Introduction

John Witte, Jr.

Over the past two generations, a new interdisciplinary movement has emerged 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 organization. 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, rule and equity, discipline and love. This dialectical interaction gives these two disciplines and dimensions of life their vitality and their strength.

To be sure, the spheres and sciences of law and religion have, on occasion, both converged and contradicted each other. Every major religious tradition has known both theonomism and antinomianism – the excessive legalization and the excessive spiritualization of religion. Every major legal tradition has known both theocracy and totalitarianism – the excessive sacralization and the excessive secularization of law. But the dominant reality in most eras and most cultures, many scholars now argue, is that law and religion relate dialectically. Every major religious tradition strives to come to terms with law by striking a balance between the rational and the mystical, the prophetic and the priestly, the structural and the spiritual. Every major legal tradition struggles to link its formal structures and processes with the beliefs and ideals of its people. Law and religion are distinct spheres and sciences of human life, but they exist in dialectical interaction, constantly crossing-over and cross-fertilizing each other.[1]

[1] See especially the early anchor text in this field by Harold J. Berman, *The Interaction of Law and Religion* (Nashville, TN: Abingdon Press, 1974), updated in Harold J. Berman, *Faith and Order: The Reconciliation of Law and Religion* (Grand Rapids, MI: Wm. B. Eerdmans Publishing, 1993). See further Howard O. Hunter, ed., *The Integrative Jurisprudence of Harold J. Berman* (Boulder, CO: Westview Press, 1996).

1 "The Newly Discovered Book of the Law Read to King Josiah," from Nicolas Fontaine, *The History of the Old and New Testament: Extracted out of Sacred Scripture and Writings of the Fathers* (Exeter, 1780), s.v. 2 Kings 22.

It is these points of cross-over and cross-fertilization 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 the burgeoning field of law and religion study has set out to answer. Over the past two generations, scholars of various confessions and professions throughout the world have addressed these questions with growing alacrity.[2]

This volume surveys and maps one part of the broad field of law and religion – law and Christianity in the Western tradition. Using the "binocular of law and religion," the chapters that follow view afresh many familiar ideas and institutions that traditionally were studied through the "monocular of law" or the "monocular of religion" alone.[3] In the opening chapters herein, David Novak and Luke Johnson mine the Ur texts of Western law and religion, the Hebrew Bible and the New Testament, both viewed in classical and cultural context, and both the subjects of enormous bodies of juridical learning in the Jewish and Christian traditions respectively. R. H. Helmholz analyzes the Christian church's own internal laws that were built on these biblical and classical foundations – the two millennium-old canon law of the Catholic tradition, and the more recent Protestant church orders and ordinances. Brian Tierney analyzes the Western tradition's perennial attachment to concepts of natural law, and its development of a distinctive understanding of natural rights and liberties. Kent Greenawalt takes up one important form of natural law, the law of conscience, and how it has informed Western understandings of conscientious objection, civil disobedience, and resistance. The natural law in various biblical and rational forms, Harold Berman and Mathias Schmoeckel show, has also been critical to guide and to govern the words of testimony and evidence used in judicial proceedings and the words of promise and contract used in social and economic life. Among the most important such words, Don Browning shows, are those that form the marriage contract, an institution of such critical importance in the Western tradition that the church has elevated it to

[2] See, e.g., F. C. DeCoste and Lillian MacPhearson, *Law, Religion, Theology: A Selective Annotated Bibliography* (West Cornwall, CT: Locust Press, 1997); "Reviews on New Books in Law and Religion," *Journal of Law and Religion* 16 (2001): 249–1035 and 17 (2002): 97–459, and ongoing scholarship reflected and reviewed in such specialty journals as the *Ecclesiastical Law Journal, Studia Canonica, Bulletin of the Medieval Canon Law Society, Zeitschrift der Savigny-Stiftung (Kanonisches Abteilung), Ius Commune, Journal of Law and Religion, Journal of Church and State*, and others.

