
Foreword

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Over the past two generations, a major new field of law and religion study has emerged, involving more than 1500 scholars around the globe. They are studying the religious dimensions of law, the legal dimensions of religion, and the interaction of legal and religious ideas and institutions, methods and practices – historically and today. These scholars have shown that, at a fundamental level, religion gives law its spirit and inspires its adherence to ritual, tradition, and justice. Law gives religion its structure and encourages its devotion to order, organization, and orthodoxy. Law and religion share such 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. It is this dialectical interaction that gives these two disciplines and two dimensions of life their vitality and their strength. Without law at its backbone, religion slowly crumbles into shallow spiritualism. Without religion at its heart, law gradually crumbles into empty, and sometimes brutal, formalism.

In the United States, the study of law and religion has drawn a substantial scholarly guild. The Association of American Law Schools 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. Some 110 American law schools now have at least one basic course on religious liberty or religion–state relations as part of their basic legal curriculum, and 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 now have interdisciplinary programs or concentrations in law, religion, and ethics, several with specialty journals, websites, and blogs on law and religion, or with heavy law and review content in their general law journals. And more law and religion scholars and scholarship are at hand in university departments of religion, political science, history, government, anthropology, Middle Eastern Studies, African Studies, and Southeast Asian studies. Some 750 books and 5000 articles on law and religion themes were published in America alone from 1990 to 2015. 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.

The 21 exquisite chapters collected in this volume illustrate how far and wide this field of interdisciplinary legal study has grown around the globe. Gathered herein are the works of both well-established and sterling younger scholars from New Zealand, Australia, Singapore, South Africa, Israel, Estonia, the Netherlands, the United Kingdom, Canada, and the United States, and the chapters include studies of a dozen more nation-states like India and Turkey with complex law and religion issues. On display in these chapters are the many tools and methods of this growing interdisciplinary trade in law and religion – constitutional law, legislation and regulation, legal history, comparative law, international human rights, legal hermeneutics, biblical studies, theology, comparative religious studies, political philosophy, government, political science, democratic theory, anthropology, sociology, psychology, women's studies, and more. Leading New Zealand jurist, Rex Ahdar, has both the gifts and the stature to build global networks of serious conversation on law and religion themes, including in his recent provocative and wide-ranging anthology with Nicholas Aroney on *Shari'a in the West*. He has come through again here with another learned and lively title that will certainly become a staple in every serious law library.

Together, the chapters in this volume illustrate many of the main themes that now dominate law and religion scholarship around the world. It is worth having such a map before you as you enter the rich labyrinth of topics that awaits you on the pages that follow.

First, by far the largest body of law and religion scholarship is devoted to issues of religious freedom and religion–state relations in national and international contexts. This topic courses through more than half the chapters in this volume, and it will continue to dominate the field in the foreseeable future. In the United States, this is in part the law of the First Amendment guarantees of no establishment and free exercise of religion and related statutes. In other lands, these questions are topics of special constitutional provisions, concordats, treaties, statutes, regulations, and cases. Several international human rights instruments also include religious freedom norms, not least the 1950 European Convention, the 1966 International Covenant on Civil and Political Rights, and the 1981 UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion and Belief.

The legal, theological, cultural, and personal issues arising under such provisions are perennial and profound; how to manage religious pluralism and protect religious and cultural minorities – particularly groups like Jews, Muslims, Mormons, Jehovah's Witnesses, Scientologists, and Indigenous Peoples, who often bring charges of private and state-based discrimination. How to define and set limits on religious and anti-religious exercises and expressions that cause offense or harm to others or elicit charges of blasphemy, defamation, or sacrilege. How to adjudicate challenges that a state's laws run directly counter to a party's core claims of conscience or cardinal commandments of their faith. How to balance private and public exercises of religion, including the liberty of conscience of one party to be left alone and the free exercise right of another to proselytize. How to balance conflicts between the rights of parents to bring up their children in their faith and the duties of the state to protect the best interests of the child. How to discern the proper place of religion in public state schools, and the proper place

of government in private religious schools. How to protect the distinct religious needs of prisoners, soldiers, refugees, and others who do not enjoy ready access to traditional forms and forums of religious worship and expression.

