefferson*; Hamburger, *Separation of Church and State*; S Green, *The Second Disestablishment: Church and state in nineteenth-century America* (New York, 2010).

34 The Court first used this metaphor in *Reynolds v United States*, 98 US 146, 164 (1879).

35 *Everson v Board of Education*, 330 US 1, 15–16 (1947).

36 The main cases are *Cantwell v Connecticut*, 310 US 296 (1940); *Cox v New Hampshire*, 312 US 569 (1941); *Murdock v Pennsylvania*, 319 US 141 (1943); *Follet v McCormick*, 321 US 574 (1944); *Fowler v Rhode Island*, 345 US 67 (1953); *Poulos v New Hampshire*, 345 US 395 (1953); *Sherbert v Verner*, 374 US 398 (1963).

37 The main case is *West Virginia State Board of Education v Barnette*, 319 US 624 (1943).

38 The main cases are *In re Summers*, 325 US 561 (1945); *Girouard v United States*, 328 US 61 (1946); *First Unitarian Church v County of Los Angeles*, 357 US 545 (1958).

constitutional protection to adjudicate their own internal disputes over property and polity without state interference.<sup>39</sup> On the religion side of the wall of separation, the First Amendment provided religion with ample protection.

On the political side of the wall, however, religion could not depend upon the state's patronage. The Court drove this point home in a long series of establishment clause cases from 1948 to 1987 that banished religion from the nation's public (government-run) schools. The court outlawed the use of religious teachers, prayers, bibles, devotions, Decalogue displays, creationist teachings and moments of silence in public schools on the argument that these traditional educational practices violated the wall of separation of Church and state.<sup>40</sup> The Court also removed religious schools from much of their traditional state support. States could not provide salary and service supplements to religious schools, could not reimburse them for administering standardised tests, could not lend them state-prescribed textbooks, supplies, films or counselling services, could not allow tax deductions or credits for religious school tuition.<sup>41</sup> The wall of separation between Church and state, the Court insisted, also required a wall of separation between public state schools and private religious schools. The free exercise clause protected religion in private schools, but the establishment clause barred religion in public schools or public patronage of religious schools.

In *Lemon v Kurtzman* (1971), the Court distilled the Jeffersonian logic of its early cases into a general test to be used in all First Amendment establishment clause cases. Henceforth, every law challenged under the establishment clause would pass constitutional muster only if it could satisfy three criteria. The law must: have a secular purpose; have a primary effect that neither advances nor inhibits religion; and foster no excessive entanglement between Church and state. Incidental religious 'effects' or modest 'entanglements' of Church and state could be tolerated, but defiance of any of these criteria would be constitutionally fatal.<sup>42</sup>

This constitutional reification of Jeffersonian logic rendered the establishment clause a formidable obstacle to many traditional forms of state patronage of and co-operation with religion. The lower federal courts in particular used this test to outlaw all manner of government subsidies for religious charities, social services and mission works, government use of religious services, facilities and publications, government protections of Sundays and Holy Days, government

39 The main case is *Kedroff v St Nicholas Cathedral*, 344 US 94 (1952).

40 The main cases are *McCullum v Board of Education*, 333 US 203 (1948); *Engel v Vitale*, 320 US 471 (1962); *Abington School District v Schempp*, 374 US 203 (1963); *Stone v Graham*, 449 US 39 (1980); *Wallace v Jaffree*, 472 US 38 (1985); *Edwards v Aguillard*, 482 US 578 (1987).

41 The main cases are *Lemon v Kurtzman*, 403 US 602 (1971); *Sloan v Lemon*, 413 US 825 (1973); *Meek v Pittinger*, 421 US 349 (1975); *Wolman v Walter*, 433 US 229 (1977); *Grand Rapids School District v Ball*, 473 US 373 (1985); *Aguilar v Felton*, 473 US 402 (1985). See below, n 43 for cases overturning several of these precedents.

42 *Lemon*, 403 US at 602.

enforcement of blasphemy and sacrilege laws, and government participation in religious rituals and religious displays. It often did not take law suits to effect these reforms. Local governments in particular, sensitive to the political and fiscal costs of constitutional litigation, often voluntarily ended their prayers, removed their Decalogues and closed their coffers to religion long before any case was filed against them. The Jeffersonian logic of the establishment clause seemed to demand this.

While many officials and citizens – and the elite media with them – have remained faithful to this Jeffersonian logic, the reality is that separation of Church and state is no longer the law of the land in America. Over the past 30 years, the Supreme Court has been quietly defying its earlier separationist logic and has reversed some of its harshest separationist precedents.<sup>43</sup> The Court has several times upheld government policies that provide religious parties and non-religious parties with equal access to and equal treatment in public activities, forums, facilities and funds. Under this new equality logic, Christian clergy are just as entitled to run for state political office as non-religious candidates.<sup>44</sup> Church-affiliated pregnancy counselling centres can be funded as part of a broader federal family counselling programme.<sup>45</sup> Religious student groups can have equal access to state university and public high-school classrooms that are open to non-religious student groups.<sup>46</sup> Religious school students are just as entitled to avail themselves of general scholarships and remedial and disability services available to public school students.<sup>47</sup> Religious groups have equal access to public facilities or civic education programmes that were already open to other civic groups.<sup>48</sup> Religious parties are just as entitled as non-religious parties to display their symbols in public forums.<sup>49</sup> Religious student newspapers are just as entitled to public university funding as those of non-religious student groups.<sup>50</sup> Religious schools are just as entitled as other private schools to participate in a state-sponsored educational improvement or school voucher programme.<sup>51</sup>

43 *Mitchell v Helms*, 530 US 793, 808 (2001), overturning *Meek v Pittenger*, 421 US 329 (1975) and *Wolman v Walter*, 433 US 229 (1977); *Agostini v Felton*, 521 US 203, 235 (1997), overturning *Aguilar v Felton*, 473 US 402 (1985).

