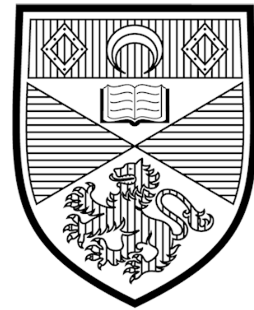

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Law and Theology in the Western Legal Tradition

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Law and Theology in the Western Legal Tradition

John Witte Jr.

The term 'law' does not admit of easy or universal definition. In its broadest sense, law consists of all the written and unwritten norms that govern human conduct – moral commandments, state statutes, church canons, family rules, commercial habits, communal customs, and others. It includes the process of formulating and enforcing these norms through legislation, adjudication, and administration by those with legal authority. It also involves actualizing these norms through obedience, negotiation, litigation, criticism, resistance, and other legal activities by those who are subject to those norms (Berman 1993).

Law in this broad sense is pervasive in our lives. It covers everything from the 'laws written on the heart' (Rom 2:14) to local rules about parking or food packing. A parent's order to children to 'stop fighting!' is as much a legal command as a state's criminal prohibition on assault and battery. Law is at work in Abraham's bargaining with God over the pending destruction of Sodom and Gomorrah (Gen 18:16–33) as much as in the modern world's treaty negotiations about nuclear weapons. Law governs the covenant forged between Yahweh and Israel as well as the contract formed between husband and wife. Laws of all sorts are ever present – encouraging and directing, prescribing and prohibiting, supporting and facilitating, rewarding and punishing, ordering and nudging our conduct, relationships, and institutions.

This article focuses more narrowly on the formal laws and procedures of states and churches – political and ecclesiastical authorities, as they were called in the pre-modern Western tradition. Most Western states today are dedicated to the rule of law and have written or unwritten constitutions that define the powers and provinces of political authorities and the rights and duties of their political subjects. Most nations make formal distinctions among the executive, legislative, and judicial powers of government and functions of law. Most distinguish among bodies of public, private, penal, and procedural law. Most recognize multiple sources of law: constitutions, treaties, statutes, regulations, judicial precedents, customary practices, and more. Of increasing importance to many nations today are public, private, and penal international laws. Also, important today are the enumerated rights and liberties set out in national and international declarations, covenants, charters, concordats, constitutions, and statutes.

Churches, too, have law at their backbone, balancing their spiritual and structural dimensions. Each church depends upon rules, regulations, and procedures to maintain

its order, organization, and orthodoxy; clergy, polity, and property; worship, liturgy, and sacraments; discipline, missions, and diaconal work; charity, education, and catechesis; publications, foundations, and religious life; and its property, governance, and interactions with the state and other social institutions. Church laws, of course, vary greatly in form and function over time and across the Catholic, Orthodox, and Protestant communities around the world. Some church laws are written, others are customary. Some are codified, others more loosely collected. Some are mandatory, others probative or facilitative. Some are universal canons; others are local and variant rules. Some are drawn from the Bible; others go back to ancient Roman law and the Talmud. Some church laws deal with the essentials of the faith, others with the adiaphora. Some are internally created by the church's own government; others are externally imposed or induced by the state. Some church laws are declared by ecclesiastical hierarchies; others are democratically selected. Some churches maintain elaborate tribunals and formal procedures, while others use informal and conversational methods of enforcement. For all this variety, however, church law is a common and necessary feature of church life (Doe 2015; 2021).

Keywords: Church law, State law, Civil law, Natural law, Common law, Canon Law, Protestant Reformation, Enlightenment, Rights, Jurisdiction

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1 Law and Christianity in the Roman Empire

This article traces the development of the laws of church and state in the Western tradition. It focuses on four watershed periods: (1) the Roman Empire; (2) the High Middle Ages; (3) the Protestant Reformation; (4) and the Enlightenment era. It then summarizes a few main law and theology themes today within and beyond the Western tradition.

Christianity was born into the sophisticated legal worlds of Judaism and the Roman Empire, and it interacted intensely with both legal worlds as it gradually shaped its own legal teachings and practices.

1.1 Jewish law and Christianity

At the heart of first-century Judaism was the Torah or Mosaic law, set out in the Pentateuch and amplified by the prophets. The Torah has remained a vast and vital source of law for Western churches and states alike from antiquity to the present day. Already in the first centuries, the church fathers divided this Mosaic law into three main categories. First, were the 'moral laws' distilled in the Decalogue (Exod 20:1–20; Deut 5:1–21) and inspired by the Mosaic commands to 'love your God with all your heart, and with all your soul, and with all your might' and 'to love your neighbour as yourself' (Lev 19:18; Deut 6:4–5). These moral laws were regarded as perennially binding on all people. Second, were the 'juridical laws' – the principles, rules, and cases in the Hebrew Bible concerning marriage and family, crimes and torts, property and economics, charity and education, labour and slavery, poverty and welfare, and many other legal topics. These juridical laws were considered probative and useful laws for churches and states, though not necessarily binding on Christians unless enacted by church or state authorities. Third, were the 'ceremonial laws' governing diet, hygiene, sabbath observance, liturgy, holy days, the priesthood and temple life of this ancient Jewish people. These ceremonial laws were not considered to be binding on Christians, although the church needed to develop its own comparable spiritual laws (see further Novak 2009).

At the centre of the Jewish community was the temple, the principal site of worship, liturgy, education, social engagement, commerce, and legal governance. Rabbinic interpretation of the Torah and governance of religious and civil life were already important in Jesus' day – but rabbinic law became essential after the destruction of Jerusalem in 70 CE and the wide diaspora of Jews from the Holy Land. This scattered rabbinic law was periodically gathered and systematized, first in the Mishnah then in the Jerusalem and Babylonian Talmuds.