[3] The phrase is from Jaroslav Pelikan, "Foreword," to John Witte, Jr. and Frank S. Alexander, eds., *The Weightier Matters of the Law: Essays on Law and Religion in Tribute to Harold J. Berman* (Atlanta, GA: Scholars Press, 1988), xi–xii.

a covenant or sacrament as well. Another vital institution, embraced from the start, is that of property. Frank Alexander shows how property shapes our identity, power, and relationships in modern society, and carries with it the primeval commandments of dominion and stewardship – "to dress and keep the Garden" (Genesis 2:15). One critical use of property for Christians, Brian Pullan reminds us, is to relieve the plight of the poor and needy, and Christians over the centuries have elaborated structures and programs to discharge their obligations of charity and love to the "least" in society (Matthew 25:40). Christian love extends beyond the poor and needy, Michael Perry reminds us. The Bible commands us to love all others as ourselves, and this universal love command is a critical foundation of our modern understanding of human dignity and human rights. Christians are called to love even their enemies, and Jeffrie Murphy shows how this startling ethic must work to transform our understanding of punishment of one such enemy, the criminal.

The concluding chapters of the volume shift to issues of religious liberty, and to the relations of churches and other associations to the state. David Little maps the Christian foundations and modern institutions of religious liberty for individuals and for groups, showing how these norms have both captured and challenged national and international law today. Norman Doe and William Bassett describe the complex internal legal structures of modern churches, and show how these institutions interact with, and sometimes conflict with, the modern state. The institutional church, of course, is only one of many associations recognized at law. The law recognizes countless associations for other things – not only families, charities, schools, and the like, as we have seen, but also corporations, partnerships, unions, and other groups focused on commerce and business. For many centuries, David Skeel shows, the church chartered and Christians ran many of the business associations of the West, and defined a good bit of the law of associations that governed these institutions. Today, business corporations are governed by complex state laws, which modern Christians have largely accepted, albeit with some critique of corporate excesses and exploitation.

The balance of this Introduction seeks to contextualize these chapters a bit more. I set "the binocular of law and religion" at its most panoramic setting to survey the grand civilizational pictures of law and Christianity in Western history. My argument is that there is a distinctive Western legal tradition – rooted in the ancient civilizations of Israel, Greece, and Rome. This Western legal tradition was nourished for nearly two millennia by Christianity and for more than two centuries by the Enlightenment. It has

developed 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 legal science and legal philosophy. The precise shape and balance of the Western legal tradition at any period has been determined, in part, by the Western religious tradition. And 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 to thirteenth 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 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. What follows is a quick sketch of the interactions of law and Christianity in these four watershed eras, which sets up the more refined and colorful portraits of individual topics offered in the succeeding chapters.[4]

LAW AND CHRISTIANITY IN THE ROMAN EMPIRE

The first watershed period came with the Christian conversion of the Roman emperor and Empire in the fourth through sixth centuries CE. Prior to that time, Roman law reigned supreme throughout much of the West. Roman law defined the status of persons and associations and the legal actions and procedures available to them. It proscribed delicts (torts) and crimes. It governed marriage and divorce, households and children, property and inheritance, contracts and commerce, slavery and labor. It protected the public property and welfare of the Roman state, and created the

[4] The following section is distilled in part from my *God's Joust, God's Justice: Law and Religion in the Western Tradition* (Grand Rapids, MI: Wm. B. Eerdmans Publishing, 2006).

vast hierarchies of government that allowed Rome to rule its far-flung Empire for centuries.[5]

A refined legal theory began to emerge in Rome at the dawn of the new millennium, built in part on Greek prototypes. The Roman Stoics, Cicero (106–43 BCE) and Seneca (d. 65 CE), among other Roman philosophers, cast in legal terms the topical methods of reasoning, rhetoric, and interpretation inherited from the Greek philosopher, Aristotle (384–322 BCE). They also greatly expanded the concepts of natural, distributive, and commutative justice developed by Aristotle and Plato (CA. 426–387 BCE). The Roman jurists, Gaius (d. *c.* 180 CE), Ulpian (*c.* 160–228 CE), and others drew what would become classic Western distinctions among: (1) civil law (*ius civile*), the statutes and procedures of a particular community to be applied strictly or with equity; (2) the law of nations (*ius gentium*), the principles and customs common to several communities and often the basis for treaties; and (3) natural law (*ius naturale*), 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 Roman jurists also began to develop the rudiments of a concept of subjective rights (*iura*), freedoms (*libertates*), and capacities (*facultates*) in private and public law.

