Over the past two generations, a new interdisciplinary movement has emerged dedicated to studying 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.

The historical interaction of law and religion has always been a major theme of this interdisciplinary study. One of the pioneers of this historical study was an American jurist, Harold J. Berman. There is a distinct Western legal tradition, Berman argued, a set of legal ideas and institutions that has evolved by accretion and adaptation over the centuries. Six great revolutions, however, have punctuated the gradual evolution of the Western legal tradition: the Papal Revolution of 1075; the German Lutheran Revolution of 1517; the English Puritan Revolution of 1640; and the American, French, and Russian Revolutions of 1776, 1789, and 1917. These revolutions were, in part, rebellions against a legal and political order that had become outmoded and ossified, arbitrary and abusive. But, more fundamentally, these revolutions were products of radical shifts in the dominant religions or belief systems of the people—shifts from Catholicism to Protestantism to Deism to Marxist-Leninism. Each of these new belief systems offered a new eschatology, a new apocalyptic vision of the perfect end-time, whether that be the second coming of Christ, the arrival of the heavenly city of the Enlightenment philosophers, or the withering away of the state. Each of these revolutions triggered massive changes in prevailing legal forms and norms—movements from canon law to civil law to common law, from the supremacy of the church, to the supremacy of the state, to the supremacy of the individual and the collective. Each of these revolutions, in its radical phase, sought the death of an old legal order to bring forth a new order that would survive its understanding of the Last Judgment. Eventually, each of these revolutions settled down and introduced fundamental legal changes that were ultimately subsumed in and accommodated to the Western legal tradition. Today, Berman concluded, this Western legal tradition has been drawn into
increasing cooperation and competition with other legal traditions from around the globe, in the struggle to define a new common law, a new common faith for the emerging world order.

Berman's account of law and religion in Western history built on earlier European scholarship. Nineteenth-century German jurists Friedrich Carl von Savigny and Otto von Gierke, for example, offered a quite different account of Western legal history based on shifting images of the individual and the collective, the Volk and the Volksgeist, the citizen and the association (Genossenschaft). English legal historian Sir Henry Maine depicted millennium-long shifts in the Western legal tradition from status to contract, from equity to legislation, from custom to code. Dutch philosopher Herman Dooyeweerd analyzed the founding and grounding “religious motifs” of each age – the motifs of Greek “form and matter,” Catholic “grace and nature,” Protestant “creation, fall, and redemption,” and Enlightenment “nature and freedom” and the concrete manifestations of these shifting motifs in legal, political, and cultural life.

In all these grand historical narratives, the “binocular of law and religion” is viewed at its most panoramic setting. The focus is on the interaction between the predominant belief system of a civilization or age and the major forms and norms of its predominant legal system. But historians have also set the binocular of law and religion more narrowly to trace the religious sources and dimensions of particular legal ideas and institutions over time – of marriage and family, of contract and obligation, of fault and remedy, of crime and punishment, of rights and liberties, of citizens and corporations, and more. They have also traced the secular legal influence of sophisticated religious legal systems like Jewish Halacha, Christian canon law, Muslim Shari’a, Hindu dharma, and more.

Though very recent writings have begun to study the legal influences of these non-Western religions, most of the historical scholarship (at least in Romance languages) has been focused on law and religion in the Western tradition. This chapter offers a brief distillation of the principal findings. I offer brief portraits of law and religion in four watershed periods in the history of the West: (1) 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 modern times.

**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 C.E. Prior to that time, Roman law reigned supreme throughout much of the known 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 vast hierarchies of government that allowed Rome to rule its far-flung Empire for centuries.

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 cast in legal terms the topical methods of reasoning, rhetoric, and interpretation as well as the concepts of natural, distributive, and commutative justice inherited from Aristotle. They also 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 worshipped as a god and king in the rituals of the imperial court and in the festivals of the public square. The Roman law itself was 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. Early Christians did adopt a number of Roman legal institutions and practices, but they could not easily accept the Roman imperial cult nor readily partake of the pagan rituals required for participation in public life. Emulating the sophisticated legal communities of Judaism from which they were born, the early churches thus organized themselves into separate communities, largely withdrawn from official Roman society, and eventually dissociated from Jewish communities as well. Early internal church laws called canon laws set forth rules for church organization, clerical life, Christian morality, charity, education, family, and property relations. Early Christian leaders 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. But they also urged their Roman rulers to reform the law in accordance with Christian teachings – to protect religious freedom, to outlaw infanticide and easy divorce, to expand charity and education, to curb military violence and criminal punishments, to emancipate slaves, and more. In response, the Roman emperors 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 supreme ruler of 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. 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 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 (ca. 540–604) who insisted that there were two powers to govern Christendom – one held by the spiritual authorities, the other by the temporal authorities. But the Romanization of Christianity that occurred with the Christianization of Rome shaped Western Christianity for a millennium thereafter.