Many religious freedom issues also involve religious groups, for whom the right to organize as a legal entity with juridical personality is itself often the most critical first issue. But here, too, myriad other questions have reached national high courts and international tribunals. How to negotiate the complex needs and norms of religious groups without according them too much sovereignty over their members or too little relief from secular courts in the event of fundamental rights violations by religious officials. How to balance the rights of religious groups to self-determination and self-governance with the guarantees of freedom from discrimination based on religion, gender, culture, and sexual orientation. How to balance competing religious groups who each claim access to a common holy site, or a single religious or cultural group whose sacred site is threatened with desecration, development, or disaster. How to protect the relations between local religious communities and their foreign co-religionists. How to adjudicate intra- or inter-religious disputes over property, contracts, or torts that come before secular tribunals for resolution. How to determine the proper levels of state cooperation with and support of religious officials and institutions in the delivery of child care, medical services, disaster relief, or humanitarian aid. How to define the lines of cooperation and jurisdiction between religious and political officials over fundamental institutions like the family, school and charity that have both spiritual and secular dimensions for many citizens.

Second, and relatedly, various scholars now focus on the (contested) place of religion and religious freedom in the human rights pantheon. Several leading critical scholars today – jurists, historians, anthropologists, political theorists, and philosophers alike – argue that religion is too dangerous, divisive, and diverse in its demands to be accorded special protection. Freedom of conscience claimants unfairly demand the right to be a law unto themselves, to the detriment of general laws and to the endangerment of other people’s fundamental rights and legitimate interests. Institutional religious autonomy is too often just a special cover for abuses of power and forms of prejudice that should not be countenanced in any organization – religious or not. Religious liberty claims are too often proxies for political or social agendas that deserve no more protection than any other agenda. Religion, these critics thus conclude, should be viewed as just another category of liberty or association, with no more preference or privilege than its secular counterparts. Religion should be treated as just another form of expression, subject to the same rules of rational democratic deliberation that govern other ideas and values. To accord religion any special protection or exemption discriminates against the nonreligious. To afford religion a special seat at the table of public deliberation or a special role in the implementation of government programs invites religious self-dealing.

By sharp contrast, a number of leading scholars, including several in this volume, argue that religion is a cornerstone of human rights and that religious freedom is indispensable to constitutional order. Even in today’s liberal societies, committed to policies of secularism, neutrality, or *laïcité*, religions still help to define the meanings and measures of shame and regret, restraint and respect, responsibility and restitution that a human rights regime presupposes. They help to lay out and tie down the

fundamentals of human dignity and human community, and the essentials of human nature, human capacities, and human needs upon which human rights are built. Moreover, religious organizations stand alongside the state and other institutions in helping to implement and protect the rights of a person and community – especially at times when the state is weak, distracted, divided, cash-strapped, transitioning, or corrupt. Religious communities can create the conditions (sometimes the prototypes) for the realization of civil and political rights of speech, press, assembly, and more. They can provide a critical (sometimes the principal) means of education, healthcare, childcare, labour organizations, employment, and artistic opportunities, among other things. And they offer some of the deepest insights into duties of stewardship and servanthood that lie at the heart of environmental care and the rights of nature. Several detailed empirical studies, Brian Grimm writes in summary, have shown that the protection of ‘religious freedom in a country is strongly associated with other freedoms, including civil and political liberty, press freedom, and economic freedom, as well as with multiple measures of well-being’¹ – less warfare and violence, better healthcare, higher levels of income, and better educational and social opportunities, especially for women, children, the disabled, and the poor. By contrast, where religious freedom is low, communities tend to suffer and struggle, and human rights protection dramatically decline across the board. This topic, too, comes through in some of these chapters.

Third, the internal religious legal systems of the great world religions have also captured growing attention in law and religion scholarship – and worries, too, in some quarters. Each of these world religions, especially Christians, Jews, and Muslims, have long had their own internal legal specialists who have been part of the broader law and religion discourse. But these topics are now becoming more mainstream in law, religion, sociology, history, and anthropology departments of research universities and societies worldwide, with growing new attention to the place of law in various Asian and Indigenous traditions, too. Cambridge University Press, for example, has inaugurated a series of fresh studies on law and Christianity, Judaism, Islam, Hinduism, Buddhism, Confucianism, and Indigenous Religions. Other books are beginning to emerge offering intra- and inter-religious perspectives on discrete legal topics – human rights, family law, constitutionalism, private law, and more.

A major new issue that many Western democracies are now facing squarely is the place of faith-based laws, tribunals, and dispute resolution in secular legal regimes. How much deference do secular authorities owe to these religious authorities? How much involvement may secular authorities have in the adjudication of religious disputes and questions that come before them for resolution? What happens ‘when judges are theologians’, as Michael Helfand puts it provocatively in his chapter herein. These new questions join older questions about more overt state establishments of forms of Christianity, Judaism, Islam, Shintoism, Confucianism, and other faith traditions. How do modern nations square their state establishment or privileging of one faith with the universal human rights claims to religious freedom and equality for all?