Though the first Christians were Jews, the early Christian church leaders gradually rejected rabbinic Jewish law in favour of the teachings of Jesus and his disciples. 'Christ is the end of the law' (Rom 10:4), Paul pronounced, and 'the law was our

schoolmaster (*paidagoḡos*) until Christ came'. But with Christ, 'we are no longer under a schoolmaster' (Gal 3:24–26). Instead, Christians have the freedom and the duty to live by the moral law that God has 'written on their hearts' and consciences (Rom 2:14), rewritten in the Decalogue and other biblical moral laws, and elaborated and illustrated in the teachings of Jesus, Paul, and other New Testament writers (Fredriksen 2018).

Early church laws from the *Didaché* (c. 90) to the *Didascalia Apostolorum* (c. 250) cast these moral principles into ever more specific precepts, procedures, and preferred practices of Christian living, sometimes adopting or adapting various Jewish and Graeco-Roman laws. By the second century, the early churches scattered around the Mediterranean developed their first laws for clerical life, ecclesiastical discipline, public and private morality, worship, sacraments, cemeteries, charity, education, family, property, dispute resolution, and other matters of Christian living. By the third century, the churches developed more elaborated forms of church government under bishops and councils. They also augmented their Christian laws with more refined patristic teachings, bishops' letters, conciliar decrees, and the first penitential books and moral manuals for proper Christian living (McGuckin 2012; Reynolds 2019).

1.2 Roman law and Christianity

The Christian churches grew rapidly in the first three centuries, despite ample persecution by the Roman authorities. Rome was the supreme political and legal authority of the ancient Western world. The laws of the Roman Empire defined the status of persons and associations and the legal actions and procedures available to them. It proscribed private harms and public crimes. It governed marriage and divorce, households and children, property and inheritance, contracts and commerce, slavery and labour. It protected the public property, security, and welfare of the Roman state, and created the vast hierarchies of imperial government that allowed Rome to rule its far-flung Empire for centuries (Domingo 2018).

Roman law drew on a refined legal theory, built in part on the teachings of Plato, Aristotle, and other Greek sages. Cicero (106–43 BCE), Seneca (d. 60 CE), and other Roman philosophers cast in legal terms Aristotle's topical methods of reasoning, rhetoric, and interpretation as well as his and Plato's concepts of natural, distributive, and commutative justice. Gaius (130–180), Ulpian (d. c. 228), and other Roman jurists 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) common law (*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 (Rowe 2016).

Initially, Rome tolerated the Christian church, much like it tolerated all other peaceable religions that it had conquered. After all, Jesus had enjoined his followers to 'render to Caesar the things that are Caesar's' (Matt 22:21). When Roman governor Pontius Pilate pressed him about his political ambitions, Jesus said plainly, 'my kingship is not of this world' (John 18:36). Paul and Peter, too, called Christians in good 'conscience' to 'be subject to the governing authorities', paying them taxes, tributes, honour, and obedience (Rom 13:1–7; 1 Pet 2:13–17).

Nevertheless, the Bible also instructed the faithful to 'obey God rather than men' (Acts 5:29). Early Christians soon found they could not accept the Roman imperial cult, pledge their allegiance to the emperor as a god, or readily partake of the many pagan rituals and oaths attached to Roman commerce, litigation, festivals, or military service. Moreover, some early Christian leaders used Jesus' apostolic commission – to 'make disciples of all nations [...] teaching them to observe all that I have commanded you' (Matt 28:19–20) – to critique Roman law. They urged the Roman authorities to reform their law – to respect liberty of conscience and religious freedom; to outlaw concubinage and male promiscuity; to limit easy divorce and remarriage; to end infanticide; to expand charity and education; to curb military violence and criminal punishments; to emancipate slaves; to expand Roman citizenship, and more. Such church independence and reformist agitation eventually brought forth firm imperial edicts which condemned Christianity as an 'illicit religion' and exposed Christians to intermittent waves of brutal persecution for 250 years (Wilken 2003).

The Christian conversion of Emperor Constantine (reign 306–337) in 312 CE ended this persecution. The so-called 'Edict of Milan' in 313 CE granted Christians and all others the freedom to exercise their religion, and the right of churches to restitution of their confiscated and destroyed properties. In the decades thereafter, however, Rome gradually took firm legal control of the church, and established trinitarian Christianity as the official religion of the Roman Empire in 380 CE. The Roman Empire was now understood as the universal body of Christ on earth, embracing all persons and all things. The Roman emperor claimed to be both pope and king, who reigned supreme in spiritual and temporal matters. The Roman law was viewed as the pristine instrument of natural law and Christian morality (Ehler and Morrall 1954).

This new convergence of Roman and Christian beliefs allowed the Christian Church to imbue the Roman law with several of its basic teachings, and to have those enforced throughout much of the Empire; brutally against pagans, heretics, and Jews, whom the law singled out for special repression. Particularly the great synthetic texts of Roman law – the *Codex Theodosianus* (438), the *Corpus Iuris Civilis* (529–534), and Justinian's *Novellae* (534–565) – legally established Christian teachings on the Trinity, the sacraments, liturgy, holy days, Sabbath observance, sexual ethics, charity, education, and much else. The Roman law also provided special immunities, exemptions, and subsidies for Christian

ministers, missionaries, and monastics, who thrived under this new patronage. This legal establishment of a uniform and universal 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. The Roman emperors convened 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 (Cochrane 2003).

This imperial rule of the church, later called the 'symphonia' of religious and political authority, remained largely in place in the Eastern Orthodox Church that was part of the Byzantine Empire from 330 to 1453. This 'symphonia' idea also informed the great compilations of Orthodox canon law – from the *Collectio 50 titulorum* (c. 550) to the *Nomocanon 14 titulorum* (c. 920) – that were issued together by state and church authorities in Orthodox lands. These massive legal documents combined biblical and Christianized Roman legal teachings with detailed new rules and procedures for the church and its clergy, and for the public and private lives of Christian laity. Included were Eastern Orthodox teachings on religious images, the *filioque* clause in the Nicene Creed, and church leadership that eventually led to the Great Schism from the Western Church in 1054 (Wagschal 2015; Nicol 2008).