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, when Pope Gregory VII and his successors threw off their civil rulers and established the Roman Catholic Church as an autonomous legal and political corporation within Western Christendom. From the twelfth to the 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.

This new spiritual jurisdiction was in part an extension of the church’s traditional authority to govern the seven sacraments. The sacrament of marriage supported the canon law of sex, marriage, and family life. The sacrament of penance supported the canon law of crimes and torts (delicts) and, indirectly, the canon law of contracts, oaths, charity, and inheritance. 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. The sacrament of ordination became the foundation for a refined canon law of corporate rights and duties of the clergy and monastics, and an intricate network of corporations and associations that they formed. The sacraments of baptism and confirmation supported a new constitutional law of natural rights and duties of Christian believers.

This new spiritual jurisdiction also reflected the belief that the Church’s canon law was the true source of Christian equity – “the mother of exceptions,” “the epitome of the law of love,” and “the mother of justice,” as they variously called it. As the mother of exceptions, canon law was flexible, reasonable, and fair, capable either of bending the rigor of a rule in an individual case through dispensations and injunctions, or punctiliously insisting on the letter of an agreement through orders of specific performance or reformation of documents. As the epitome of love, canon law afforded special care for the disadvantaged – widows, orphans, the poor, the handicapped, abused wives, neglected children, maltreated servants, and the like. It provided them with standing to press claims in church courts, competence to testify against their superiors without their permission, methods to gain succor and shelter from abuse and want, opportunities to pursue pious and protected careers in the cloister. As the mother of justice, canon law provided a method whereby the individual believer could be reconciled to God, neighbor, and self at once. Church courts treated both the legality and the morality of the conflicts before them. Their remedies enabled litigants to become righteous and just not only in their relationships with opposing parties and the rest of the community, but also in their relationship to God. This was one reason for the enormous popularity and success of the church courts in much of medieval Christendom. Church courts treated both the legality and the
morality of the conflicts before them. Their remedies enabled litigants to become “righteous” and “just” not only in their relationships with opposing parties and the rest of the community, but also in their relationship to God.

These and other arguments rendered the medieval church the supreme legislator, judge, and executive of Western Christendom. Church authorities issued a steady stream of new canonical legislation through papal decretals and bulls, conciliar and synodical decrees and edicts, and more discrete orders by local bishops and abbots. Church courts adjudicated cases in accordance with the substantive and procedural rules of the canon law. Cases could be appealed up the hierarchy of church courts, ultimately to the papal rota. The medieval church also developed a vast network of executive and administrative offices. The medieval church registered its citizens through baptism. It taxed them through tithes. It conscripted them through crusades. It educated them through church schools. It nurtured them through cloisters, monasteries, chantries, foundations, and guilds. The medieval Church was, in F.W. Maitland’s famous phrase, “the first true state in the West.” Its medieval canon law was the first international law of the West since the eclipse of the classical Roman law half a millennium before.

From the twelfth century onward, the jurists of the canon law, called “canonists,” began to systematize this vast new body of law, using the popular dialectical methods of the day. Thousands of legal and ethical teachings drawn from the apostolic constitutions, patristic writings, and Christianized Roman law of the first millennium were collated and harmonized in the famous Decretum Gratiani (ca. 1140), the anchor text of medieval canon law. The Decretum was then heavily supplemented by collections of papal and conciliar legislation and juridical glosses and commentaries. All these texts were later integrated in the Corpus Iuris Canonici published in the 1580s, and in hundreds of important canon law texts on discrete legal topics that emerged with alacrity after the invention of the printing press in the early fifteenth century.