44 *McDaniel v Paty*, 435 US 618 (1978).

45 *Bowen v Kendrick*, 487 US 589 (1988).

46 *Widmar v Vincent*, 454 US 263 (1981); *Board of Education of the Westside Community Schools v Mergens*, 496 US 226 (1990).

47 *Witters v Washington Department of Services for the Blind*, 474 US 481 (1986); *Zobrest v Catalina Foothills School District*, 509 US 1 (1993).

48 *Lamb's Chapel v Center Moriches Union Free School District*, 508 US 384 (1993); *Good News Club v Milford Central School District*, 533 US 98 (2001).

49 *Capitol Square Review and Advisory Board*, 515 US 753 (1995).

50 *Rosenberger v University of Virginia*, 515 US 819 (1995).

51 *Mitchell v Helms*, 530 US 793 (2000); *Zelman v Simmons-Harris*, 122 S Ct 2460 (2002).

The Court has defended these more recent holdings on wide-ranging constitutional grounds: among other arguments, as a proper accommodation of religion under the establishment clause; as a necessary protection of religion under the free speech or free exercise clauses; and as a simple application of the equal protection clause. Collectively, these cases have shifted the centre of gravity of the First Amendment religion clauses from separationism and secularisation to equal treatment of public and private religious expression.

One theme common to the Supreme Court's recent First Amendment cases is that religion no longer needs to remain hidden on the private side of the wall of separation between Church and state. Public expression of religion must be as free as private expression – not because the religious groups in these cases are really non-religious; not because their public activities are really non-sectarian; and not because their public expressions are really part of the cultural mainstream. On the contrary, these public groups and activities deserve to be free, just because they are religious, just because they engage in sectarian practices, just because they sometimes take their stands above, beyond and against the mainstream. They provide leaven and leverage for the polity to improve.

A second theme common to these cases is that the freedom of religion sometimes requires the support of the state. Today's state is not the distant, quiet sovereign of Jefferson's day, from whom separation was both natural and easy. The modern welfare state, whether for good or ill, is an intensely active sovereign, from whom complete separation is impossible. Few religious bodies can now avoid contact with the state's pervasive network of education, charity, welfare, child care, health care, family, construction, zoning, workplace, taxation, security and other regulations. Both confrontation and co-operation with the modern welfare state are almost inevitable for any religion. When a state's regulation imposes too heavy a burden on a particular religion, the free exercise clause should provide a pathway to relief. When a state's appropriation imparts too generous a benefit to religion alone, the establishment clause should provide a pathway to dissent. But when a general government scheme provides public religious groups and activities with the same benefits afforded to all other eligible recipients, establishment clause objections are rarely availing. And, even on rare occasions, when federal courts do target religion for special burdens or benefits, Congress and state legislatures provide statutory fixes.

A third theme common to these cases is that freedom of public religion also requires freedom *from* public religion. Government must strike a balance between coercion and freedom. The state cannot coerce citizens to participate in religious ceremonies and subsidies that they find odious. Nor can it prevent citizens from participation in public ceremonies and programmes just because they are religious. It is one thing to outlaw Christian prayers and broadcast Bible readings from the public school; after all, students are compelled to be there. It is quite another thing to ban moments of silence and private

religious speech in these same public schools. It is one thing to bar direct tax support for religious education, quite another thing to bar tax deductions for parents who choose to educate their children in religious schools. It is one thing to prevent government officials from delegating their core police powers to religious bodies, quite another thing to prevent them from facilitating the charitable services of voluntary religious and non-religious associations alike. It is one thing to outlaw governmental prescriptions of prayers, ceremonies and symbols in public forums, quite another thing to outlaw governmental accommodations of private prayers, ceremonies and symbols in these same public forums.

A final theme common to these cases is that the freedom of public religion does not mean the establishment of a common religion. Today, the public religion of America is a collection of particular religions, not a combination of religious particulars. It is a process of open religious discourse, not a product of ecumenical distillation. All religious voices, visions and values, in all their denominational particularity, have the right to be heard and deliberated in the public square. All public religious services and activities, unless criminal or tortious, have a chance to come forth and compete.

Some conservative evangelical and catholic groups in America have seen and seized on this insight better than most. Their rise to prominence in the public square in the last three decades should not be met with glib talk of censorship or habitual incantation of Jefferson's mythical wall of separation. The rise of the so-called Christian right should be met with the equally strong rise of the Christian left, of the Christian middle and of many other Jewish, Muslim and other religious groups who test and contest its premises, prescriptions and policies. That is how a healthy democracy works. The real challenge of the new Christian right is not to the integrity of American politics but to the apathy of American religions. It is a challenge for peoples of all faiths and of no faith to take their seat in public debate.

Unlike a generation ago, no-one seated at this table of public deliberation today needs to hide their Bibles, Qur'ans, or prayer books. No-one needs to remove their yarmulkes, headscarves or crucifixes. No-one needs to cover their deep convictions under a patina of purported neutrality. American judges and jurists are slowly overcoming their allergies to public expressions of religion. They have come to realize that every serious position on the fundamentals of public and private life – on warfare, marriage reform, bioethics, environmental protection and more – rests on a set of founding metaphors and starting beliefs that have comparable faith-like qualities.<sup>52</sup> As the federal judge John T Noonan Jr writes: it impossible for judges or other officials 'to

52 See eg, R Cover, 'The Supreme Court 1982 term – foreword: nomos and narrative', (1983) 97 *Harvard Law Review* 4–68; S Winter, *A Clearing in the Forest: law, life and the mind* (Chicago, 2001).



pretend that they are neutrals somehow free from all prejudice when they decide intrachurch disputes, determine who has a religious claim, or balance the State's interest in relation to the First Amendment'.<sup>53</sup> Today, easy claims of neutrality and objectivity in public and political argument face very strong epistemological and constitutional headwinds.