¹ Brian J Grimm, ‘Restrictions on Religion in the World: Measures and Implications’ in Allen D Hertzke (ed), *The Future of Religious Freedom: Global Challenges* (New York, Oxford University Press, 2013) 86, 101.

Fourth, a small library of books has also emerged documenting the contributions of the world's religions and their religious legal systems to the secular legal systems around them, both historically and currently. Part of this inquiry concerns the exportation, transplantation, or accommodation of discrete internal religious rules or procedures into secular legal systems. But more of this inquiry concerns the influence of religious ideas and practices on the complex doctrines of public, private, penal, and procedural law of the state. In the Western tradition, numerous historians have documented the successive influences of Christianity on Roman law, Germanic law, medieval and early modern canon law, civil law, and the common law, and the eventual colonization of these efforts throughout the world. Similar work is now being done on the cross-cultural legal influences of the laws of Judaism, Hinduism, and Confucianism, and especially the tremendous influence of Islamic law on the secular laws of the 57 Muslim-majority states today and their political predecessors. The reality in many parts of the world, including in the secular West, is that religious ideas and institutions, norms and practices are part of the foundation and infrastructure of the positive laws of the state.

Fifth, as part of these last two points, a large body of literature has grown around the perennially contested issues of law, religion, and family life. Three new questions are now attracting a great deal of new scholarly attention, a part of which is reflected in this volume, too. The first question concerns the growing contests between religious liberty and sexual liberty. May a state require a minister to marry a gay or inter-religious 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 organization dismiss or discipline an official or member because of their sexual orientation or practice, or because they had a divorce or abortion? These are major points of contestation and litigation on both sides of the Atlantic and with likely implications for the global law and religion field. A second question concerns religiously-based polygamy. For nearly two millennia, the West has rejected polygamy, calling it a capital offense from the ninth to the nineteenth century. These issues are back, with various Muslims, Fundamentalist Mormons, and Traditional religions and cultures in Asia and Africa pressing their case for toleration if not recognition of polygamy on the grounds of religious freedom, sexual autonomy, domestic privacy, and equal protection. This, too, has triggered a small avalanche of writing.

A final question in this law, religion, and family field concerns the growing call by 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 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. Comparable complex work can be found on the law and religion issues surrounding education, charity, poor relief, immigration, environmental care, sex trafficking, warfare, torture, terrorism, and more.

Sixth, natural law theory is becoming a topic of growing interest again, having once dominated patristic, medieval, and early modern Catholic, Protestant, and Enlightenment thought before giving way to modern legal positivism. The renaissance of natural law theory began already in the mid-twentieth century. The horrible excesses of Nazi Germany and Stalinist Russia catalyzed the modern international human rights revolution, which defined and defended the natural rights protections of human dignity and the natural law limits on state power. The rise of Catholic social teachings and the monumental reforms of the Second Vatican Council in 1962–1965 together gave further powerful impetus to Catholic natural law theories. A number of Jewish, Protestant, Eastern Orthodox, and Muslim scholars are now also resurrecting the rich natural law teachings of their own traditions and developing new natural law theories to address fundamental legal questions today in and on terms that others with different faith traditions can appreciate. And all these groups have found interesting 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 inter-religious and interdisciplinary dialogue.

Seventh, 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 recognized the overlaps in form and function of the legal and religious professions. Both professions require extensive doctrinal training and maintain stringent admissions policies. Both have developed codes of professional ethics and internal structures of authority to enforce them. Both seek to promote cooperation, collegiality, and *esprit de corps*. There are close affinities between the mediation of the lawyer and the intercession of the cleric, between the adjudication of the court and the arbitration of the consistory, between the beneficence of the bar and the benevolence of the diaconate. Ideally, both professions serve and minister to society. Both professions seek to exemplify the ideals of calling and community. Nonetheless, there can also be strong tensions between one's legal professional duties and personal faith convictions. What does it mean to be a Christian, Jewish, Muslim, Hindu, or Buddhist lawyer at work in a secular legal system? These topics have now attracted a small cluster of important new scholarship.

Eighth, 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 sound in terms of rationality and neutrality. Today, a number of scholars have argued that religious and other comprehensive doctrines are essential parts of an enduring legal and political morality.

Finally, questions of law and religious language, have also raised broader questions about the overlaps between legal and theological interpretation, translation, and hermeneutics. Legal historians have long been intrigued by the overlaps 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 globalization and the study of global law and world religions, a number of jurists have become keenly interested in the questions of translation, transplantation, and transmutation of legal and religious ideas across cultural, disciplinary, and denominational boundaries.

It will take a whole library to come to terms with these and related themes of law and religion scholarship. But the chapters that follow will give you a judicious and delicious sampling of the refined work that is now on offer in this growing field.

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