This complex new legal system of the church also attracted sophisticated new legal and political theories. Medieval jurists reclassified the sources and forms of law, ultimately distinguishing: (1) the eternal law of the creation order; (2) the natural laws of the Bible, reason, and conscience; (3) the positive canon laws of the church; (4) the positive civil laws of the imperial, royal, princely, ducal, manorial and other authorities that comprised the medieval state; (5) the common laws of all nations and peoples; and (6) the customary laws of local communities. These scholars also developed enduring rules for the resolution of conflicts among these types of laws, and contests of jurisdiction among their authors and authorities. They developed refined concepts of legislation, adjudication, and executive administration, and core constitutional concepts of sovereignty, election, and representation. They developed a good deal of the Western theory and law of chartered corporations, private associations, foundations, and trusts, built in part on early Roman law and later civil law prototypes.

Medieval writers also worked out a whole complex latticework of what we now call rights, freedoms, powers, immunities, protections, and capacities for different groups and persons. They defined in detail the rights of the church to make its own laws, to maintain its own courts, to define its own doctrines and liturgies, to elect and remove its own clergy. They also stipulated the exemptions of church property from civil taxation and takings, and the right of the clergy to control and use church property without interference or encumbrance from secular authorities. They also guaranteed the immunity of the clergy from civil prosecution, military service, and compulsory testimony, and the rights of church entities like parishes, monasteries, charities, and guilds to form and dissolve, to accept and reject members, and to establish order and discipline. In later twelfth- and thirteenth-century decrees, the canon law defined the rights of church councils and synods to participate in the election and discipline of bishops, abbots, and other clergy. It defined the rights of the lower clergy vis-à-vis their superiors. It defined the rights of
the laity to worship, evangelize, maintain religious symbols, participate in the sacraments, travel on religious pilgrimages, and educate their children. It defined the rights of the poor, widows, and needy to seek solace, succor, and sanctuary within the church. It defined the rights of husbands and wives, parents and children, masters and servants within the household.

These medieval canon law formulations of rights and liberties had parallels in later medieval common law and civil law. Particularly notable sources were the thousands of medieval treaties, concordats, charters, and other constitutional texts that were issued by religious and secular authorities. These were often detailed, and sometimes very flowery, statements of the rights and liberties to be enjoyed by various groups of clergy, nobles, barons, knights, urban councilors, citizens, universities, monasteries, and others. These were often highly localized instruments, but occasionally they applied to whole territories and nations. A familiar example of the latter type of instrument was the Magna Carta (1215), the great charter issued by the English Crown at the behest of the church and barons of England. These charters of rights, which were common throughout the medieval West, became important prototypes on which early modern Catholic, Protestant, and Enlightenment-based revolutionaries would later call to justify their revolts against tyrannical authorities.

Law and Protestantism

The third watershed period in the Western legal tradition came with the Protestant Reformation, inaugurated by Martin Luther of Wittenberg in his famous posting of the Ninety-Five Theses in 1517 and his burning of the canon law and confessional books in 1520. It ultimately erupted in various quarters of Western Europe in the early sixteenth century, settling into Lutheran, Anglican, Calvinist, and Anabaptist branches.

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

These new Protestant teachings helped to transform Western law in the sixteenth and seventeenth centuries. The Protestant Reformation permanently broke the international rule of the Catholic Church and the canon law, splintering Western Christendom into competing nations and territories. Each of these polities had its own (sometimes conjoined) religious and political rulers, many of whom fought violently with each other in a century of blood religious warfare that finally ended with the Religious Peace of Westphalia (1648). The Protestant Reformation also triggered a massive shift of power, property, and prerogative from the church to the state. Political rulers now assumed jurisdiction over numerous subjects previously governed principally by the Catholic Church and its canon law – marriage and family life, property and testamentary matters, charity and education, contracts and oaths, moral and ideological crimes. Particularly in Lutheran and Anglican polities, political authorities also came
Law and religion in the Western legal tradition

to exercise considerable control over the clergy, polity, and property of the church as well – in self-conscious emulation of the laws and practices of Christianized Rome, and in implementation of new Christian theories of absolute monarchy.

These massive shifts in legal power and property from church to state did not separate Western law from its Christian foundations. Catholic canon law remained part of a good deal of early modern Western common law and civil law – predictably so in Catholic lands, but also surprisingly so in many Protestant lands. Protestant jurists and magistrates readily plucked many legal teachings from the medieval canon law that they regarded as consonant with their new teachings. A good deal of public, private, penal, and procedural law developed in medieval Catholic canon law thus became part of early modern Protestant secular law as well. Moreover, in the Catholic regions of Eastern Europe and the Holy Roman Empire, as well as in France, Spain, Portugal, Italy and their many colonies, especially in Latin America, Catholic clerics and canonists continued to have a strong influence on the content and character of early modern state law. This influence was strengthened by the resurgence of refined legal learning in sixteenth-century Spain and Portugal and the sweeping legal and theological reforms of the Council of Trent (1545–1563).

