

the people whom Law knew and the writings with which he was familiar. Sometimes digressive and biased but generally useful.

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LAW AND RELIGION

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LAW AND RELIGION: AN OVERVIEW

“Law” and “religion” denote vast, imperial realms that are, for the most part, each understood to be clearly bounded and independent. On closer inspection, these terms prove to be curiously amorphous and resistant to precise definition. Each is also, in present common usage, peculiarly the product of modernity. Linking the two terms, as in “law and religion,” compounds these ambiguities. The ancient roots of these two terms, the definitional difficulties associated with employing them cross-culturally, and, above all, the problematic understanding of “modernity” they encode are only some of the challenges that complicate an analysis of their interconnection. The purpose of the present article is to begin this work of definition in a manner that introduces and synthesizes some of the key themes in the articles on law presented both in this section and elsewhere in the *Encyclopedia*, and to specify a range of historical and structural connections between law and religion that illuminate the possible meanings of each of these terms, and of their intersection. (In an article of this size and scope it is, of course, impossible to treat comprehensively the manifold religious and legal traditions of human history and their intersections. This section will focus primarily, although not exclusively, on the Anglo-American common-law tradition, reflecting the legal training of its authors. Other parallel and related stories centering on other legal traditions are presented in the articles that follow).

INTRODUCTION. There is a widespread tendency in modern, secular society to view law and religion as unrelated except insofar as they may, from time to time, come into conflict. According to a commonplace of post-Enlightenment thought, the “secularization thesis,” societies as they modernize move progressively away from religious norms toward a complete regime of secular law that permits only such religion as does not inhibit its administration. From the standpoint of secular law, religion is regarded as largely irrelevant,

or even as a source of sectarian partisanship, in contrast with the presumed universalism of law. The sole positive role allowed to religion is the subordinate one of reinforcing norms otherwise determined and enforced by the state. The evolutionary hypothesis that religion, as an irrational vestige of pre-modern or “primitive” culture, will gradually disappear, views the continuation and especially the resurgence of religion as a problem and challenge for secular law. For many inside and outside the academy, this view is the only one that continues to have relevance (and, with few exceptions, it is also the only one incorporated in the law school curriculum in the United States and most other modern, secular states). Consequently, it is crucial to note at the outset that this manner of conceiving the relation between law and religion is quite parochial and, in some respects, fundamentally flawed. Historically, there have been close connections, extending in some cases to an identity, between law and religion in many societies. Moreover, structural and historical connections between law and religion continue into modernity. These connections demonstrate that the concept of law as inherently secular is highly anachronistic and ought to be regarded with greater suspicion and criticism. (In other words, “law” as a category ought to be regarded by scholars of religion as problematic to the same extent as the category “religion.”)

The contemporary separation between law and religion has been taken for granted both by those who endorse and by those who deplore this separation. Both the British legal historian Henry Maine (1822–1888) and the French sociologist Émile Durkheim (1857–1917), among others, argued for the convergence of law and religion in ancient or “primitive” society. (Arthur S. Diamond’s [1897–1978] argument against Maine that law has always been to a greater or lesser extent autonomous from religion is a minority view.) Neither Maine nor Durkheim took a strong normative position as to the desirability of this separation. However, Maine’s advocacy of gradualism in the evolution of law and Durkheim’s association of primitive law with the strong social functioning of “collective representations”—the comparative weakness of which in modern society presented a problem for social cohesion—may suggest the potentially negative effects of this separation. More recently, the American law professor Harold Berman has consistently called into question the desirability of the present extreme separation of law from religion. This perspective—which we may call “religionist” in order to distinguish it from the “secularist” position to which it is opposed—shares with the latter the conviction that law today is, indeed, separate from religion. Both positions tend not to address definitional difficulties. The differences of opinion are largely as to when, how, and why this separation came about; as well as, of course, its desirability.

Although the roots of the secular legal autonomy of the modern state lie deep in medieval Europe, a decisive point of separation between law and religion within the Anglophone common-law tradition occurred in nineteenth-century legal theory. The English jurist Matthew Hale

(1609–1676) declared that Christianity is a part of the common law. William Blackstone (1723–1780), author of the influential *Commentaries on the Laws of England*, identified divine law and natural law among the sources of the common law. Against such views, the founding figures of legal positivism, which continues to be the reigning political theory of law, argued that law is necessarily separate from religion and morality. The English Utilitarian philosopher and legal reformer Jeremy Bentham (1748–1832) argued that law ought to be embodied in a written code enacted by the legislature, to the exclusion of other sources, including religious ones. His follower John Austin (1790–1859) rejected Blackstone's argument that human laws that conflict with divine laws are not valid. Through their intellectual descendants, such as the Oxford legal philosopher Herbert Hart (1907–1992), Bentham's and Austin's views have largely won this debate within modern jurisprudence.