In the Western Roman Empire, by contrast, strong clergy like Ambrose of Milan (339–397), Augustine of Hippo (354–430), and Pope Gelasius I (492–496) insisted that 'there are two powers' to govern the 'two cities' that comprise Christendom. One was the spiritual power of the word and the sacraments held by church officials to govern the affairs of the city of God; another was the temporal power of the sword and material life held by the political authorities to govern the affairs of the city of man. Christians were citizens of both the city of man by birth and the city of God by faith. State and church authorities could cooperate in the maintenance of a universal Christian society, however, political authorities had no power to administer the sacraments, and the clergy had no licence to bear the sword or shed blood (Field 1998).

This dualistic understanding of spiritual and political authorities governing a unified Christian society eventually came to prevail in later Germanic kingdoms that replaced the Western Roman Empire after the death of its final emperor in 476. Germanic rulers who converted to Christianity found in its teachings an important source of authority for their efforts to extend their rule over the diverse peoples that made up their regimes. The clergy not only supported the Germanic Christian kings in the suppression of pagan tribal religions, but many of them also looked upon such leaders as the Frankish Emperor

Charlemagne (reign 768–814) and the English King Alfred the Great (reign 871–899) as their own spiritual leaders. Those Christian Germanic rulers, in turn, supported the clergy in their struggle against heresies and gave them military protection, political patronage, and material support, much as the Christian Roman emperors before them had done.

Feudal lords within these Germanic domains further patronized the church through the donation of lands and other properties for pious causes in return for the power to appoint and control the priests, abbots, and abbesses who occupied and used these new church properties. Particularly, the monasteries chartered by political and feudal leaders in the later first millennium remained vital repositories of church art, icons, and literature, not least important collections of canon law and conciliar decrees (Reynolds 2019; Morrison 2015).

2 Law and medieval Catholicism

The second watershed period in the development of law and theology in the Western tradition came with the 'Papal Revolution' or Investiture Conflict of 1075–1122. Rejecting royal and feudal control of the church and lay investiture of clergy in their spiritual offices, Pope Gregory VII (reign 1073–1085) established the Roman Catholic Church as an autonomous legal and political corporation within a unified Western Christendom. The medieval Church now claimed a vast new 'jurisdiction' – the power to 'declare 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 secular political authorities (Tierney 1982; 1988a; Berman 1983).

2.1 Ecclesiastical jurisdiction

Medieval writers pressed four main arguments in support of these expansive jurisdictional claims. First, this new jurisdiction was seen as a simple extension of the church's traditional authority to govern what the church now defined as the seven sacraments: baptism, confirmation, penance, Eucharist, marriage, ordination, and extreme unction. By the fifteenth century, each of the sacraments supported whole bodies of sophisticated church law, called 'canon law'. The sacrament of marriage supported the canon law concerning 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 governing 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 the corporations and associations they formed. The sacraments of baptism and confirmation were the foundation for new constitutional laws of natural rights and duties of Christian believers (Wilpert and Hoffmann 1969; Helmholz 2010).

Second, church leaders predicated their jurisdictional claims on Jesus' famous delegation to the Apostle Peter, 'I will give you the keys of the kingdom of heaven, and whatever you bind on earth shall be bound in heaven, and whatever you loose on earth shall be loosed in heaven' (Matt 16:19). According to conventional medieval lore, Christ had conferred on Peter two keys: a key of knowledge to discern God's word and will and a key of power to implement and enforce that word and will throughout the church. Just as Peter had used these keys to help define the doctrine and discipline of the apostolic church, now the pope and his clergy had inherited these keys to define the doctrine and discipline of the contemporary church. This inheritance, the canonists believed, conferred on the pope and his clergy a legal power; a power to make and enforce canon laws. This argument of the keys readily supported the church's claims to subject matter jurisdiction over core spiritual matters of doctrine and liturgy: the purpose and timing of the mass, baptism, Eucharist, confession, and the like. The key of knowledge gave the pope and his clergy access to the mysteries of divine revelation, which, by use of the key of power, they communicated to all believers through canon law.

The argument of the keys, however, could be easily extended. Even the most mundane of human affairs ultimately have spiritual and moral dimensions. Resolution of a boundary line dispute between neighbours implicates the commandment to love one's neighbour. Unaccountable failure to pay one's civil taxes or feudal dues is a breach of the spiritual duty to honour those in authority. Printing or reading a censored book is a sin. Strong clergy, therefore, readily used the argument of the keys to extend the subject matter jurisdiction of the church to matters with more attenuated spiritual and moral dimensions, particularly in jurisdictions where they had no strong civil rivals (Tierney 1988b).

Third, medieval writers argued 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 (Wohlhaupter 1931). As the mother of exceptions, canon law was flexible, reasonable, and fair – capable either of bending the rigour 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

succour 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, neighbour, 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 (Wohlhaupter 1931; Berman 1993).

Fourth, some writers reworked the patristic 'two powers' theory into a 'two swords' theory to support claims that the church's jurisdiction was superior to that of secular authorities. The medieval 'two swords' theory taught that the pope was the vicar of Christ on earth, in whom Christ vested the plentitude of his authority. This authority was symbolized in the 'two swords' mentioned in Luke 22:38; a spiritual sword and a temporal sword. Medieval writers interpreted this passage to mean that Christ metaphorically handed these two swords to the highest being in the hierarchical human world: the pope, known as the vicar of Christ. The pope and lower clergy wielded the spiritual sword, in part by establishing canon law rules for the governance of all Christendom. The clergy, however, were considered above the responsibility of wielding the temporal sword. They thus delegated this temporal sword to those authorities below the spiritual realm: emperors, kings, dukes, and their civil retinues, who held their swords 'of' and 'for' the church. These civil magistrates were to promulgate and enforce civil laws in a manner consistent with canon law. Under this 'two swords' theory, civil law was – by its nature – inferior to canon law; civil jurisdiction was subordinate to ecclesiastical jurisdiction. The state answered to the church, and kings and emperors were subject to the bishops and popes (Tierney 1988a; Field 1998).