In the Protestant nations of early modern Europe and their many colonies, many new Protestant theological views came to direct and dramatic expression at state law. For example, Protestant theologians replaced the traditional sacramental understanding of marriage that dominated medieval canon law with a new idea of the marital household as a “social estate” or “covenantal association” of the earthly kingdom. On that basis, Protestant magistrates developed a new state law of marriage, featuring requirements of parental consent, state registration, church consecration, and peer presence for valid marital formation, and the introduction of absolute divorce on grounds of adultery, desertion, and other faults, with subsequent rights to remarry at least for the innocent party. Protestant theologians replaced the traditional understanding of education as a teaching office of the church with a new understanding of the state-run public school as a “civic seminary” for all persons to prepare for their peculiar vocations. On that basis, Protestant magistrates replaced clerics as the chief rulers of education, state law replaced church law as the principal law of education, and the general callings of all Christians replaced the special calling of the clergy as the raison d’être of education.

Beyond these general Protestant legal influences, the particular branches of Protestantism also made distinct contributions to the Western legal tradition. The Lutheran Reformation of Germany and Scandinavia territorialized the Christian faith, and gave ample new political power to the local Christian magistrate. Luther and his followers regarded the local magistrate as God’s vice-regent called to elaborate and enforce natural law within the community, particularly the religious and civic duties of the Ten Commandments. They also regarded the local magistrate as the “father of the community” who was called to care for his political subjects as if they were his children. Like a loving father, the magistrate was to keep the peace and to protect his subjects in their persons, properties, and reputations. He was to deter his subjects from abusing themselves through drunkenness, sumptuousness, gambling, prostitution, and other vices. He was to nurture his subjects through the community chest, the public almshouse, the state-run hospice. He was to educate them through the public school, the public library, the public lectern. He was to see to their spiritual needs by supporting the ministry of the local church, and encouraging attendance and participation through civil laws of religious worship and tithing. These twin metaphors of the Christian magistrate – as the lofty vice-regent of God and as the loving father of the local community – described the basics of Lutheran legal and political theory for the next three centuries. Political authority was divine in origin, but earthly in operation. It expressed
God’s harsh judgment against sin but also his tender mercy for sinners. It communicated the Law of God but also the lore of the local community. It depended upon the church for prophetic direction but it took over from the church all jurisdiction. Either metaphor of the Christian magistrate standing alone could be a recipe for abusive tyranny or officious paternalism. But both metaphors together provided Luther and his followers with the core ingredients of a robust Christian republicanism and budding Christian welfare state. These ideas remained central to German and Scandinavian law and politics until modern times.

Anglicanism pressed to more extreme national forms the Lutheran model of a unitary Christian commonwealth under the final authority of the Christian magistrate. King Henry VIII severed all legal and political ties between the Church in England and the pope. The Supremacy Act (1534) declared the monarch to be “Supreme Head” of the Church and Commonwealth of England as well as the Defender of the Faith. The English monarchs, through their Parliaments, established a uniform doctrine and liturgy and issued the Book of Common Prayer (1559), Thirty-Nine Articles (1576), and eventually the Authorized (King James) Version of the Bible (1611). The secular authorities also assumed jurisdiction over poor relief, education, and other activities that had previously been carried on under Catholic auspices, and dissolved the many monasteries, foundations, and guilds through which the church had administered its social ministry and welfare. Communicant status in the Church of England was rendered a condition for citizenship status in the Commonwealth of England. Contraventions of royal religious policy were punishable both as heresy and as treason.

In the seventeenth century, the Stuart monarchs moved slowly, through hard experience, toward greater toleration of religious pluralism and greater autonomy of dissenting churches. From 1603–1640, Kings James I and Charles I persecuted Protestant and Catholic non-conformists with a growing vengeance, driving tens of thousands of them out of England. In 1640, the Protestants who remained in England and Scotland led a revolution against King Charles, and ultimately deposed and executed him in 1649. They also passed laws that declared England a free Christian commonwealth, free from Anglican establishment and aristocratic privilege. This commonwealth experiment was short-lived, though it provided endless inspiration to later revolutionaries throughout the common law world, notably in America. In 1660, royal rule and traditional Anglicanism were vigorously reestablished, and repression of Protestant and Catholic dissenters renewed. But when the dissenters again rose up in revolt, Parliament passed the Bill of Rights and Toleration Act in 1689 that guaranteed a measure of freedom of association, worship, self-government, and basic civil rights to all peaceable Protestant churches. Many of the remaining legal restrictions on Protestants fell into desuetude in the following century, though Catholicism and Judaism remained formally proscribed in England until the Emancipation Acts of 1829 and 1833.