Recently, legal positivism has been the subject of sustained critique from several quarters. (Here we will focus on the problematic aspects of legal positivism from the point of view of religious studies. Other critiques of legal positivism have focused on expanding our understanding of law from other critical perspectives, including those of gender and post-colonial theory, and have focused on legal positivism's tendency to fixate on law as rules rather than as cases. These other critiques are, of course, also related to the problematic separation of law and religion.) Positivism's insistence on the separation of law from both religion and history has increasingly been seen to encourage the neglect and ignorance of these domains and of their importance for law. When one approaches law historically, however, it becomes apparent not only that law was not always so separate from religion, but also, and more surprisingly, that the modern separation of law from religion was in part the result of particular religious developments that either originated in or accelerated during the Protestant Reformation. Although these developments are further described below, some brief indications may be given here. The English critical legal historian Peter Goodrich argues that the common-law tradition in the sixteenth and seventeenth centuries established itself through an "antirrhetic," a polemic against images that borrowed from religious iconoclasm. Law borrowed its foundational narrative from religion and located its authority in an increasingly written canon of reified tradition. From a longer-term perspective, French socio-legal theorist Marcel Gauchet has argued for the compatibility of secularism with certain tendencies in Judaism and Christianity. Increasingly, it appears that law is, for us moderns, "our religion" not merely in the sense of having inherited part of religion's role as an arbiter of values and guide to conduct, but also in the sense of being historically or genealogically related to older modes of religiosity. Following such demonstrations, it becomes increasingly difficult to maintain the secularization thesis, or the idea of a clean separation between law and religion, in its usual, overly simplified form. Yet if the secularization thesis, which is a founding narrative not only of modern law but

of modernity itself, is no longer quite so believable, then there is greater reason to inquire into the relations between law and religion, and especially their historical connections, both as a means of better understanding the present, and as a potential guide to the future.

The present article initiates this inquiry, and makes a plea for further conversation between scholars of religion and scholars of law. In modern times, the separation between law and religion is paralleled by a separation between the two academic disciplines of legal studies and religious studies. These two fields, reflecting the strengths of secular legal positivism and religious antinomianism, have led mostly independent lives. On the one hand, despite the best efforts of legal anthropologists, scholars of law remain almost exclusively focused on Western, secular legal materials. In contrast, comparative religious historians have exhibited little interest in either law or the West. However, there is precedent for a deeper engagement between these two groups. Maine coined the term "comparative jurisprudence" on the model of comparative philology and comparative mythology, the predecessor of the history of religions. Citing this forgotten precedent, the present article attempts to initiate a conversation between legal studies and religious studies.

RELIGION AND SECULAR LAW: STRUCTURAL DIFFERENCES AND SIMILARITIES. The historical convergences of law and religion are perhaps most obvious in what is sometimes called "religious law," a term used to refer to those parts of many religious traditions that prescribe and regulate norms of conduct, as encoded, for example, in such sources as the Ten Commandments (*Exodus* 20), the *shari'ah* and the Hindu *Laws of Manu*, and which include many aspects of conduct that are now within the purview of secular law. It was these traditional legal forms that inspired Maine's and Durkheim's theses regarding the "primitive" or traditional lack of separation between law and religion. Some legal theorists today contend that the category "religious law" makes sense only in such an evolutionary scheme defined by secularization. They argue that all legal regimes, whether religious or secular, are more usefully characterized by referring to the styles of reasoning and decision-making they employ. From this perspective, the argument goes, *qadi*-administered law, for example, might be better understood by seeing its resemblance to English common law than by classifying it with other "religious" laws, some of which may exhibit radically different legal characteristics. Although acknowledging such views, the present section explores the value of the term "religious law" for distinguishing key features of many legal systems prior to modernity.

In many pre-modern legal traditions, the connection between law and religion is underscored by the absence of a separate or secular term for "law." For example, in Hinduism the term *dharma* means not only "law" but also "religion" and "proper conduct," among other things. Torah and *shari'a* can refer both to operating community legal regimes and to the overall religious path or discipline of an individual

or community. In this latter sense, law may be understood metaphorically as extending to the realm of conscience. Of course, even in many so-called traditional societies, whether ancient or modern, there are legal norms, processes, and institutions—particularly those associated with royal administration, taxation, and trade—that are relatively autonomous from religion, as narrowly construed, although generally not to the same extent as in the modern West.

In general, religious, or pre-modern, law exhibits certain differences from those forms of law that have become normative in modernity. If we follow the legal positivists and define law as a norm of general or even universal application promulgated by the state and enforced by its sanction (although some positivists place less emphasis on the role of sanctions in constituting law), then it is clear that many religious laws deviate from this standard in one or more respects. In some cases, they may lack universality. The Ten Commandments apply to an entire population and therefore are nearly universal. However, the Vinaya, the monastic code of the Buddhists, regulates the conduct of religious professionals only. Often, as in the *Laws of Manu*, provisions of general and group-specific (gender- or caste-based) application are announced within the same text.