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, forum, and basilicas. The Roman emperor was to be worshiped 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 sometimes viewed as the embodiment of an immutable divine law, appropriated and applied through the sacred legal science of imperial pontiffs and jurists. The Roman imperial cult claimed no monopoly; each of the conquered peoples in the Empire could maintain their own religious faith and practices, so long as they remained peaceable and so long as they accepted the basic requirements of the imperial cult that were prescribed by Roman law.

The early Christian church stood largely opposed to this Roman law and culture – as had the Jewish communities in which the church was born.[6] Early Christians certainly adopted a number of Roman legal institutions and practices – putting "a complex spin or twist on them," in Don Browning's apt phrase, in light of Gospel narratives and imperatives.[7] But

[5] See the chapter by Luke Timothy Johnson herein.
[6] On Judaism, see the chapter by David Novak herein.
[7] See the chapter by Don Browning herein, with further examples of early adaptation in the chapters by Luke Johnson, Brian Tierney, R. H. Helmholz, Mathias Schmoeckel, and David Skeel herein.

early Christians could not easily accept the Roman imperial cult nor readily partake of the pagan rituals required for participation in commerce, litigation, military life, and other public forums and activities. Emulating the sophisticated legal communities of Judaism, the early churches thus organized themselves into separate communities, largely withdrawn from official Roman society, and increasingly dissociated from Jewish communities as well. Early church constitutions, such as the *Didache* (*c.* 90–120), set forth internal rules for church organization, clerical life, ecclesiastical discipline, charity, education, family, and property relations, and these laws were amply augmented by legislation and decrees by bishops and church councils from the later second century onward.[8] Early Christian leaders – building on biblical injunctions to "render to Caesar the things that are Caesar's" (Matthew 22:21) and to "honor the authorities" (Romans 13:1; 1 Peter 2:13–17) – taught the faithful to pay their taxes, to register their properties, and to obey the Roman rulers up to the limits of Christian conscience and commandment.[9] But these early Christian leaders also urged their Roman rulers to reform the law in accordance with their new teachings – to respect liberty of conscience and worship, to outlaw concubinage and infanticide, to limit easy divorce, to expand charity and education, to curb military violence, to mitigate criminal punishments, to emancipate slaves, and more. Such legal independence and reformist agitation eventually brought forth firm imperial edicts which condemned Christianity as an "illicit religion" and exposed Christians to intermittent waves of brutal persecution.

The Christian conversion of Emperor Constantine in 312 and the formal establishment by law 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 morality. This new convergence 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 – notably and brutally against such heretics as Arians, Apollonarians, and Manicheans. Particularly in the great synthetic texts of Roman law that have survived – the *Codex Theodosianus* (438) and the *Corpus*

[8] See the chapters by Luke Johnson and R. H. Helmholz herein.
[9] See the chapter by Kent Greenawalt herein.

Iuris Civilis (529–534) – Christian teachings on the Trinity, the sacraments, liturgy, holy days, the Sabbath Day, sexual ethics, charity, education, and much else were copiously defined and regulated at law. The Roman law also provided special immunities, exemptions, and subsidies for Christian ministers, missionaries, and monastics, who thrived under this new patronage and eventually extended the church's reach to the farthest corners of the Roman Empire. The 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. 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 Christian imperial cult, hierarchically organized and ultimately subordinate to imperial authority. The church's property was, in effect, the new public property of the empire, subject both to its protection and to its control. Thus the Roman emperors and their delegates convoked many of the church councils and major synods; appointed, disciplined, and removed the high clergy; administered many of the church's parishes, monasteries, and charities; and legally controlled the acquisition, maintenance, and disposition of much church property.

This "caesaropapist" pattern of substantive influence but procedural subordination of the church to the state, and of the Christian religion to secular law, met with some resistance by strong clerics, such as Bishop Ambrose of Milan (339–397), Pope Gelasius (d. 496), and Pope Gregory the Great (*c.* 540–604). In several bold pronouncements, they insisted on the maintenance of two powers, if not "two swords" (Luke 22:38), to govern the affairs of Western Christendom – one held by the spiritual authorities, the other by the temporal authorities. But the more enduring political formulation came from St. Augustine (354–430), who saw in this new imperial arrangement a means to balance the spiritual and temporal dimensions and powers of the earthly life. In his famous political tract, *City of God*, Augustine contrasted the city of God with the city of man that coexist on this earth. The city of God consists of all those who are predestined to salvation, bound by the love of God, and devoted to a life of Christian piety, morality, and worship led by the clergy. The city of man consists of all the things of this sinful world, and the legal, political, and social institutions that God has created to maintain a modicum of order and peace on the earth. Augustine sometimes depicted this dualism as two walled cities separated from each other – particularly when he was describing the