2.2 Church government and canon law

While each of these four arguments had its critics and never came to full legal or political expression, together they provided the medieval church with a formidable legal and political authority and power. Church officials became both the new legislators and new judges of Western Christendom. Church authorities issued a steady stream of new canon laws 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. Periodically, the pope or a strong bishop would deploy itinerant ecclesiastical judges ('inquisitors') with original jurisdiction over discrete questions that would normally lie within the competence

of the church courts. Furthermore, the pope also sent out legates who would exercise a variety of judicial and administrative powers in his name. Cases could be appealed upward through the hierarchy of church courts and ultimately to the papal rota. Cases raising novel questions could be referred to distinguished canonists or law faculties called assessors, whose learned opinions (*consilia*) on these questions were often taken by the church court as edifying if not binding (Schmoeckel 2009–2020).

Alongside these legislative and judicial functions, the church developed a vast network of ecclesiastical officials who presided over the church's executive and administrative functions. The medieval church registered its citizens through baptism. It taxed them through tithes. It conscripted them through crusades. It educated them through schools. It nurtured and cared for 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'. The medieval canon law, in turn, was the first international law of the West since the eclipse of classical Roman law in the fifth and sixth centuries (Berman 1983).

The jurists of the canon law, called 'canonists', systematized this vast new body of medieval church law using the popular dialectical methods of the day. Many of the legal teachings of the first millennium were collated and harmonized in the famous *Decretum Gratiani* (c. 1140), the anchor text of medieval canon law. The *Decretum* was then heavily supplemented by collections of papal and conciliar legislation such as the *Decretals of Gregory IX* (1234). These canonical collections attracted heavy juridical glosses and commentaries forming the basis of more systematic works on all manner of discrete legal topics of public, private, penal, and procedural law (Brundage 1995; Helmholz 2010).

Moreover, this complex new legal system of the church attracted sophisticated new legal and political theories. The most original formulations came from such medieval jurists as John of Salisbury (d. 1180), Hostiensis (1200–1271), and Baldus de Ubaldis (c.1327–1400); and such medieval theologians and philosophers as Hugh of St. Victor (c.1096–1141), Thomas Aquinas (1225–1274), John of Paris (c.1240–1306), and William of Ockham (c.1280–1349). These scholars 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 comprising 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 much of the Western legal theory and law regarding

chartered corporations, private associations, foundations, and trusts – built in part on early Roman law and later civil law prototypes (Tierney 1982; 1997).

2.3 Rights and liberties

Medieval canonists differentiated all manner of rights, freedoms, powers, immunities, protections, and capacities for different groups and persons. They associated them – variously – with a power or capacity (*facultas*) inhering in rational human nature and with the property (*dominium*) of a person or the power (*potestas*) of an office of authority (*officium*). Most important were the rights that protected the 'freedom of the church' (*libertas ecclesiae*) from the intrusions and control of secular authorities. Medieval writers specified in detail the rights of the church and its clergy to make its own laws, to maintain its own courts, to define its own doctrines and liturgies, and 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. 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, succour, and sanctuary within the church. It defined the rights of husbands and wives, parents and children, masters and servants within the household. Canon law even defined the (truncated) rights that Orthodox Christians, Jews, Muslims, and heretics had in Western Christendom (Tierney 1997; Witte and Alexander 2010).

These medieval canon law formulations of rights and liberties had parallels in high medieval common law and civil law texts. Particularly notable sources were the hundreds of surviving 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 councils, citizens, universities, monasteries, and others. Most such constitutional documents were localized instruments. Some applied to whole territories and nations. For example, the *Magna Carta* (1215) guaranteed that 'the Church of England shall be free (*libera*) and shall have all her whole rights (*iura*) and liberties (*libertates*) inviolable' and that all 'free-men' (*liberis hominibus*) were to enjoy their various 'liberties' (*libertates*). These rights and liberties included sundry rights to property, marriage, and inheritance, to freedom from undue military service, and to freedom to

pay one's debts and taxes from the property of one's own choosing. The *Magna Carta* also set out various rights and powers of towns and of local justices and their tribunals, various rights and prerogatives of the king and of the royal courts, and various procedural rights in these courts (including the right to jury trial). These charters of rights – 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 (Witte 2021b).

This high medieval Catholic synthesis of law and theology was preserved, reformed, and augmented in the fifteenth to seventeenth centuries. The Italian Renaissance brought the Western world not only breathtaking new art, architecture, and literature, but it also brought comprehensive reforms and renewals of Catholic doctrine, liturgy, catechesis, and governance. These reforms were set out authoritatively in the decrees of the Council of Trent (1546–1563), which was the church's definitive and enduring response to the Protestant Reformation. Trent also transformed the church's canon law, leading to the publication of the *Corpus Iuris Canonici* in 1582, the definitive canon law text for global Catholicism until the new canon law codes of 1917, 1983, and 1990. Trent also re-established strong canon law faculties in many major European universities, spurring the collection and publication of the best legal learning of the prior half millennium in the massive twenty-eight folio volumes of the *Tractatus universi juris* of 1584. Alongside these Tridentine reforms, Spanish scholars in Salamanca such as Francisco Vitoria (1483–1546), Bartolomé de las Casas (1484–1566), and Francisco Suarez (1548–1617) engineered a brilliant neo-Thomist renaissance in theology, philosophy, and natural law theory. Their views came to dominate the Spanish-speaking world on both sides of the Atlantic until modern times (Domingo and Martínez-Torrón 2019; Domingo and Condorelli 2021).