Many religious laws also lack the element of an effective, state-enforced sanction. The Ten Commandments themselves prescribed no sanction for their violation; this was done for most of its provisions elsewhere in the Pentateuch. The presence of alternative or even contradictory norms can also vitiate the certainty of the sanction. Consider, for example, the provisions on vegetarianism in the *Laws of Manu*. There is a blanket provision on eating any meat. However, if one does eat meat, then only certain meats should be consumed under certain circumstances by certain persons. Finally, if one violates these provisions, penances or expiations are prescribed to restore purity. For modern theorists, this kind of flexibility in enforcement has counted against the status of religious law as “real” law. Conversely, the law of retribution (“an eye for an eye”) in the Hebrew Bible (e.g., *Exodus* 21:23–24) has been interpreted, probably erroneously, as mandating an inflexible punishment. An even more noteworthy aspect of many religious laws is that they prescribe a sanction to be visited upon the offender in the afterlife or next life through the agency of the deity or the cosmos itself. In *Manu*, for example, many actions are punished or rewarded through the operation of *karma*. This is what Bentham termed the “religious sanction.” Such punishments were either cumulative with or in place of punishments to be imposed by the state. From the standpoint of positive law, religious sanctions lack the certainty sufficient to create valid, binding legal norms.

Religious laws also differ from secular ones with respect to their sources of authority, processes of dispute resolution, and mechanisms of enforcement. The source of authority of religious law is often said to be the deity or the first ancestors. One of the hallmarks of law in modern democratic societies

is that the authority to create law resides exclusively in a popularly elected legislature, subject in many cases to a more fundamental constitution also held to embody the popular will, which may in turn be constrained by universal secular norms. Some religious law has in the past used trials by ordeal as a method of dispute resolution. In Hinduism and Medieval Christianity, for example, ordeals placed the outcome of the trial at least nominally in the hands of the deity. In modern trials, the outcome rests in the hands of human decision makers, whether judge or jury. Without the imperative of the modern state, religious law may in many cases operate most effectively at a local level—taking as its function the return of parties to social competency rather than acting as an instrument of state legitimacy, authority, and power.

So far the main consideration of this section has been to highlight some of the principal differences of religious law from modern, secular law. There are also numerous parallels and convergences between secular law and religion more generally, not limited to the most “law-like” aspects of religious traditions. Some of these convergences are evident in the special importance to each of ethical concepts; of rituals, including especially formulaic utterances; of narratives; of canons, especially of the written variety; and of hermeneutics or modes of interpretation. Other parallels could certainly be discussed, but these are among the most important.

Religion and law have both given attention to how humans ought to live their lives. Modern western legal concepts of crime and punishment, for example, closely resemble their predecessors, the Western religious concepts of sin, expiation, and purity. In religious law, sin is regarded as a violation of the cosmic order. Punishments or expiations may be designed to restore order and purity for the individual or the community. In its origin, then, crime often was not distinguished from sin. Even today, a number of the practices and articulated purposes of punishment—including retribution, the ghost of which has proved difficult to exorcise from the law—echo earlier, non-utilitarian religious ideas. Law and religion have therefore shared the dubious distinction of administering violence. In addition to the threatened religious sanction of punishment in the afterlife, religious law also frequently prescribed punishments in this world, together with voluntary expiations, ascetic practices, and sacrifices.

Both law and religion depend heavily on ritual operations, as evident in the structured, dramatic procedures of courtroom and temple, with their organization of public spaces, choreography of events, and use of specialized costumes. Both law and religion rely on verbal techniques, including formulaic utterances. Pre-modern law was often exacting in its demand for conformity to prescribed procedure and has been accused of an excessive formalism whereby, for example, a small mistake in the pronunciation of a petition could lead to its dismissal. Many oaths, vows, and declarations of legal effect were, like spells, poetic in form. In early English and German law, as represented respectively in the eleventh-century Anglo-Saxon charms and the thirteenth-

century *Sachsenspiegel* and catalogued by the German folklorist Jacob Grimm (1785–1863) in his essay *On Poetry in Law* (*Von der Poesie im Recht*, 1816), rhythmic parallelisms such as “unbidden and unbought” and “for goods or gold” were common. These are the ancestors of the formula “to have and to hold” in the marriage ceremony as still prescribed in the Anglican *Book of Common Prayer*. Poetic devices not only made such formulas more memorable, a function of special importance in an oral culture, but also reinforced their persuasive, “binding” function. Rhetorical devices were also used frequently in early law to reinforce the connection between crime and punishment.