## THE MAIN THEMES OF AMERICAN LAW AND RELIGION SCHOLARSHIP

The field of law and religion scholarship in America has profited from both trends described in the previous two sections: the gradual implosion of legal positivism and the gradual erosion of the wall of separation. Religion is now a legitimate voice in legal and political discourse and a legitimate subject of interdisciplinary legal study. In the vast new law and religion literature that has emerged in the American academy over the past three decades, ten themes stand out, some more prominent than others.

First, by far the largest body of law and religion scholarship is devoted to the American law of religious freedom, which I summarised in the last section. This is in part the law of the First Amendment, as interpreted and applied by the federal courts. The no-establishment case law has been heavily focused on the role of religion in public education, the place of government in religious education and government use and support of religious symbols, ceremonies and services. The free exercise case law has treated a wider swath of claims: the claims of individuals to conscientious objections to military service, education, oath swearing, medical procedures and more; their claims to special constitutional protections for religious dress, grooming, proselytism, holy day observance and access to sacred sites; their calls for special accommodations within the military, prisons, hospitals, public schools, government agencies, public forums and private workplaces and associations. The federal courts have used both the establishment and free exercise clauses to deal with the rights of religious groups to incorporate, to hold and use property, to govern their religious polity and clergy, to maintain internal laws and norms of discipline, to resolve internal disputes and to provide education, charity and other services.

While many of these religious liberty questions in America remain subject to federal – and increasingly also state – constitutional laws, they now also arise under federal, state and local statutes and regulations. Over the past three decades, hundreds of special protections, immunities and exemptions for religion have quietly found their way into the laws governing evidence, civil

53 J Noonan, 'The tensions and the ideals', in J van der Vyver and J Witte (eds), *Religious Human Rights in Global Perspective: Legal Perspectives* (The Hague, 1996), p 604. See further S Idleman, 'The role of religious values in judicial decision making', (1993) 68 *Indiana Law Journal* 433–488.

procedure, taxation, bankruptcy, labour, employment, workplace, military, immigration, prisons, hospitals, land use, zoning, education, charity, child care and more. Ironically, parties seeking religious freedom protections today get more protection under one of these statutes than by filing a First Amendment case in federal court. Hundreds of American legal scholars have been writing on these religious liberty themes and this topic will continue to dominate American law and religion scholarship in the foreseeable future.<sup>54</sup>

Second, a growing number of American scholars of religious liberty have been drawn to the study of comparative and international laws of religious freedom and of the religious sources and dimensions of human rights. This is a relative new field of study in American law schools; few American jurists engaged seriously with this topic before 1990. This new scholarly emphasis is part and parcel of the general rise of comparative legal studies in American law schools, catalysed further by the Supreme Court's new use of international norms to help make constitutional judgments. It is driven, in part, by new interest in the constitutional transformations of post-colonial Africa, post-fascist Latin America and post-Communist Russia, Eastern Europe and central Asia. It is also driven by new interest in the jurisprudence of religious freedom in the European Court of Human Rights and in various European national courts. And it is driven by the new great awakening of religion around the world that has radically shifted the religious demographic landscape of the West. American legal scholars have been in the vanguard of a growing international guild of scholars dedicated to the study of the international and regional human rights instruments affecting religion and of the contributions of various faith traditions to the cultivation – and abridgement – of human rights and democratic norms around the world.<sup>55</sup>

A small library of books has emerged from this international guild, documenting the contributions of the main world religions, especially Western Christianity, to modern understandings of human rights. A central question animating this literature is whether human rights are a universal good of human nature or a distinctly Western (Christian) invention that has no easy resonance in other cultures with different founding beliefs and values. If human rights are

54 See, eg, K Greenawalt, *Religion and Fairness* (2 vols, Princeton, NJ, 2006–2008); M McConnell, J Garvey and T Berg, *Religion and the Constitution* (second edition, New York, 2006); D Laycock, *Religious Liberty* (4 vols, Grand Rapids, MI, 2010); W Bassett, *Religious Organizations and the Law* (2 vols with updates, St Paul, MN, 1999); J Serritella, *Religious Organizations in the United States: a study of identity, liberty, and the law* (Durham, NC, 2006).

55 See a good summary and sampling of the recent literature and instruments in C Durham and B Scharffs, *Law and Religion: international, national, and comparative perspectives* (New York, 2010); J van der Ven, *Human Rights or Religious Rules?* (Leiden, 2010); N Lerner, *Religion, Secular Beliefs and Human Rights: 25 years after the Human Rights Declaration* (Leiden, 2006); T Stahnke and J Martin (eds), *Religion and Human Rights: basic documents* (New York, 1998); T Lindholm, C Durham and B Tahzib-Lie, *Facilitating Freedom of Religion or Belief: a deskbook* (Leiden, 2004); P Taylor, *Freedom of Religion: UN and European Human Rights law and practice* (Cambridge, 2005).

truly universal, what other formulations besides those rooted in Western philosophy, theology and culture need to be incorporated? If human rights are distinctly Western (Christian) inventions, what other normative structures and systems do non-Western traditions offer to protect human dignity and to promote peace, justice and an orderly society? A related question is whether human rights norms must now be cast in secular or neutral language in order to be legitimate and universal. Are Christian, Jewish, Islamic, Hindu, Buddhist, Confucian, Indigenous and other such declarations of human rights now in vogue, by definition, parochial and exclusive?<sup>56</sup>