Anabaptists advocated the separation of the redeemed realm of religion and the church from the fallen realm of politics and the state. Known variously as Amish, Brethren, Hutterites, Mennonites, and others, Anabaptists withdrew from civic life into small, self-sufficient, intensely democratic communities. When such communities grew too large or too divided, they deliberately colonized themselves, eventually spreading Anabaptism from Russia to Ireland to the furthest frontiers of North America. Building on early church models, these Anabaptist communities were governed internally by biblical principles of discipleship, simplicity, charity, and non-resistance. They set their own internal standards of worship, liturgy, diet, discipline, dress, and education. They handled their own internal affairs of property, contracts, commerce, marriage, and inheritance—so far as possible by appeal to biblical laws and practices, not those of the state.

The state and its law, most Anabaptists believed, was part of the fallen world. Christians should obey state laws so far as Scripture enjoined, such as in paying their taxes or registering their
properties, but they should avoid active participation in the world and the state. Most early modern Anabaptists were pacifists, preferring derision, exile, or martyrdom to active participation in war. Most Anabaptists also refused to swear oaths, or to participate in political elections, civil litigation, or civic feasts and functions. This aversion to political and civic activities often earned Anabaptists severe reprisal and repression by Catholics and Protestants alike – violent martyrdom in many instances.

While unpopular in its genesis, Anabaptism ultimately proved to be a vital source of later Western legal arguments for the separation of church and state and for the protection of the civil and religious liberties of minorities. Equally important for later legal reforms was the new Anabaptist doctrine of adult baptism. This doctrine gave new emphasis to religious voluntarism as opposed to traditional theories of predestined, birthright, or territorial faith. In Anabaptist theology, each adult was called to make a conscious and conscientious choice to accept the faith – metaphorically, to scale the wall of separation between the fallen world and the realm of religion to come within the perfection of Christ. In the later eighteenth century, their Free Church followers, both in Europe and North America, converted this cardinal image into a powerful platform of liberty of conscience and free exercise of religion not only for Christians but eventually for all peaceable believers.

Calvinists charted a course between the Erastianism of Lutherans and Anglicans that subordinated the church to the state, and the asceticism of early Anabaptists that withdrew the church from the state and society. Calvinists emphasized more fully than other Protestants the educational use of the law to teach persons both the letter and the spirit of the law, both the civil morality of common human duty and the spiritual morality of special Christian aspiration. Calvinists also stressed that both church and state officials were to play complementary roles in the creation of the local Christian commonwealth and in the cultivation of the Christian citizen. Local Calvinist communities throughout Europe and North America thus became intense and intentional Christian communities where church consistories and city councils cooperated to cultivate overt Christian norms and habits, and to discipline the morality and spiritual lives of its citizens through both spiritual and civil means.

Later Calvinists also laid further foundations for modern Western theories of democracy, human rights, and constitutional order. Their starting point was the signature Protestant teaching, coined by Martin Luther, that a person is at once sinner and saint (simul justus et peccator). On the one hand, later Calvinists argued, every person is created in the image of God and justified by faith in God. Every person is called to a distinct vocation, which stands equal in dignity and sanctity to all others. Every person is a prophet, priest and king, and responsible to exhort, to minister, and to rule in the community. Every person thus stands equal before God and before his or her neighbor. Every person is vested with a natural liberty to live, to believe, to love and serve God and neighbor. Every person is entitled to the vernacular Scripture, to education, to work in a vocation.