Today the ritual formulas of law are seldom poetic. The transition in early modern Europe from an oral culture to one based on literacy and the medium of print certainly played an important role in the disappearance of such formulas. With the greater availability of writing, poetic forms were no longer needed as mnemonic devices. Both religion and law were deeply influenced by the new medium, as evidenced by their increasing emphasis on written canons, as further described below. There was also a religious component to these developments. Protestant biblical literalism contributed to a polemic against verbal images. For example, Thomas Cranmer’s (1489–1556) introduction to the *Book of Common Prayer* (1549) justified the removal of “vain repetitions” and other superstitious formulas from the liturgy. Among the regional variants excluded from the new, more prosaic marriage ceremony were the phrase “for fairer for fouler” and the bride’s promise “to be bonour and buxom at bed and at board” (i.e. gentle and obedient). Although the phrase “to have and to hold”—a key declaration of legal ownership—was retained, the net effect was to strip away much of the poetry of the law. Positivists have continued a polemic against poetry. Bentham in his original attack on Blackstone charged that early law often depended on poetic “harmony” for its persuasiveness, and that modern law continued this dependence in more hidden form. More recently, the English philosopher John Langshaw Austin (1911–1960), Hart’s colleague at Oxford, used the declaration “I do” (the actual declaration is “I will”) in the marriage ceremony as his first example of a “performative utterance,” meaning a statement that accomplishes something (such as a legally binding marriage) through the act of utterance itself (*How to Do Things with Words*, 1962). By ignoring the history of this declaration, including its earlier, more poetic forms, Austin produced a theory of legal and ritual language that continued the repression of poetry, albeit through neglect rather than overt animosity.

In addition to employing poetry and other verbal formulas, law and religion both also depend on narrative. In religion and religious law, myths are used to found a moral cosmos. For example, the *Laws of Manu* begins with an account of the cosmogony. Although modern law eschews the explicit use of myth, it remains dependent on foundational narratives, as Robert Cover emphasized, and there is even, in Peter

Fitzpatrick’s term, a particular “mythology of law.” In addition to such grand narratives, narratives of a simpler sort—in the form of stories that make sense of people’s actions—constitute an important part of the everyday business of law. The examination of witnesses, lawyers’ arguments during trial, and judicial opinions all use narrative techniques to construct compelling fact scenarios and resolve disputes over the interpretation of the law. As legal anthropologists and sociologists have shown, ordinary people also tell stories to make sense of the law and their relationship to it. Law, like a story, is directed toward a definite conclusion and is peopled by actors who are engaged in a clash of interests that are often intensely personal, of dramatic public importance, and engaged with fundamental social values. Like literary interpretations, the answers law affords to such dilemmas may remain provisional and uncertain. These characteristics shared by law and literature are also shared by many religious texts, and especially by myths, the interpretation of which assumes a similar hermeneutic irreducibility, if not undecidability.

A related parallel that points to the “closed” rather than “open” nature of both law and religion is the frequent dependence of each on a canon, which now usually means a corpus of texts. Canon, in Jonathan Z. Smith’s definition (*Imagining Religion*, p. 43), represents a delimitation to a set (for example, of texts), which is then subjected to ingenious and varied interpretation. Canon therefore combines the opposed gestures of restriction and expansion: the first is aimed at control and the second at completeness. Although this is obviously a distinctive feature of many religious traditions and especially of collections of scripture, it is also a point of contact between law and religion. Under the sign of canon, the work of both law and religion becomes one of interpretation or hermeneutics. Within this work, different degrees of flexibility may be pursued, as described by Paul’s phrase “the letter killeth, but the spirit giveth life” (*2 Corinthians* 3:6). Paul appears to dismiss the adherence to black-letter law as a narrow formalism and to embrace flexibility in interpretation. The distinction in religious law between “letter” and “spirit” can be seen to correspond to the distinction in modern law between “formal” and “substantive” justice or between “law” and “equity.” Although the tendency away from formalism is often regarded as one of the hallmarks of modern as opposed to pre-modern law and religion, some more restrictive modern forms of canon belie such a simple dichotomy. The form of canon most common in modern law is the “code”: the reduction of the law to a set of written statutes that is comprehensive and unequivocal. Not only the canon itself but the interpretation thereof has been restricted in accordance with the image of law as a perfect, and perfectly unambiguous, language. As described below, codification bears historical connections to Protestant biblical literalism. However, the influence of religion on legal interpretation has operated in different ways. In *Vichy Law and the Holocaust in France* (1996), Richard Weisberg argues that lawyers in Nazi-occupied France used a certain flexibility in interpreta-

tion, a form of casuistry inspired in part by religious and other cultural factors, to justify anti-Semitic laws. Other scholars of law and literature emphasize the inflexibility of modern law and its hostility to multivocal interpretation. For example, Goodrich ("Europe in America: Grammatology, Legal Studies, and the Politics of Transmission," *Columbia Law Review*, 2001) identifies this rigidity as a source of resistance to Jacques Derrida's philosophy of deconstruction, which he associates with Talmudic interpretation.