Another small library of books has emerged analysing the wide range of human rights issues that confront religious persons and communities today. A central question at work in this literature is whether freedom of religion and belief is something distinctive or simply the sum of all the other rights that other parties can claim, too. If religious freedom is distinctive, what special rights and liberties attach uniquely to religious parties that are not given to other non-religious parties? If religious freedom is not distinctive, how do core claims of conscience or central commandments of faith get protected when they run contrary to the cultural mainstream or majoritarian rules?<sup>57</sup>

A third large body of scholarship in American law schools has gathered around the perennially contested issues of law, religion and family life. Historically, in the West and in many religious communities still today, the marital household was viewed as both a spiritual and temporal institution, and sexual activity had both moral and corporeal dimensions. Western churches and states thus collaborated in governing sex, marriage and family life. They both had rules and procedures for sexual etiquette, courtship and betrothal; for marital formation, maintenance and dissolution; for conjugal duties, debts and desires; for parental roles, rights and responsibilities. They collaborated in setting moral and criminal laws to police and punish illicit sex. For many centuries, these two powers kept overlapping rolls of sexual sin and crime: adultery and fornication, sodomy and buggery, incest and bestiality, bigamy and polygamy, prostitution and pornography, abortion and contraception. They also operated interlocking tribunals to enforce these rules on sex, marriage and family life. The Church guarded the inner life through its canons, confessionals and consistory courts. The state guarded the outer life through its policing, prosecution and punishment of sexual crimes. Of course, Church and state officials clashed frequently over whose laws governed. And their respective laws on these subjects did change a great deal – dramatically in the fourth, twelfth,

56 For a recent summary of this literature, with ample bibliography, see J Witte and M Green (eds), *Religion and Human Rights: an introduction* (Oxford, 2011).

57 See literature analysed in M Glendon, 'Is religious freedom becoming a second class right?', (2012) *Emory Law Journal* (forthcoming).

sixteenth and nineteenth centuries. But, for all this rivalry and change, Christianity – and the Jewish, Greek and Roman sources on which it drew – had a formative influence on Western laws of sex, marriage and family life.<sup>58</sup>

Most of these classic legal doctrines have now been eclipsed by the dramatic rise of new public laws and popular customs of sexual liberty and personal privacy in America and other Western lands. Courtship, cohabitation, betrothal and marriage are now mostly private sexual contracts with few roles for Church and state to play and few restrictions on freedoms of entrance, exercise and exit. Classic crimes of contraception and abortion have been found to violate constitutional liberties. Classic prohibitions on adultery and fornication have become dead or discarded letters on most statute books. Free speech laws protect all manner of sexual expression, short of obscenity. Constitutional privacy laws protect all manner of voluntary sexual conduct, short of child abuse and statutory rape. The classic prohibitions on incest, polygamy and homosexuality still remain on some law books, but they are now the subjects of bitter constitutional and cultural battles. All this has attracted a large body of scholarship among American lawyers and legal historians. A central question of this scholarship is how to rethink and reconstruct traditional family norms and practices in a manner that respects modern norms of privacy, freedom and equality, yet protects women, children and other dependents, who have often suffered gravely in the modern sexual and divorce revolution.<sup>59</sup>

Three new questions at the intersection of law, religion and family 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 central commandments of their faith? May a religious organisation dismiss or discipline an official or member because of their sexual orientation or practice, or because they had a divorce or abortion? These are becoming major points of contestation and litigation.<sup>60</sup>

58 See literature distilled in J Witte, *From Sacrament to Contract: marriage, religion and law in the Western tradition* (second edition, Louisville, KY, 2011).

59 See especially the work of the late Don S Browning, director of the Religion, Culture and Family Project at the University of Chicago and author of numerous titles, including *Marriage and Modernization* (Grand Rapids, MI, 2003); D Browning *et al*, *From Culture Wars to Common Ground: religion and the American family debate* (second edition, Louisville, KY, 2000). See also, among family law scholars, M Brining, *From Contract to Covenant: beyond the law and economics of the family* (Cambridge, MA, 2000); M Brining, *Family Law and Community: supporting the covenant* (Chicago, 2010).

60 See a fine recent treatment in R Vischer, *Conscience and the Common Good: reclaiming the space between the individual and the state* (Cambridge, 2010); D Laycock, A Picarello and R Fretwell

A second question concerns religiously based polygamy. A century and a half ago, the United States Supreme Court firmly rejected the religious freedom claims of Mormons to practise polygamy. These issues are back in the American courts and culture wars again, with Fundamentalist Mormons and various Muslim groups pressing their case on grounds of religious freedom, sexual autonomy, domestic privacy and equal protection. This, too, has triggered a small avalanche of writing.<sup>61</sup>

A third question concerns the growing call by selected Muslims and other religious minorities to opt out of the state's family law system and into their own religious legal systems. This is raising a lot of hard legal and cultural questions: what forms of marriage should citizens be able to choose and what forums of religious marriage law should state governments be required to respect? How should religious minorities with distinct family norms and cultural practices be accommodated in a society dedicated to religious liberty and self-determination and to religious equality and non-discrimination? Is legal or normative pluralism necessary to protect Muslims and other religious believers who are conscientiously opposed to the values that inform modern state laws on sex, marriage and family? Doesn't state accommodation or implementation of a faith-based family law system run the risk of higher gender discrimination, child abuse, coerced marriage, unchecked patriarchy or worse, and how can these social tragedies be avoided? Won't the addition of a religious legal system encourage more forum shopping and legal manipulation by crafty litigants involved in domestic disputes, often pitting religious and state norms of family against each other? Does the very state recognition, accommodation or implementation of a religious legal system erode the authority and compromise the integrity of those religious norms? Isn't strict separation of religious norms and state laws the best way to deal with the intimate questions of sex, marriage and family life? These hard questions are generating a great deal of important new scholarship.<sup>62</sup>

Fourth, this last question – about the place of faith-based family laws in Western democracies – points to a larger question about the overall place of religious legal systems in Western democracies and the forms and functions of law within organised religious bodies. The internal religious legal systems of Christians, Jews and Native American Indians have long attracted small

Wilson (eds), *Same-Sex Marriage and Religious Liberty: emerging conflicts* (Lanham, MD, 2008); K Greenawalt, *Private Consciences and Public Reasons* (New York, 1995).