On the other hand, Protestants argued, every person is sinful and prone to evil and egoism. Every person needs the restraint of the law to deter him from evil, and to drive him to repentance. Every person needs the association of others to exhort, minister, and rule her with law and with love. Every person, therefore, is inherently a communal creature. Every person belongs to a family, a church, a political community. These social institutions of family, church, and state are divine in origin and human in organization. They are created by God and governed by godly ordinances. They stand equal before God and are called to discharge distinctive godly functions in the community. The family is called to rear and nurture children, to educate and discipline them, to exemplify love and cooperation. The church is called to preach the Word, administer the sacraments, educate the young, aid the needy. The state is called to protect order, punish crime,
promote community. Though divine in origin, these institutions are formed through human covenants or contracts sworn between their members before God. Such covenants confirm the divine functions, the created offices, of these institutions. Such covenants also organize these offices so that they are protected from the sinful excesses of officials who occupy them. Family, church, and state are thus organized as public institutions, accessible and accountable to each other and to their members. Calvinists especially stressed that the church is to be organized as a democratic congregational polity, with a separation of ecclesiastical powers among pastors, elders, and deacons, election of officers to limited tenures of office, and ready participation of the congregation in the life and leadership of the church.

By the turn of the seventeenth century, Calvinists began to recast these theological doctrines into democratic norms and forms. Protestant doctrines of the person and society were cast into democratic social forms. Since all persons stand equal before God, they must stand equal before God's political agents in the state. Since God has vested all persons with natural liberties of life and belief, the state must ensure them of similar civil liberties. Since God has called all persons to be prophets, priests, and kings, the state must protect their constitutional freedoms to speak, to preach, and to rule in the community. Since God has created persons as social creatures, the state must promote and protect a plurality of social institutions, particularly the church and the family.

Protestant doctrines of sin, in turn, were cast into democratic political forms. The political office must be protected against the sinfulness of the political official. Political power, like ecclesiastical power, must be distributed among self-checking executive, legislative, and judicial branches. Officials must be elected to limited terms of office. Laws must be clearly codified, and discretion closely guarded. If officials abuse their office, they must be disobeyed. If they persist in their abuse, they must be removed, even if by revolutionary force and regicide. These Protestant teachings were among the driving ideological forces behind the revolts of the French Huguenots, Dutch Pietists, and Scottish Presbyterians against their monarchical oppressors in the later sixteenth and seventeenth centuries. They were critical weapons in the arsenal of the revolutionaries in England and America, and important sources of constitutional inspiration and instruction during the great age of democratic construction in modern times.

**Law and religion in the modern age**

The fourth watershed period in the Western legal tradition came with the Enlightenment of the eighteenth and nineteenth centuries. The Enlightenment was no single, unified movement, but a series of diverse ideological movements in various academic disciplines and social circles of Western Europe and North America. Enlightenment philosophers such as David Hume, Jean Jacques Rousseau, Thomas Jefferson, and others offered a new theology of individualism, rationalism, and nationalism to supplement, if not supplant, traditional Christian teachings. To Enlightenment exponents, the individual was no longer viewed primarily as a sinner seeking salvation in the life hereafter. Every individual was created equal in virtue and dignity, vested with inherent rights of life and liberty and capable of choosing his or her own means and measures of happiness. Reason was no longer the handmaiden of revelation, rational disputation no longer subordinate to homiletic declaration. The rational process, conducted privately by each person, and collectively in the open marketplace of ideas, was considered a sufficient source of private morality and public law. The nation-state was no longer identified with a national church or a divinely blessed covenant people. The nation-state was to be glorified in its own right. Its constitutions and laws were sacred texts reflecting the morals and mores of the collective national culture. Its officials were secular priests, representing the sovereignty and will of the people.
Such teachings transformed many modern Western legal systems. They helped shape new constitutional provisions for limited government and ample liberty, new injunctions to separate church and state, new criminal procedures and methods of criminal punishment, new commercial, contractual, and other laws of the private marketplace, new laws of private property and inheritance, shifts toward a fault-based law of delicts and torts, the ultimate expulsion of slavery in Europe and the Americas, and the gradual removal of discrimination based on race, religion, culture, and gender. Many Western nations also developed elaborate new codes of public law and private law, transformed the curricula of their faculties of law, and radically reconfigured their legal professions.

The new theology of the Enlightenment penetrated Western legal philosophy. Spurred on by Hugo Grotius’ earlier “impious hypothesis” that natural law could exist “even if there is no God,” jurists offered a range of new legal philosophies – often abstracted from or appended to earlier Christian and classical teachings. Enlightenment writers postulated a mythical state of nature that antedated and integrated human laws and natural rights. Nationalist myths were grafted onto this paradigm to unify and sanctify national legal traditions: Italian jurists appealed to their utopic Roman heritage; English jurists to their ancient constitution and Anglo-Saxon roots; French jurists to their Salic law; German jurists to their ancient constitutional liberties.