The modern bias toward canon or the location of culture in texts has long distorted scholarly interpretations of both law and religion. Many religious laws are embodied in a textual corpus of rules and therefore resemble modern law, which is now promulgated primarily in written statutes and judicial opinions. This bias has facilitated the over-emphasis on such texts to the detriment of customs, not only in scholarship but also in the colonial administration of laws in such countries as India. The valorization of texts, although not new, has increased in recent centuries. Its apex in England can be traced to Bentham's codification proposal and attack on Blackstone's celebration of the largely customary common-law tradition. The first edition of this *Encyclopedia* included a number of articles on the laws of the world religions, namely those traditions that, in addition to having many adherents, have coalesced historically around collections of scripture. The laws of oral, indigenous, tribal, or "primitive" traditions were largely ignored. This bias has affected our understanding even of the law of literate societies. Anthropologists and historians have worked against this textual bias and recovered the importance of customary and unwritten traditions of both religion and law. Some further historical dimensions of the emphasis on a written canon are described below.

Another bias that has distorted our understanding of religious law is the modern tendency to reduce religion to belief, to the exclusion of practice. Rules that prescribe, often minutely, both everyday and ritual conduct have constituted historically a central part of many religious traditions. Increasingly since the Reformation, religion or its "essence" has come to be defined as belief, meaning the voluntary and affective assent to a particular doctrine. Religious conduct has often been defined as non-essential to religion or even, in the case of ritual conduct, as "superstitious." Not coincidentally, it is precisely these particularistic religious practices, such as those involving diet, dress, and marriage, that have tended to come into conflict with secular law, with its universalizing tendencies. Freedom of religion now means primarily freedom of conscience, and the expression of one's religious convictions becomes more problematic when it extends beyond verbal modes of expression. These developments have also operated as a barrier to our historical understanding of the practical or legal dimensions of religious traditions—what we are here calling "religious law."

RELIGIOUS GENEALOGIES OF SECULAR LAW. In modernity, as previously noted, law and religion are generally regarded

as separate. This view has already been challenged by examinations of both pre-modern religious law and the continuing structural parallels between law and religion. There are also important genetic or, to invoke the increasingly popular Nietzschean term, genealogical connections between law and religion. In contradiction of the secularization thesis, not only did much of modern law originate in religion, but it remains, in an important sense, "religious" in character. Even the process by which law separated from religion is, as previously indicated, related to religious developments, especially and most proximately those arising in the Protestant Reformation. Although there are, of course, many competing narratives of the process by which modern law came to be as it is, the following narrative is offered as a partial corrective to the standard trope of secularization.

The emergence of regional legal regimes in Europe and elsewhere and the development of international law have stimulated a renewed interest in the sources of Western law. The history of law in the West is the history of the complex interactions among the tribal laws of Europe, Roman law, and the institutions of the Roman church. With the decline of its Western empire, Roman law fell into disuse. Law in Europe was a highly diffuse collection of local customs and institutions, which depended on local religious ideologies and symbols. The rediscovery of Roman law in the form of Justinian's *Institutes* in the early twelfth century and its subsequent elaboration and influence on both the canon law of the papacy and on emerging national legal regimes, fundamentally altered the relationship of law and religion in Europe. This Roman-derived law served as the prototype for the autonomous secular and universalistic law of the modern period. The separation of law and religion already occurred in one form in the theological elaboration of the idea of two domains of law, one spiritual and the other secular. Harold Berman has described this as a "revolution" of the highest importance in the development of modern law, though not the last.

Other scholars have focused attention on the period during and after the Reformation as a key phase in the development of modern law, including its separation from religion. Goodrich's account of the parallels in English Protestant and common-law foundationalism, each of which opposed a reified, and increasingly written, canonical tradition to the "idolatry" of images, has already been mentioned. These developments, although heavily influenced by the rise of literacy and printing, also represented a religious dynamic. A later phase of this development occurred with Bentham's proposal for codification of the still largely unwritten common-law tradition. This proposal drew on the opposition of a now exclusively written canon to the "idolatry" of custom. Earlier English codes, from Alfred's in the ninth century to the one promulgated in the Massachusetts Bay Colony in the 1640s, had drawn on scripture for their substantive law. Bentham's code had a more subtle, indirect relation to religion that emerged most clearly in his criticism of "fictions," lin-

guistic pathologies that he generally argued should be expunged both from the law and from language. One of his key complaints was the habit of reifying language or taking words for things. He argued that only words that referred to really existing things should be permitted. As the common law, being nowhere written down, could not be pointed to, the phrase “common law” was, he said, a fiction used by lawyers to dupe their opponents. The sole remedy was codification. Although arguably an atheist, Bentham in his jurisprudence drew upon religious sources. One indirect source was English linguistic empiricism, which, beginning with Francis Bacon’s (1561–1626) critique of “idols of the marketplace,” had applied Protestant literalism to language. Another source was scripture, which, in his papers on codification (*Works*, vol. 10, p. 483), Bentham directly invoked in condemning the invocation of the “common law” as a form of personification and idolatry.