3 Law and Protestantism

3.1 Four Protestant movements of law and theology

The third watershed period in the development of the Western tradition of law and theology came with the Protestant Reformation. The Reformation erupted in 1517 with Martin Luther's posting of the Ninety-Five Theses on the church door in Wittenberg and his burning of the medieval canon law books at the city gates three years later. The Reformation soon split into four main branches: Lutheranism, Anabaptism, Anglicanism, and Calvinism – with ample regional and denominational variation within each branch. Lutheranism spread throughout the northern Holy Roman Empire, Prussia, and Scandinavia and their later colonies, consolidated by Luther's catechisms and the Augsburg Confession (1530), and by local liturgical books and Bible translations. Anabaptists fanned out in small communities throughout Western and Eastern Europe, Russia, and eventually North America, most of them devoted to the founding religious

principles of the Schleitheim Confession (1527). Anglicanism was established in England by King Henry VIII and Parliament in the 1530s and, once consolidated by the *Great Bible* (1539) and the *Book of Common Prayer* (1559), spread throughout the vast British Empire in North America, Africa, the Middle East, and the Indian subcontinent. Calvinist or Reformed communities, modelled on John Calvin's Geneva and anchored by the Geneva Academy, spread into portions of the Swiss Confederation, France, the Palatinate, the Lowlands, Scotland, England, and North America. This checkerboard of Protestant communities, living tenuously alongside each other and their Catholic neighbours, was protected for a time by the Peace of Augsburg (1555), the Union of Utrecht (1579), the Edict of Nantes (1598), the Peace of Westphalia (1648), and other peace treaties, although religious persecution and religious warfare were tragically regular events in early modern Europe (Witte and Wheeler 2018).

While new confessions, creeds, and catechisms helped to inspire and integrate these Protestant movements, it was new law that usually set them in motion and consolidated them. Hundreds of local 'church ordinances' (*Kirchenordnungen*), or 'legal reformations' (*Rechtsreformationen*) were issued by Lutheran German cities, duchies, and principalities after 1520; these were echoed in national church ordinances in Sweden, Denmark, Norway, Finland, and Iceland over the next century. Local Anabaptist elders issued short 'church orders' to establish and govern their small, self-sufficient Anabaptist communities; many of their rules drawn directly from biblical and early apostolic teachings. Parliament's Supremacy Act (1534) declared the English monarch to be 'supreme head' and 'defender of faith' in the freestanding Church of England (*Anglicana Ecclesiastica*). Geneva's Reformation Edict (1536) – modelled on similar reformation edicts passed in the decade before in Zurich and other Swiss cities – was echoed in scores of European towns and provinces and later North American colonies that accepted Reformed Protestantism.

These early Protestant legal declarations began with calls for freedom from medieval Catholicism: freedom of the individual conscience from intrusive canon laws; freedom of political officials from clerical power and privilege; and freedom of local clergy from centralized papal and conciliar rule. Early leaders of all four branches of Protestantism – Martin Luther (1483–1546), John Calvin (1509–1564), Thomas Cranmer (1489–1556), Menno Simons (1496–1561), and others – taught that salvation comes through faith in the Gospel, not by works of the law. Each individual was to approach God directly in prayer, to seek God's gracious forgiveness of sin, and to conduct life in accordance with the Bible and the Christian conscience. To the reformers, the Catholic canon law administrated by the clergy obstructed the individual's relationship with God and obscured simple biblical norms for right living. Furthermore, the early reformers taught that the church was at heart a community of saints and not necessarily a corporation of law. Its principal marks and callings were to preach the Word, to administer the sacraments, to catechize the young, and to care for the needy. The Catholic clergy's legal rule in Christendom impeded

the church's divine mission and usurped the state's role as God's vice-regent called to articulate and apply divine and natural law in the earthly kingdom. Protestants did recognize that the church needed internal customs, rules, and procedures of order to govern its polity, teaching, and discipline. Church officials and councils needed to oppose legal injustice and combat political tyranny. Nevertheless, for most early Protestants, law was primarily the province of the state, not the church – of the magistrate, not the pastor.

These Protestant teachings helped to transform Western law in the sixteenth and seventeenth centuries. The Protestant Reformation broke the international rule of the Catholic Church and canon law, permanently dividing the West into separate nations and regions, each with its own religious and political rulers, and triggering a massive shift of power and property from the church to the state. State rulers now assumed jurisdiction over numerous subjects and persons previously governed by the church and its canon law: including marriage and family law, poor relief, education, inheritance, oath-swearing, and public morality. In some Protestant lands, the state also assumed new jurisdiction over church property, clergy, polity as well as public and private religious life (Witte 2021b).

The wide variety of early modern Protestant confessions yielded a wide variety of legal and political arrangements in Protestant lands. Absolute monarchists in Denmark, England, and Prussia were as fervently Protestant as democratic revolutionaries in Scotland, the Netherlands, England, and America. Strict Anglican or Lutheran religious establishments were as deeply rooted in Reformation teachings as novel Anabaptist or Calvinist theories of religious freedom. Some early modern Protestant groups were intense religious pietists and political quietists, while others worked relentlessly to develop written constitutions, enumerated bills of rights, clear separations of powers, and federalist structures of government. Some Protestants turned cheeks in expression of Christian love and martyrdom; others swung swords in pursuit of just wars and democratic revolutions.

3.2 Lutheranism

The Lutheran Reformers of Germany and Scandinavia territorialized the Christian faith, and gave ample new political power to the local Christian magistrate. Luther replaced the medieval 'two swords' teachings with a new 'two kingdoms' theory. The 'invisible' church of the heavenly kingdom, he argued, was a perfect community of saints, where all were equal in dignity before God, all enjoyed perfect Christian liberty, and all conducted their affairs in accordance with the gospel. The 'visible' church of this earthly kingdom, however, embraced saints and sinners alike. Its members still related directly to God and still enjoyed liberty of conscience, including the liberty to leave the visible church itself. But, unlike the invisible church, the visible church needed both the Gospel and human law to govern its members' relationships with God and with fellow believers. The church held the

authority of the word and the Gospel; the state held the authority of the sword and the law (Witte 2002).