- 61 See sources and analysis in J Witte, *Why Two in One Flesh: the Western case for monogamy over polygamy* (Oxford, forthcoming). See also a recent case in the British Columbia Supreme Court, which sets out the main arguments in detail: *Re Section 293 of the Criminal Code of Canada* 2011 BCSC 1588.
- 62 See, eg, J Nichols (ed), *Marriage and Divorce in a Multicultural Context: multi-tiered marriage and the boundaries of civil law and religion* (Cambridge, 2012); 'Symposium: sharia, family and democracy: religious norms and family law in pluralistic democratic states', (2012) 25 *Emory International Law Review* 779–1059 (special issue); R Ahdar and N Aroney (eds), *Sharia in the West* (Oxford, 2010).

groups of scholarly specialists in American universities. These topics are now becoming more mainstream in American law schools as well: several law schools now have specialised programmes or concentrations on these topics. Among Christian legal systems, Roman Catholic canon law gets the closest scholarly attention – in part because of the promulgation of the *Code of Canon Law* in 1983, in part because recent scandals over clerical paedophilia have focused new attention on the internal government of the Roman Catholic Church. American Episcopalians, Lutherans, Presbyterians and other mainline protestants, as well as Evangelicals and Orthodox Christians, have historically had less comprehensive internal bodies of ecclesiastical law and discipline. This is now leading to costly litigation in secular courts in disputes over church property, schools, charities, labour and employment and more. Non-catholic Christian groups in America have begun working assiduously to put their legal houses in order with the aid of law professors – though they have not yet constructed a body of ‘American ecclesiastical law’ on the scale of the English ecclesiastical law so ably developed by Mark Hill, Norman Doe and others.<sup>63</sup>

Jewish law, especially in its historical and Orthodox forms, has long had a small foothold in American law schools. This topic has become more mainstream with the rise of organised Jewish law courts in America that now arbitrate a number of issues of marriage, divorce, property, inheritance and commerce for the Jewish faithful who prefer to appear before them rather than before secular courts.<sup>64</sup> American Jewish law courts are, in fact, now viewed as models of religious arbitration for Christian, Muslim, Hindu and other religious groups in America who prefer to avoid litigation in secular courts.

The study of Muslim law (sharia) is now a major growth industry in American law schools and other university departments. Part of this new interest is the natural consequence of the rapid growth of different Muslim communities in America and other Western lands, and the need to discern their distinct legal needs and accommodations. But more of it is driven by the increased tensions between Islam and the West born of the terrorist attacks of 11 September 2001 and 7 July 2005 (‘9/11’ and ‘7/7’), the Fort Hood shooting, the rise of al-Qaeda and the bloody wars against terrorism in Iraq, Afghanistan and beyond. While some American legal scholars continue to perpetuate ‘a clash of civilizations’<sup>65</sup>

63 For a good recent example, see I Lupu and R Tuttle, *The Keys to the Kingdom: ecclesiastical polity and discipline in American protestantism* (Grand Rapids, MI, 2013). See the monumental studies of M Hill, *Ecclesiastical Law* (third edition, Oxford, 2007) and N Doe, *The Law of the Church in Wales* (Cardiff, 2002).

64 See, eg, M Broyde, *The Pursuit of Justice and Jewish Law: Halakhic perspectives on the legal profession* (revised edition, New York, 2007); E Dorff, *The Unfolding Tradition: Jewish law after Sinai* (New York, 2005); E Dorff and A Rosett, *A Living Tree: the roots and growth of Jewish law* (Albany, NY, 1988).

65 This is the title of S Huntington, *The Clash of Civilizations and the Remaking of World Order* (New York, 2011).

ethic, more of them have seen clearly the need to deepen our legal, cultural and religious understandings across Muslim, Christian and Jewish lines and to develop a pan-Abrahamic jurisprudence of public, private, penal and procedural law.<sup>66</sup>

Fifth, the emerging new scholarship on religious legal systems has moved into a broader scholarly inquiry about the influence of world religions on 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 it concerns the influence of religious ideas and practices of each of these world religions on the public, private, penal and procedural law of the state. Cambridge University Press has inaugurated a series of fresh studies on law and Christianity, Judaism, Islam, Hinduism, Buddhism, Confucianism and Indigenous Religions.<sup>67</sup> Other books are beginning to emerge offering intra- and interreligious perspectives on discrete legal topics – human rights, family law, constitutionalism, private law and more.<sup>68</sup>

Sixth, and as a specialised form of this last topic, American jurists have long studied the historical influence of Christianity on the Western legal tradition. Since the days of James Kent and Joseph Story in the early nineteenth century, legal historians of Anglo-American law have documented the influence of early modern English ecclesiastical law and mediaeval canon law on the American legal system. More recent historians have also addressed the influence of discrete groups such as the New England Puritans on colonial law, or eighteenth-century Baptists on First Amendment religious liberty law. These early specialised pockets of study are becoming broader in their inquiry and more mainstream in their influence. American legal historians such as Harold J Berman, James A Brundage, Charles Donahue, Richard Helmholz, John T Noonan Jr, Brian Tierney and others have shown the enduring influence of mediaeval and early modern Catholic canon law on American and broader Western laws of marriage and family, constitutionalism and human rights,

66 See esp the work of my colleague, A An-Na'im: *Muslims and Global Justice* (Philadelphia, 2011); *Islam and Human Rights* (Burlington, VT, 2010); *Islam and the Secular State: negotiating the future of sharia* (Cambridge, MA, 2008); *Towards an Islamic Reformation: civil liberties, human rights, and international law* (Syracuse NY, 1990). See also, for example, R Cochran (ed), *Faith and Law: how religious traditions from Calvinism to Islam view American law* (New York, 2008).