Given Bentham’s profound influence on both legal reform and the philosophy of legal positivism, it has seemed especially appropriate to detail these connections between his jurisprudence and certain strains of Protestantism. The positivists’ contention of the separation between law and religion is belied by a closer examination of the work of one of their founding figures. Regarded as a “vanishing point” at which religion effectively transformed into modern, secular law, Bentham is a crucial figure for a genealogical analysis of law. His example suggests that secularization was, in at least some of its dimensions, influenced by a specifically religious dynamic. The relationship between religion and legal rationalization thus outlined parallels the relationship the German sociologist Max Weber (1864–1920), himself a trained lawyer, identified between religion and capitalist economic rationalization. Bentham’s example further suggests a reevaluation of the separation between legal and religious studies. The founder of the history of religions, Friedrich Max Müller (1823–1920), drew on many of the same linguistic and religious ideas as Bentham for his concept of myth as a “disease of language,” a form of radical metaphor where a word is reified and, ultimately, deified. The founding narratives of both legal and religious studies owe more to the history of particular religious developments than either discipline cares to acknowledge.

RELIGION AND HUMAN RIGHTS. The phrase “religion and law” today is not infrequently also understood to denote an expanding arena of modern life purportedly governed by guarantees of religious freedom under national constitutions, transnational conventions, and other international legal instruments. The rather limited legal accommodation made for religion in the West under the Enlightenment guarantees of religious freedom is proving inadequate in the face of demands to accommodate an ever widening spectrum of religious practices from both traditional religious communities and new religious movements, some of which refuse to accept the implications of the secularization thesis for law. The strong desire by many to acknowledge (or to be seen to acknowledge) the powerful demands of religion on individuals

and communities is handicapped by the underlying claims to universalism of modern, secular law.

Various legal and political arrangements have been made to handle demands for legal accommodation of religious practices. The complex and sometimes explosive mix of religious and ethnic diversity, the global dynamism of diaspora religious communities, and the vestiges of legal structures reflecting prior religio-political histories have inspired different legal strategies. A simple, and perhaps deceptively clean, solution has been the United States Supreme Court’s interpretation of the First Amendment to that country’s Constitution. The First Amendment religion clauses have increasingly been interpreted in such a way as to efface the legal significance of religion. The state may not discriminate against religious persons and practices, but neither is it required to provide legal exemptions or accommodations for them. Furthermore, the state may fund and contract with religious institutions for the provision of government services, but only on the same terms as it extends to secular organizations. Religion as a legal category has less and less relevance. In cases in the United States and in other jurisdictions where legal instruments are interpreted to privilege religiously motivated persons or institutions, persistent questions have arisen concerning the boundaries of such exemptions, particularly in light of the usual accompanying provision that the state may regulate religious conduct to protect the health and safety of its citizens, a provision that has allowed states a wide latitude in suppressing, or even criminalizing, religious ways of life. This is especially ironic, given that recent revisionist scholarship on religious human rights has emphasized the influence of religious ideas, including those of the fascinating but historically rather remote Puritan Roger Williams (c.1603–1683), on the historical development of the First Amendment.

Other secular constitutional democracies are often less dominated by an ideology of equality than the United States and have for historical reasons been more likely to privilege some religious communities in their dealings with the state and to carve out exemptions for religiously motivated persons. An example is India, a country with a very different history, level of development, and experience of colonialism, where the continuing existence of separate domains of private law for different religious traditions and recent political developments favoring communalism, have inspired a fierce debate over the meaning of secularism and its permissible cultural variations.

Questions have recently arisen about whether human rights language is so indebted to the history and culture of the West that it may be inadequate to protect individuals and communities from or in non-Western cultures and societies. The human rights paradigm is understood, according to this critique, to privilege a “Protestant” view of religion as private, individual, voluntary, and constituted by belief rather than practice. What is clear is that many of the foundations of international human rights law were laid by scholars such

as Hugo Grotius (1583–1645) on a religious basis and in response to the wars of religion in seventeenth-century Europe. After several centuries, and with the extension of this historically contingent (and evolving) paradigm to other cultures, the religious roots of the modern doctrine of freedom of religion may be more exposed and shakier than they have been for some time.

Two often-stated goals of U.S. foreign policy today are first, international enforcement of guarantees of religious freedom, and second, global extension of the rule of law. A particular understanding of religion and law is regarded as the *sine qua non* for the spread of democracy. Religion freely chosen by the individual and secular law impartially and democratically administered by a state dedicated to due process and human rights are proclaimed together as the “natural” and necessary characteristics of a society that respects human dignity. The anthropologist Richard Shweder calls this American stance “imperial liberalism.” Alternative models for negotiating the competing demands of religion and modern, secular law are being developed in various forums, including the agencies of the United Nations.