sequestered life and discipline of monasticism, or the earlier plight of the Christian churches under pagan Roman persecution. But Augustine's more dominant teaching was that, in the Christianized Roman Empire, these two cities overlapped in responsibility and membership. Christians would remain dual citizens until these two cities were fully and finally separated on the Return of Christ and at the Last Judgment of God. A Christian remained bound by the sinful habits of the world, even if he aspired to greater purity of the Gospel. A Christian remained subject to the power of both cities, even if she aspired to be a citizen of the city of God alone. If the rulers of the city of man favored Christians instead of persecuting them, so much the better.[10]

This Roman imperial understanding of law and Christianity largely continued in the West after the fall of Rome to various Germanic tribes in the fifth century. Before their conversion, many of the pagan Germanic rulers were considered to be divine and were the cult leaders as well as the military leaders of their people. Upon their conversion to Christianity, they lost their divinity, yet continued as sacral rulers of the Christian churches within their territories. They found in Christianity an important source of authority in their efforts to extend their rule over the diverse peoples that made up their regimes. The clergy not only supported the Germanic Christian kings in the suppression of pagan tribal religions, but many of them also looked upon such leaders as the Frankish Emperor Charlemagne (r. 768–814) and the Anglo-Saxon King Alfred (r. 871–899) as their spiritual leaders. Those Germanic rulers who converted to Christianity, in turn, supported the clergy in their struggle against heresies and gave them military protection, political patronage, and material support, as the Christian Roman emperors before them had done. Feudal lords within these Germanic domains further patronized the church, by donating lands and other properties for pious causes in return for the power to appoint and control the priests, abbots, and abbesses who occupied and used these new church properties.

LAW AND MEDIEVAL CATHOLICISM

The second watershed period of the Western legal tradition came with the Papal Revolution or Gregorian Reform of the late eleventh through thirteenth centuries. Building on the conflict over lay investiture of clergy, Pope

[10] On Augustine, see further the chapters by Brian Tierney, Kent Greenawalt, Jeffrie Murphy, and David Little herein.

Gregory VII (1015–1085) and his successors eventually threw off their civil rulers and established the Roman Catholic Church as an autonomous legal and political corporation within Western Christendom. This event was part and product of an enormous transformation of Western society in the late eleventh to thirteenth centuries. The West was renewed through the rediscovery and study of the ancient texts of Roman law, Greek philosophy, and Patristic theology. The first modern Western universities were established in Bologna, Rome, and Paris with their core faculties of theology, law, and medicine. A number of small towns were transformed into burgeoning city-states. Trade and commerce boomed. A new dialogue was opened between Christianity and the sophisticated cultures of Judaism and Islam. Great advances were made in the natural sciences, in mechanics, in literature, in art, music, and architecture. And Western law, particularly the law of the church, was transformed.[11]

From the twelfth to fifteenth centuries, the Catholic Church claimed a vast new jurisdiction – literally the power "to speak the law" (*jus dicere*). 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, ideological, and sexual crimes. The church also claimed temporal jurisdiction over subjects and persons that also fell within the concurrent jurisdiction of one or more civil authorities.

Medieval writers pressed four main arguments in support of these jurisdictional claims. First, this new jurisdiction was seen as a simple extension of the church's traditional authority to govern the seven sacraments – baptism, confirmation, penance, eucharist, marriage, ordination, and extreme unction. By the fifteenth century, the sacraments supported whole bodies of sophisticated church law, called "canon law." The sacrament of marriage supported the canon law of sex, marriage, and family life.[12] The sacrament of penance supported the canon law of crimes and torts (delicts) and, indirectly, the canon law of contracts, oaths, charity, and inheritance.[13] The sacrament of penance and extreme unction also supported a sophisticated canon law of charity and poor relief, and a vast network of church-based guilds, foundations, hospitals, and other institutions that served the *personae miserabiles* of Western society.[14] The sacrament of

[11] See the chapter by Harold J. Berman herein.
[12] See the chapter by Don Browning herein.
[13] See the chapter by Harold J. Berman herein.
[14] See the chapter by Brian Pullan herein.