Luther's two kingdoms theory supported major legal reforms in Protestant lands. The Lutheran reformers pressed to radical conclusions the theological concept of the magistrate as God's vice-regent called to enforce both tables of the Decalogue. This idea helped to trigger a massive shift in power and property from the church to the state, and ultimately introduced enduring systems of state-established churches, schools, and social welfare institutions as well as comprehensive new state laws to govern public, private, and penal matters. The Lutheran reformers replaced the traditional idea of marriage as a sacrament with an understanding of the marital household as a social estate to which all persons are called – clerical and lay alike. On that basis, the reformers developed a new civil law of marriage, encouraging marriage for all fit adults, featuring requirements of parental consent, state registration, church consecration, and the presence of witnesses for valid marital formation as well as absolute divorce on grounds of adultery, desertion, and other faults, with subsequent rights to remarriage. The Lutheran reformers replaced the medieval understanding of education as a teaching office of the church with a new understanding of the public school as a 'civic seminary' for all persons to prepare for their distinctive vocations. On that basis, magistrates replaced clerics as the chief rulers of education, civil law replaced canon law as the principal law of education, and the general callings of all Christians replaced the special calling of the clergy as the principal goal of education. The Lutheran reformers replaced the medieval view of charity and poor relief as an office of the church funded by the salvific alms of the faithful with a new understanding of the state as the father of the community called to care for all his political children. On that basis, magistrates replaced the clergy as the principal administrators of charity and poor relief, maintaining community chests and welfare institutions supported by taxes. The Lutheran reformers developed a theory of the essential unity of law and equity in the conscience of the Christian judge. On that basis, they developed innovative new theories of practical legal reasoning and pious judicial activism, and advocated the merger of church courts and state courts, of legal procedures and equitable remedies. The Lutheran reformers introduced a new theology of the civil, theological, and educational uses of the law. On that basis, they developed arresting new theories of divine law, natural law, and civil law, and an integrated theory of the retributive, deterrent, and rehabilitative functions of law and authority. Many of these earlier legal changes were echoed and elaborated in Protestant lands on both sides of the Atlantic (Witte 2002; Schmoeckel 2014).

3.3 Anglicanism

In England, the Anglican reformers pressed to more expansive national forms the Lutheran model of a unitary local Christian commonwealth under the final authority of the Christian magistrate. Echoing Christianized Roman imperial laws, King Henry VIII (reign 1509–

1547) 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). They 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. Contraventions of royal religious policy were punishable both as heresy and as treason. Particularly during the long reign of Queen Elizabeth I (reign 1558–1603), England established strong theological and education systems to settle on an Anglican *via media* between Catholic and Protestant views for Great Britain and its growing colonial empire (Haigh 2012).

In the seventeenth century, England moved slowly, through hard experience, toward greater religious toleration. Both King James I (reign 1603–1625) and Charles I (reign 1625–1649) had adopted strong 'divine right of kings' theories, exemplified by political theorists like Robert Filmer (1588–1653). They used these theories to justify firm intrusions into religious, civil, and economic life, and to mount strong persecutions of Protestant non-conformists. In 1640, these Protestants revolted 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. Royal rule and traditional Anglicanism were vigorously reestablished in 1660, and repression of dissenters renewed. But when these dissenters again revolted, 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 gradually fell into desuetude, although Catholics and Jews remained under formal legal disabilities in England until the Emancipation Acts of 1829 and 1858 (Witte 2007).

Despite these intermittent waves of revolt, restoration, and constitutional reform, much English law remained rather strikingly traditional in the early modern period. Unlike other Protestant lands, England did not pass comprehensive new legal reformations that reflected and implemented its new Protestant faith. Armed with the conservative legal syntheses of Richard Hooker (1553–1600) and others, England chose to maintain a good deal of its traditional medieval common law and canon law, which was only gradually reformed over the centuries by piecemeal Parliamentary statutes and judicial precedents. Moreover, after divesting the medieval Catholic church of its lands and jurisdiction during

the early Reformation era, England turned anew to established Anglican church institutions to help administer the new Parliamentary laws of charity, education, domestic relations, and more. Furthermore, England retained church courts to administer much of the state law on family, inheritance, defamation, and other subjects, and these remained legally active until the reforms of 1857 (Helmholz 1990).

3.4 Anabaptism

Early Anabaptist reformers advocated the strict separation of church and state. In their definitive Schleitheim Confession (1527), the Anabaptists called for a return to the communitarian ideals of the New Testament and the ascetic principles of the apostolic church. Anabaptist communities 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 Anabaptists from Russia to Ireland to the furthest frontiers of North America. These 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 (Klaassen 1981).

The state and its law, most Anabaptists believed, was part of the fallen world, which was to be avoided in accordance with biblical injunctions that Christians should 'be in the world, but not of the world' or 'conformed' to it (John 15:18–19; 17:14–16; Rom 12:2; 1 John 2:15–17). Christians should obey the laws of political authorities, so far as Scripture enjoined, such as in paying their taxes or registering their properties. But Christians should avoid active participation in and unnecessary interaction with 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 from Catholics and other Protestants alike – violent martyrdom in many instances (Williams 2021).

While unpopular in its genesis, Anabaptist theological separatism was 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 Anabaptist doctrine of adult baptism. This doctrine gave new emphasis to religious voluntarism as opposed to traditional theories of birthright or predestined 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, 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 (McLoughlin 1971).

3.5 Calvinism

The Calvinist or Reformed tradition charted a course between Lutherans and Anglicans who subordinated the church to state rule, and early Anabaptists who withdrew the church from the state and society. Like Lutherans, Calvinists insisted that each local polity should be an overtly Christian commonwealth that adhered to the general principles of natural law and translated them into detailed new positive laws of religious worship, Sabbath observance, public morality, marriage and family, crime and tort, contract and business, charity and education. Like Anabaptists, Calvinists insisted on the basic separation of the offices and operations of church and state, leaving the church to govern its own doctrine and liturgy, polity and property, without interference from the state. Unlike these other Protestants, Calvinists stressed that both church officials were to join the state in playing complementary roles in the creation of the local Christian commonwealth and in the cultivation of the Christian citizen (Witte 2007).