CONCLUSION. This article has sketched some of the contours of the religious dimensions of law and the legal dimensions of religion as an invitation to scholars of religion to avoid reproducing the modern Western positivist self-understanding of law as autonomous, state-produced and state-enforced, and secular. The standard narrative of secularization has damaged our understanding of both law and religion by rendering each incomprehensible to the other. On the contrary, the numerous historical connections, the continuing structural parallels, and above all the genealogical relationships between law and religion suggest new pathways for exploring the reciprocal relevance of these two fundamental categories and the relevance of both for the comprehension of modernity. For those studying contemporary religio-political structures, in particular—although the same could be said of many earlier societies—conditions of religious and legal pluralism vastly complicate the matter. The comprehensive explanatory and disciplinary pretensions of both law and religion are moderated by the presence and constant interaction of multiple systems.

The remaining articles in this section provide an approach to the interactions of law and religion across a number of axes. First in order are several articles that examine law and religion within or respecting particular cultural traditions, which are for the most part bounded geographically and/or historically (“Law and New Religious Movements,” “Law and Religion in Medieval Europe,” “Law and Religion in The Ancient Mediterranean World,” “Law and Religion in Hinduism,” “Law and Religion in Buddhism,” “Law and Religion in Chinese Religions,” “Law and Religion in Indigenous Cultures”). After these come several articles that consider the interaction of law and religion in relation to a third category or from a particular methodological perspective (“Law, Religion, and Critical Theory,” “Law, Religion, and

Human Rights,” “Law, Religion, and Literature,” “Law, Religion, and Morality,” “Law, Religion, and Punishment”). The reader is referred also to articles elsewhere in the *Encyclopedia* that are relevant to the topic of law and religion.

SEE ALSO Afterlife; Atonement; Canon; Codes and Codification; Covenant; Islamic Law; Israelite Law; Ordeal; Purification; Revenge and Retribution; Secularization; Sin and Guilt; Vows and Oaths.

BIBLIOGRAPHY

- Berman, Harold. *Law and Revolution: The Formation of the Western Legal Tradition*. Cambridge, Mass., 1983.
- Berman, Harold. *Law and Revolution II: The Impact of the Protestant Reformations on the Western Legal Tradition*. Cambridge, Mass., 2003.
- Casanova, José. *Public Religions in the Modern World*. Chicago, 1994.
- Comaroff, John L., and Simon Roberts. *Rules and Processes: The Cultural Logic of Dispute in an African Context*. Chicago, 1981.
- Cover, Robert. “Foreword: *Nomos* and Narrative.” *Harvard Law Review* 97 (1983): 4–68.
- Fitzpatrick, Peter. *The Mythology of Modern Law*. New York, 1992.
- French, Rebecca. *The Golden Yoke: The Legal Cosmology of Buddhist Tibet*. Ithaca, N.Y., 1995.
- Gauchet, Marcel. *Le désenchantement du monde: une histoire politique de la religion*. Paris, 1985.
- Geertz, Clifford. “Local Knowledge: Fact and Law in Comparative Perspective.” In *Local Knowledge: Further Essays in Interpretive Anthropology*. New York, 1983.
- Goodrich, Peter. *Oedipus Lex: Psychoanalysis, History, Law*. Berkeley, Calif., 1995.
- Hamburger, Philip. *Separation of Church and State*. Cambridge, Mass., 2002.
- Howe, Mark deWolfe. *The Garden and the Wilderness: Religion and Government in American Constitutional History*. Chicago, 1965.
- Huxley, Andrew, ed. *Religion, Law and Tradition: Comparative Studies in Religious Law*. London, 2002.
- Jacobsohn, Gary. *The Wheel of Law: India’s Secularism in Comparative Constitutional Context*. Princeton, N.J., 2003.
- Kahn, Paul. *The Cultural Study of Law: Reconstructing Legal Scholarship*. Chicago, 1999.
- Levack, Brian. *The Witch-Hunt in Early Modern Europe*. New York, 1995.
- Levinson, Sanford. *Constitutional Faith*. Princeton, N.J., 1988.
- Llewellyn, Karl N., and E. Adamson Hoebel. *The Cheyenne Way*. Norman, Okla., 1941.
- McConnell, Michael. “The Origins and Historical Understanding of Free Exercise of Religion.” *Harvard Law Review* 103 (1990): 1409–1517.
- Moore, Sally Falk. *Social Facts & Fabrications: “Customary” Law on Kilimanjaro, 1880–1980*. Cambridge, U.K., 1986.
- Murphy, Tim. *The Oldest Social Science: Configurations of Law and Modernity*. Oxford, 1997.

- Pocock, J. G. A. *Barbarism and Religion*. Cambridge, U.K., 2000.
- Rawls, John. *The Law of Peoples*. Cambridge, Mass., 1999.
- Roberts, Simon. *Order and Dispute: An Introduction to Legal Anthropology*. New York, 1979.
- Rosen, Lawrence. *The Anthropology of Justice: Law as Culture in Islamic Society*. New York, 1989.
- Rouland, Norbert. *Anthropologie juridique*. Paris, 1988.
- Smith, Jonathan Z. *Imagining Religion: From Babylon to Jonestown*. Chicago, 1982.
- Sousa Santos, Boaventura de. *Toward a New Common Sense: Law, Science and Politics in the Paradigmatic Transition*. New York, 1995.
- Tierney, Brian. *Religion, Law and the Growth of Constitutional Thought, 1150–1650*. Cambridge, U.K., 1982.
- van der Vyver, Johann D., and John Witte, Jr., eds. *Religious Human Rights in Global Perspective: Legal Perspectives*. The Hague, 1996.
- Williams, Robert A., Jr. *The American Indian in Western Legal Thought: The Discourses of Conquest*. Oxford, 1990.