In the nineteenth and early twentieth centuries, Western jurists ushered in a confident new age of faith in law and the state in place of earlier eras dominated by the church and the clergy. The confession of this new age of faith was that ours was a land “ruled by laws, not by men.” Its canon was the new concordance of legal codes, amply augmented by new state legislation. Its catechism was the new cases and commentaries of the law school classroom. Its church was now the courtroom where the rituals of judicial formalism and due process would yield legal truth. Its church council was the national supreme court which now issued opinions with as much dogmatic confidence as the divines of Nicaea, Augsburg, and Trent.

This new age of faith in law was in part the product of a new faith in the positivist theory of knowledge that swept over the West 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 Western 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 subsumed by theology, philosophy, or political economy. In testimony to this claim, Western jurists in this period poured forth a staggering number of new legal codes, new constitutions, new legal encyclopedias, 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 in England and Christopher Columbus Langdell in America: 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 humane disciplines. They stand, in Austin’s apt phrase, beyond “the province of jurisprudence properly determined.”

This positivist theory of law, which swept over Western law schools from the 1890s onward, rendered legal study increasingly narrow and insular. Law was simply the sovereign’s rules. 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 Western 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.

This confident new secular philosophy of law was never without its detractors. 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. 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. 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. 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 in Europe and the Americas were pressing for a broader understanding of the immutability and ineluctability of judicial reasoning. 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 humane, social, and exact sciences.

In the 1970s, a number of interdisciplinary approaches began to enter the mainstream of 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-lesbian studies, and African-American studies. And, importantly for our purposes, the study of law was also recombined with the study of religion.

**Conclusions**

This new law and religion movement has shown that, even today, law and religion continue to cross-over and cross-fertilize each other. Law and religion remain conceptually related. They both draw upon prevailing concepts of the nature of being and order, the person and community, knowledge and truth. They both embrace closely analogous doctrines of sin and crime, covenant and contract, righteousness and justice that invariably bleed together in the mind of the legislator, judge, and juror. Law and religion are methodologically related. They share overlapping hermeneutical methods of interpreting authoritative texts, casuistic methods of converting principles to precepts, systematic methods of organizing their subject matters, pedagogical methods of transmitting the science and substance of their craft to students.
Law and religion in the Western legal tradition

Law and religion are institutionally related, through the multiple relationships between political and religious officials and the multiple institutions in which these officials serve.

Even today, the laws of the secular Western state retain strong moral and religious dimensions. These dimensions are reflected not only in the many substantive doctrines of public, private, procedural, and penal law that were derived from earlier Christian theology and canon law. They are also reflected in the characteristic forms of contemporary legal systems in the West. Every legitimate legal system has what Lon L. Fuller called an “inner morality,” a set of attributes that bespeak its justice and fairness. Like divine laws, human laws are generally applicable, publicly proclaimed and known, uniform, stable, understandable, non-retroactive, and consistently enforced. Every legitimate legal system also has what Harold J. Berman calls an “inner sanctity,” a set of attributes that command the obedience, respect, and fear of both political authorities and their subjects. Like religion, law has authority – written or spoken sources, texts or oracles, which are considered to be decisive or obligatory in themselves. Like religion, law has tradition – a continuity of language, practice, and institutions, a theory of precedent and preservation. Like religion, law has liturgy and ritual – the ceremonial procedures, decorum, and words of the legislature, the courtroom, and the legal document aimed to reflect and dramatize deep social feelings about the value and validity of the law.

Even today, most religious communities maintain a legal dimension, an inner structure of legality, which gives religious lives and religious communities their coherence, order, and social form. Legal “habits of the heart” structure the inner spiritual life and discipline of religious believers, from the reclusive hermit to the aggressive zealot. Legal ideas of justice, order, dignity, atonement, restitution, responsibility, obligation, and others pervade the theological doctrines of countless religious traditions. Legal structures and processes continue to organize and govern religious communities and their distinctive beliefs and rituals, mores and morals.

Law and religion, therefore, are two great interlocking systems of ideas and institutions, values and beliefs. They have their own sources and structures of normativity and authority, their own methods and measures of enforcement and amendment, their own rituals and habits of conceptualization and celebration of values. But these spheres and sciences of law and religion exist in dialectical harmony, balancing and correcting each other. Without law, religion decays into shallow spiritualism. Without religion, law decays into empty formalism.

Bibliography

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