In Calvin's Geneva, this political responsibility of the church fell largely to the consistory, an elected body of civil and religious officials, with original jurisdiction over cases of marriage and family life, charity and social welfare, worship and public morality. Among most later Calvinists, the Genevan-style consistory was transformed into the body of pastors, elders, deacons, and teachers that governed each local church congregation, and played a less structured political and legal role in the broader Christian commonwealth. But local clergy still had a strong role in advising magistrates on the positive law of the local community. Local churches and their consistories also generally enjoyed autonomy in administering their own doctrine, liturgy, charity, polity, and property and in administering ecclesiastical discipline over their members (Benedict 2003).

Later Calvinists also laid some of the foundations for Western theories of democracy and human rights. One technique, developed by Calvinist writers like Christopher Goodman (c. 1530–1603), Theodore Beza (1519–1605), and Johannes Althusius (1557–1638) on the basis of earlier Protestant teachings, was to ground rights in the duties of the Decalogue and other biblical moral teachings. The First Table of the Decalogue prescribes duties of love that each person owes to God – to honour God and God's name, to observe the Sabbath day and to worship, to avoid false gods and false swearing. The Second Table prescribes duties of love that each person owes to neighbours – to honour one's parents and other authorities, not to kill, not to commit adultery, not to steal, not to bear false witness, not to covet. The reformers cast the person's duties toward God as a set of rights that others could not obstruct – the right to religious exercise: the right to honour God and

God's name, the right to rest and worship on one's Sabbath, the right to be free from false gods and false oaths. They cast a person's duties towards a neighbour, in turn, as the neighbour's right to have that duty discharged. One person's duties not to kill, to commit adultery, to steal, or to bear false witness thus gives rise to another person's rights to life, property, fidelity, and reputation (Witte 2007).

Another technique, developed especially by English and New England Puritans, was to draw out the legal and political implications of the signature Reformation teaching, coined by Luther, that a person is at once sinner and saint (*simul justus et peccator*). On the one hand, they 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 neighbour. Every person is vested with a natural liberty to live, to believe, to love and serve God and neighbour. 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.

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 inspiration and instruction during the great age of democratic construction in later eighteenth- and nineteenth-century North America and Western Europe (Witte 2007).

4 Law, religion, and the Enlightenment

4.1 New Enlightenment teachings on law

The fourth watershed period in the Western legal tradition came with the Enlightenment of the later seventeenth to 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 (1711–1776), Jean Jacques Rousseau (1712–1778), Thomas Jefferson (1743–1826), and others offered a new theology of individualism, rationalism, and nationalism to supplement, and eventually supplant, traditional Christian teachings. To Enlightenment exponents, the individual was no longer viewed primarily as a sinner seeking salvation in the life hereafter. All individuals were created equal in virtue and dignity, vested with inherent rights of life and liberty and capable of choosing their 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 celebrated 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 (Haakonssen 2000–present).

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 and limit the legal authority of the church; new expansion of the rights to marry, divorce, and remarry; new protections for the rights of women and children; 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; new harm-based laws of delicts and torts; and new agitation for the abolition and ultimate expulsion of slavery. Particularly, the massive codification movement of the later eighteenth and nineteenth centuries – exemplified by the new Napoleonic codes of civil law, criminal law, civil procedure, and commercial law – transformed the laws of Western Europe and their many colonies in Latin America, Africa, and Asia.

4.2 Legal theory

The new theology of the Enlightenment penetrated Western legal philosophy. Spurred on by the early impious hypothesis of Hugo Grotius (1583–1645) that natural law and natural rights could exist 'even if there is no God' (Grotius 1993: Prolegomena, 11 [first published 1625]), jurists offered a range of new legal philosophies, sometimes abstracted from, sometimes appended to, earlier Christian and classical teachings. Enlightenment writers grounded natural law and natural rights in human nature and the social contract. Building in part on the ancient Stoic ideas about a pre-political state of nature, various Enlightenment philosophers from John Locke (1632–1704) to John Stuart Mill (1806–1873) argued for a new contractarian theory of human rights and social and political order. Each person, they argued, was created equal in virtue and dignity, and vested with inherent and unalienable rights of life, liberty, and property. All individuals were naturally capable of choosing their own means and measures of happiness without necessary external references or divine commandments. All persons in their natural state were free to exercise their natural rights fully.

But life in this 'state of nature' was, at minimum, 'inconvenient', as Locke put it – if not 'solitary, poor, nasty, brutish, and short', in the phrase of Thomas Hobbes (1588–1679) (Hobbes 2010: ch. 12 [first published 1651]). For there were no means to balance and broker disputes between one person's rights and all others; no incentive to invest or create property or conclude contracts when one's title was not sure; no mechanism for dealing with the needs of children, the weak, the disabled, the vulnerable. Consequently, rational persons chose to move from the state of nature into societies with stable governments – entering into social contracts and ratifying constitutions to govern their newly created societies. By these instruments, persons agreed to sacrifice or limit some of their natural rights for the sake of creating social order and peace, and they agreed to delegate their natural rights of self-rule to elected officials who would represent and exercise executive, legislative, and judicial authority on their behalf. At the same time, however, these social and political contracts enumerated the various 'unalienable' rights and liberties that all persons were to enjoy without derogation, and the conditions of due process of law under which alienable rights could be abridged or taken away. These contracts also stipulated the right of the people to elect and change their representatives in government, and to be tried in all cases by a jury of peers (Vallauri and Dilcher 1981).

4.3 Constitutional law

These Enlightenment views helped to shape the American and French constitutions, which together had a large influence on the reformation of Western constitutional law. The Constitution of the United States (1789) separated the legislative, executive, and judicial powers and set checks and balances on their exercise. The Bill of Rights (1791) elaborated the 'blessings of liberty': guaranteeing citizens freedoms of religion, speech, assembly, and press; the right to bear arms; freedom from forced quartering of soldiers;

freedom from illegal searches and seizures; various criminal procedural protections; the right to jury trial in civil cases; the guarantee not to be to be deprived of life, liberty, or property without due process of law; and protection against eminent domain without just compensation. This set of rights was later augmented by other amendments: the most important of which outlawed slavery, guaranteed equal protection and due process, and gave all adults the right to vote. Contemporary defenders of the Bill of Rights used a variety of arguments: Enlightenment reason being among the best remembered today, but many of these rights had earlier Christian roots, too, and plenty of Christian champions and advocates across the denominational spectrum of the later eighteenth century (Kurland and Lerner 2000; Witte 2021b).