WINNIFRED FALLERS SULLIVAN (2005)
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LAW AND RELIGION: LAW AND RELIGION IN THE ANCIENT MEDITERRANEAN WORLD

Most scholars of the ancient world assume that Roman law did not fundamentally affect ancient religions. In 1905, Theodor Mommsen argued that in antiquity the only civil requirement religions had to meet was loyalty toward the rulers. In case of default the believers were forced to comply. Likewise, church historians tend to ignore any impact Roman law may have had on ancient Christianity. The jurist Harold J. Berman (1983) corroborates this view. In ancient Roman society law remained secular, he argues. Though the modern Western legal tradition derived crucial elements from it—a sharp distinction between legal and other social institutions, for example, religion, politics, and morality; an administration of law by a class of specialists; and a legal training of these professionals and the existence of a legal science—a closer relation between law and religion did not arise before the Middle Ages, when the Roman law was adopted by the Christian nation.

When Berman argues that the ancient Roman law was pervasively secular, he has the Near Eastern law codes in mind, which were promulgated by rulers on behalf of the gods or revealed by prophets in the name of God as the biblical book of the covenant (*Genesis* 20:22–23:19) or *Deuteronomy* (12–26). But is a hierarchical relation between religion and law the only one possible or even obvious? Tim Murphy (1997) proposes to consider also a horizontal one. He conceives of religion and law as two autonomous “systems,” separate, but not unrelated. Law can be studied as a cultural system that turns religion into a legal subject, and religion as a cultural system that turns law into a religious issue (Geertz,

1983, p. 184). Using this approach, Winnifred Fallers Sullivan (1994) studied the notions of religion in U.S. Supreme Court rulings on First Amendment cases. Her study confirms that the disestablishment clause did not terminate a link between legislature and religion, but instead evoked among jurists legal discourses about defining religion. Likewise, Roman law despite its secular origin turned ancient religious practices into legal subjects and established legal discourses on religious issues.

FROM THE TWELVE TABLES TO THE LATE ROMAN LAW CODES: PRINCIPLES OF THE GROWTH OF THE ROMAN LEGAL TRADITION. “The most celebrated system of jurisprudence known to the world begins, as it ends, with a code” (Maine, 1905/1861, p. 1). The Twelve Tables were drawn up by a special commission in 451–450 BCE and published on tablets in the Forum. Their demolition in 390 BCE did not undermine their authority, as Elizabeth A. Meyer (2004) shows. Until the end of the Roman Empire they were cited as a fountainhead of all public and private law (Livy 3, 34, 6). For that reason the code is known only through quotations—in an adjusted, but still archaic language—by Roman authorities: Cicero (106–43 BCE), Gaius (third quarter of the second century CE), Seneca the Younger (4 BCE–65 CE), Pliny (23–79 CE), and others, but also by Christian Church fathers such as Augustine of Hippo (354–430), as Michael H. Crawford’s reconstruction of the Twelve Tables shows (1996, pp. 555–721).

Law making in Rome was not restricted to only one institution. There were the *leges*, resolved by the people in a meeting and regarded as eternally valid, as the Twelve Tables. Other institutions legislated different kinds of law: the Senate’s *senatus consultum*; Roman officials’ *edictum*; and the emperor’s *constitutio principis*, which could take the form of an *edictum* (an enactment of a general character), *decretum* (a judicial decision), *rescriptum*, in the form of a letter (*epistola*), or an endorsement appended to a petition (*subscriptio*) (Bretone, 1998, pp. 153–157). Finally, there were the legally binding opinions of the jurists (*responsa prudentium*) when all agreed on a certain issue (Gaius, Inst. 1, 7).

Before the Twelve Tables were promulgated, the legal field was divided between human law (*ius*) and divine law (*fas*). Afterward, the main division became between public and private law (*ius publicum* and *ius privatum*) as Alan Watson shows (1992, pp. 21–29). Religious matters belonged to the realm of public law. Since public law was based on the principle of a common benefit (*utilitas*), it could not be annulled by private decisions or agreements. It also restricted private religious practices.

The Roman legal system, particularly during the empire, revolved around an institutionalized practice of questions and answers as Fergus Millar shows (1992, pp. 240–252). An official, a citizen, or a community confronted with an unusual legal case could send a petition (*libellus*) to the emperor. When the case was deemed important enough, the emperor, assisted by his council, responded. The