67 See Witte and Alexander (eds), *Christianity and Law*; J Witte and F S Alexander, *Christianity and Human Rights: an introduction* (Cambridge, 2011); T Lubin, D Davis and J Krishnan (eds), *Hinduism and Law: an introduction* (Cambridge, 2010); C Hayes (ed), *Judaism and Law: an introduction* (Cambridge, forthcoming); R French et al (eds), *Buddhism and Law: an introduction* (Cambridge, forthcoming). See also, eg, M McConnell, R Cochran and A Carmella (eds), *Christian Perspectives on Legal Thought* (New Haven, CT, 2001); D Browning, M Green and J Witte (eds), *Sex, Marriage and Family in World Religions* (New York, 2006); D Browning and M Bunge (eds), *Children and Childhood in World Religions* (New Brunswick, NJ, 2009).

68 For a good sampling, see F Ravitch, *Law and Religion, A Reader: cases, concepts, and theory* (second edition, St Paul, MN, 2008).



criminal law and procedure, property and inheritance law and much more.<sup>69</sup> Several American law professors, most notably Alan Watson, have unearthed the classical Roman law foundations on which these mediaeval canon law developments were built.<sup>70</sup> And a few legal historians are following this story of Christian legal influence into the European and North American protestant worlds of the sixteenth to nineteenth centuries.<sup>71</sup>

Seventh, natural law theory is becoming a topic of growing interest in American law schools – despite Holmes' deprecation of the natural law as a 'brooding omnipresence in the sky'. The modern study of natural law theory began in the mid-twentieth century. The horrible excesses of Nazi Germany and Stalinist Russia catalysed 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 Roman Catholic social teachings coupled with the monumental reforms of the Second Vatican Council in 1962–1965 gave further powerful impetus to Catholic natural law theories. Today, American scholars such as John Finnis, Robert George, Russ Hittinger, Stephen Pope, Jean Porter and others illustrate the wide range of Catholic natural law and natural rights teachings on a whole range of fundamental legal, political and social issues.<sup>72</sup> 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 and on terms that others with different faith traditions can appreciate.<sup>73</sup> And all these groups have found interesting

69 See, eg, Berman, *Law and Revolution*; J Brundage, *Law, Sex and Christian Society in Medieval Europe* (Chicago, 1987); J Brundage, *Medieval Canon Law* (London, 1995); C Donahue, *Law, Marriage and Society in the Later Middle Ages* (Cambridge, 2008); R Helmholz, *The Spirit of the Classical Canon Law* (Athens, GA, 1996); R Helmholz, *Roman Canon Law in Reformation England* (Cambridge, 1990); J Noonan, *Canons and Canonists in Context* (Goldbach, Germany, 1997); J Noonan, *Power to Dissolve: lawyers and marriages in the courts of the Roman Curia* (Cambridge, MA, 1972); B Tierney, *Religion, Law and the Growth of Constitutional Thought, 1150–1625* (Cambridge, 1982); B Tierney, *Medieval Poor Law: a sketch of canonical theory and its application in England* (Berkeley, CA, 1959).

70 A good summary of his voluminous scholarship is included in A Watson, *The Spirit of the Roman Law* (Athens, GA, 2005) and A Watson, *Legal Transplants: an approach to comparative law* (Edinburgh, 1974). See also, eg, B Frier and T McGinn (eds), *Casebook on Roman Family Law* (Oxford, 2004); H Hausmaninger and R Gumauf (eds), *A Casebook on Roman Property Law* (translated G Sheets, Oxford, 2012).

71 See, eg, H Berman, *Law and Revolution II: the impact of the Protestant Reformations on the Western legal tradition* (Cambridge, MA, 2003); J Witte, *Law and Protestantism: the legal teachings of the Lutheran Reformation* (Cambridge, 2002); J Witte, *The Reformation of Rights: law, religion and human rights in early modern Calvinism* (Cambridge, 2007).

72 See eg, J Finnis, *Natural Law and Natural Rights* (second edition, Oxford, 2011); R George, *In Defense of Natural Law* (Oxford, 1999); R Hittinger, *The First Grace: rediscovering the natural law in a post-Christian world* (Wilmington, DL, 2003); S Pope, *Human Evolution and Christian Ethics* (Cambridge, 2007); J Porter, *Ministers of the Law: a natural law theory of legal authority* (Grand Rapids, MI, 2010).

73 See eg, D Novak, *Natural Law in Judaism* (Cambridge, 1998); D van Drunen, *Natural Law and the Two Kingdoms: a study in the development of reformed social thought* (Grand Rapids, MI, 2010); J McGuckin, *The Ascent of Christian Law: patristic and Byzantine reformulations* (New York, 2011).

overlaps with the burgeoning religion and science scholarship that is exposing the natural foundations of human morality and sociability. Natural law theory, while still controversial, is becoming a promising new arena of interreligious and interdisciplinary dialogue.

Eighth, natural law arguments often inform a related area of continued importance in law and religion study: the topic of legal ethics, both by itself and in comparison with theological ethics, business ethics, medical ethics and more. Legal and theological ethicists have long recognised 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 co-operation, 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, and both professions seek to exemplify the ideals of calling and community. Nonetheless, there can be strong tensions between one's legal professional duties and one's 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 have now attracted a small cluster of important new scholarship.<sup>74</sup>

Ninth, this last question – about the place of the religious believer in the legal profession – has raised the broader question of the place of overt religious arguments in legal discourse altogether. This is in part an epistemological question: whether legal and political argumentation can and should forgo religious and other comprehensive doctrines in the name of rationality and neutrality. In America, this is also in part a constitutional question: whether the First Amendment prohibition on establishment of religion requires that all laws be based on secular and neutral rationales in order to pass constitutional muster. In the heyday of secular liberalism and strict separationism in the 1960s and 1970s, it was common to insist that all political debates should be undertaken in terms of rationality and neutrality.<sup>75</sup> Today, as we saw above, a number of

74 See eg, 'Symposium: the relevance of religion to a lawyer's work: an interfaith conference', (1998) 56 *Fordham Law Review* 1075–1651 (special issue); 'Symposium: rediscovering the rule of religion in the lives of lawyers and those they represent', (1999) 26 *Fordham Urban Law Journal* 821–1200 (special issue); T Shaffer and R Cochran, *Lawyers, Clients, and Moral Responsibility* (second edition, St Paul, MN, 2009); T Shaffer, *On Being a Christian and a Lawyer* (Provo, UT, 1981); J Allegretti, *The Lawyer's Calling: Christian faith and legal practice* (New York, 1996).

75 For a nice sifting of recent arguments, see J Perry, *The Pretenses of Loyalty: Locke, liberal theory, and the American political theology* (Oxford, 2010); S Smith, *The Disenchantment of Secular Discourse* (Cambridge, MA, 2010).

jurists have argued that religious and other comprehensive doctrines are essential parts of an enduring legal and political morality.<sup>76</sup>

But welcoming serious public deliberation by people of all faiths imposes its own strong demands. It demands that these faith communities develop a clear conceptual bilingualism: the development of a public language that casts deeply held convictions into terms that others, with different faith assumptions and experiences, can understand and accept, even for their own reasons. It demands deep and sincere empathy: learning to appreciate the deep convictions and cardinal practices of the other, even if only by distant analogy; that is the heart of the Golden Rule. It demands long and respectful patience: spending the time to listen to and to deliberate every serious position before rushing to cultural, constitutional, or political judgement. And it demands unswerving commitment of all parties to the first premises of American constitutional democracy: that there be religious freedom for all and religious establishment for none.

Tenth, and finally, questions of law and religious language have also raised broader questions about the overlaps between legal and theological interpretation, translation and hermeneutics. Legal historians have long been intrigued by the overlaps between the scholarly methods used to interpret the Bible and the Constitution, a code and a creed, a consistory judgment and a judicial opinion. The rise of modern literary theory and of form-critical methods of biblical interpretation has heightened this scholarly interest in how to discern the original meaning and understanding of authoritative texts. And with the rise of globalisation and the study of global law and world religions, a number of American jurists have become keenly interested in the questions of translation, transplantation and transmutation of legal and religious ideas across cultural, disciplinary and denominational boundaries.<sup>77</sup>

## THE DISTINCT CHALLENGES OF CHRISTIAN JURISPRUDENCE

As the foregoing makes clear, catholic and protestant scholars have been among the leaders of the law and religion movement in American legal education – along with growing numbers of Jewish and Muslim scholars and an increasing number of specialists on Asian and Traditional religions. Legal scholars from these various religious traditions have already learned a great deal from each

76 See especially the work of my colleague, M Perry: *Under God? Religious faith and liberal democracy* (Cambridge, 2003); *The Political Morality of Liberal Democracy* (Cambridge, 2010); *Toward a Theory of Human Rights: religion, law, courts* (Cambridge, 2007).

77 See eg, recent titles by K Greenawalt, *Legal Interpretation: perspectives from other disciplines and private texts* (Oxford, 2010); J Pelikan, *Interpreting the Bible and the Constitution* (New Haven, CT, 2004); M Ball, *Called by Stories: biblical sagas and their challenge for law* (Durham, NC, 2000); M Ball, *The Word and the Law* (Chicago, 1993).

other and have co-operated in developing richer understanding of sundry legal and political subjects. This comparative and co-operative interreligious inquiry into fundamental issues of law, politics and society needs to continue – especially in our day of increasing interreligious conflict and misunderstanding.

Christian scholars of law and religion, however – those who tend to be the readers of this distinguished *Ecclesiastical Law Journal*, including this author – face some distinct challenges and opportunities in this new century that are worth spelling out by way of conclusion.

A first challenge is for us Western Catholics and Protestants to make room for our brothers and sisters in the Eastern Orthodox Christian tradition. Many leading Orthodox scholars deal with fundamental questions of law, politics and society with novel insight, often giving a distinct reading and rendering of the biblical, apostolic and patristic sources that Christians have in common. Moreover, the Orthodox Church has immense spiritual resources and experiences, whose implications are only now beginning to be seen. These spiritual resources lie, in part, in Orthodox worship – the passion of the liturgy, the pathos of the icons, the power of spiritual silence. They also lie in Orthodox church life – the distinct balancing between hierarchy and congregationalism through autocephaly, between uniform worship and liturgical freedom through alternative vernacular rites, between community and individuality through a trinitarian communalism, centred on the parish, on the extended family, on the wizened grandmother (the ‘babushka’ in Russia). And these spiritual resources also lie in the massive martyrdom of millions of Orthodox faithful in the last century – whether suffered by Russian Orthodox under the Communist Party, by Greek and Armenian Orthodox under Turkish and Iranian radicals, by Middle Eastern Copts at the hands of religious extremists or by North African Orthodox under all manner of fascist autocrats and tribal strongmen.

These deep spiritual resources of the Orthodox Church have no exact parallels in modern Catholicism and Protestantism and most of their implications for law, politics and society have still to be drawn out. How the Orthodox Church can apply them to the nurture of law, constitutionalism and human rights is one of the great challenges – and opportunities – of this new century. At the very least, it would be wise for us Westerners to lay aside our simple caricatures of the Orthodox Church as a politically corrupt body that is too prone to clerical indiscipline, mystical idolatry and nominal piety to have much to offer to a legal regime. A Church with nearly 300 million members scattered throughout the world defies such a glib description. It would be wise to hear what an ancient Church, newly charred and chastened by decades of oppression and martyrdom, considers essential to the regime of religious rights. It would be enlightening to watch how ancient Orthodox communities, still largely centred on the parish and the family, will reconstruct social and economic rights. It would be prudent to see whether a culture more prone to beautifying than to analysing

might transform our understanding of cultural rights. It would be instructive to listen to how a tradition that still celebrates spiritual silence as its highest virtue might recast the meaning of freedom of speech and expression. It would be illuminating to feel how a people that have long cherished and celebrated the role of the woman – the wizened babushka of the home, the faithful remnant in the parish pews, the living icon of the Assumption of the Mother of God – might elaborate the meaning of women's rights.<sup>78</sup>

A second challenge is to trace the roots of these modern Christian teachings into the earlier modern period of the seventeenth to nineteenth centuries. Scholars have written a great deal about patristic, scholastic, early protestant and post-Tridentine Roman Catholic contributions to law, politics and society. But many of the best accounts of the history of Christian legal, political and social thought stop in 1625. That was the year that the father of international law, Hugo Grotius (1583–1645), uttered the impious hypothesis that law, politics and society would continue even if 'we should concede that which cannot be conceded without the utmost wickedness, that there is no God, or that the affairs of men are of no concern to him'.<sup>79</sup> While many subsequent writers conceded Grotius' hypothesis and embarked on the great secular projects of the Enlightenment, many great Christian writers did not. They have been forgotten to all but specialists. Their thinking on law, politics and society needs to be retrieved, restudied and reconstructed for our day.

A third challenge is to make these modern Christian teachings on law, politics and society more concrete. In centuries past, catholic, protestant and orthodox traditions alike produced massive codes of canon law and church discipline that covered many areas of private and public life. They instituted sophisticated tribunals for the equitable enforcement of these laws. They produced massive works of political theology and theological jurisprudence, with ample handholds in catechisms, creeds and confessional books to guide the faithful. Some of that sophisticated legal and political work still continues in parts of the Christian Church today. Modern Christian ethicists still take up some of the old questions. Some Christian jurists have contributed ably and amply to current discussion of human rights, family law and religious liberty. But the legal structure and sophistication of the modern Christian Church as a whole is a pale shadow of what went on before. It needs to be restored lest the Church lose its capacity

78 See sources in J Witte and M Bourdeaux (eds), *Proselytism and Orthodoxy in Russia: the new war for souls* (Maryknoll, NY, 1999); J Witte and F Alexander (eds), *The Teachings of Modern Orthodox Christianity on Law, Politics, and Human Nature* (New York, 2007).

79 Hugo Grotius, *De Iure Belli ac Pacis* (1625), Prolegomena, 11. See also O O'Donovan and J Lockwood O'Donovan, *From Irenaeus to Grotius: Christian political thought, 100–1625* (Grand Rapids, MI, 1999); B Tierney, *The Idea of Natural Rights: studies on natural rights, natural law, and Church law, 1150–1625* (Grand Rapids, MI, 1997).

for Christian self-rule and its members lose their capacity to serve as responsible Christian ‘prophets, priests and kings’.

The intensity and complexity of the modern culture wars over family, education, charity, religious liberty, constitutional order and other cardinal issues demand this kind of fundamental inquiry. Too often of late, Christians have marched to the culture wars without ammunition – substituting nostalgia for engagement, acerbity for prophecy, platitudes for principled argument. Too often of late, they have been content to focus on small battles such as prayers in schools and Decalogues on courthouses, without engaging with the great domestic and international soul wars that currently beset us. The Church needs to re-engage responsibly with the great legal, social and political issues of our age and to help individual Christians participate in the public square in a manner that is neither dogmatically shrill nor naively nostalgic but fully equipped with the revitalised resources of the Bible and the Christian tradition in all their complexity and diversity.

A fourth challenge is for modern catholic, protestant and orthodox Christians to develop a rigorous ecumenical understanding of law, politics and society. This is a daunting task. It is only in the past three decades, with the collapse of Communism and the rise of globalisation, that these three ancient warring sects of Christianity have begun to come together and have begun to understand each other. It will take many generations more to work out the great theological disputes over the nature of the Trinity or the doctrine of justification by faith. But there is more confluence than conflict in catholic, protestant and orthodox understandings of law, politics and society, especially if they are viewed in long and responsible historical perspective. Scholars from these three great Christian traditions need to come together to work out a comprehensive new ecumenical ‘concordance of discordant canons’ that draws out the best of these traditions, that is earnest about its ecumenism and that is honest about the greatest points of tension. Few studies would do more both to spur the great project of Christian ecumenism and to drive modern churches to get their legal houses in order.

A final challenge and perhaps the greatest of all will be to join the principally Western Christian story of law, politics and society known in North America and Western Europe with comparable stories that are told in the rest of the Christian world. Over the past two centuries, Christianity has become very much a world religion, claiming some two billion souls. Strong new capitals and captains of Christianity now stand in the South and the East – in Africa, Korea, China, India, the Philippines, Malaysia and well beyond. In some of these new zones of Christianity, the Western Christian classics are still being read and studied. But rich new indigenous forms and norms of law, politics and society are also emerging, premised on very different Christian understandings of theology and anthropology. It would take a special form of cultural arrogance for Western and non-Western Christians to refuse to learn from each other.