Enlightenment arguments proved more singularly decisive in shaping the French Declaration of the Rights of Man and of the Citizen (1791). This signature constitutional instrument, which eventually helped to revolutionize significant parts of Western Europe, enumerated various 'natural, unalienable, and sacred rights', including liberty, property, security, and resistance to oppression, 'the freedom to do everything which injures no one else', the right to participate in the foundation and formulation of law, equality of all citizens before the law, and equal eligibility to all dignities and all public positions and occupations according to one's abilities. The Declaration also included basic criminal procedural protections, freedom of (religious) opinions, freedoms of speech and press, and rights to property. Both the French and American constitutions and declarations were essential prototypes for a whole raft of constitutional and international documents on rights and liberties forged in the next two centuries, culminating in the Universal Declaration of Human Rights (1948) and the many declarations, covenants, and treaties that it inspired (Witte 2021b).

4.4 Legal education

The Enlightenment also transformed centuries-long patterns of legal education. The first Western universities – founded already in the eleventh century – had been dominated by the faculties of theology, law, and medicine. Together, these three faculties were thought to provide a complete education about the soul, mind, and body respectively. It was common for law students to earn at least a dual doctorate in the canon law of the church and the civil or common law of the state, and for advanced students to combine the study of law with the study of theology. Indeed, bishops, deans, abbots, and other church leaders customarily had legal training alongside their theological formation, and many judges, law professors, and other legal professionals were ranking ecclesiastics. Until the eighteenth century, this interlacing of legal and theological education and professional life was considered normal for Western societies that routinely established Christianity by law. As part of these religious establishments, Catholic hierarchs and, later, Protestant rulers chartered most of the major universities and professional guilds of the West. They further

licensed the professors, clergy, and jurists, and in return expected their allegiance and defense of the locally established church and state (Witte 2021a).

From the mid-eighteenth century onward, however, this centuries-long integration of law and theology gradually broke down under mounting new pressures. Strong Enlightenment philosophical attacks on traditional Christian teachings, together with violent attacks on churches and their clergy in some quarters, shook Western Christendom to its foundations. New constitutional reforms, starting in America, led to the legal disestablishment of religion and to separation of church and state and *laïcité* movements in many Western lands. Comprehensive legal codification movements, starting on the Continent, transformed Western state laws and separated these laws from many traditional religious, moral, and customary norms and institutions. New secular universities, public and private, were founded throughout nineteenth- and twentieth-century Europe and the Americas devoted to scientific methodology, free academic inquiry, and rigorous debate about all subjects. New (social) scientific and sometimes skeptical forms of religious study became ever more acceptable in state universities, leading to strong divisions between public state schools and universities and private religious schools, colleges, and seminaries, especially in the United States. New positivist theories of knowledge separated higher education into growing numbers of increasingly specialized forms of exact, humane, and social sciences – each with its own language, methods, literature, libraries, faculty, and students, and each equipping professional specialists for the workplace. The proverbial renaissance man – praised for wide learning in various fields including the classic liberal arts, theology, law, and medicine – gave way to the scientific and technical specialist.

These modern movements undercut the traditional prestige and integration of theology and law in the Western academy. Theology, once the proud ‘queen of the sciences’ that produced the coveted clerical leaders of society, was slowly reduced to just another discipline in the university, yielding ministers with shrinking cultural privilege and intellectual prerogative. The study of law, too, became more narrow, specialized, and isolated in the later nineteenth and twentieth centuries. In both Europe and North America, legal education became focused on local national law rather than the entire legal system viewed in a comprehensive intellectual context. In Europe and England, law became an undergraduate department, with apprenticeships to follow for budding lawyers. In the United States, legal study was sequestered into new separate professional schools often at the edge of campus and heavily focused on legal practice. By the early twentieth century, most Western legal academies adopted a philosophy of legal positivism that reduced the study of law to the concrete rules and procedures posited by the political sovereign and enforced by the courts. While churches and other institutions and practices might be normative and important for social coherence and political concordance, they

were considered, as John Austin put it, beyond ‘the province of jurisprudence properly determined’ (Austin and Rumble 1995, first published 1832; see generally Witte 2021a).

5 Law and theology today

Although these modern reforms removed many traditional norms and forms of religious influence on law, some of the Bible’s basic laws are still at the heart of Western legal systems today. ‘Thou shalt not kill’ remains at the foundation of the laws of homicide. ‘Thou shalt not steal’ grounds the laws of property and theft. ‘Thou shalt not bear false witness’ remains the anchor of modern laws of evidence and defamation. The ancient laws of sanctuary still operate for fleeing felons, refugees, and asylum seekers. The ancient principles of Jubilee are at the heart of modern laws of bankruptcy and debt relief. Like it or not, the Bible remains an important anchor text for the Western legal tradition (Cochran and VanDrunen 2013).

These biblical sources remain clearly manifest in the canon law, *halakha*, and Sharia religious legal systems maintained by Christians, Jews, and Muslims today. These are sophisticated religious legal systems that govern the clergy, polity, employment, property, doctrine, liturgy, family, charity, burial, and education of the leaders and members of these religious communities. Most secular states defer to these religious legal systems, so long as their leaders exercise no coercion against life and limb and respect the unencumbered right of any religious members to exit. Of growing importance – and controversy – in Western lands are strong new forms of faith-based arbitration that a growing number of voluntary faithful are choosing over secular litigation (Doe 2018; Broyde 2017).

Most modern Western states are less overt about discussing their religious sources, and they are sometimes impeded from acknowledging them because of constitutional mandates of *laïcité* or secularity in parts of Europe or ‘no establishment of religion’ in the United States. Nonetheless, every legitimate state law system has what Lon L. Fuller once 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 (Fuller 1969). 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 (Berman 1993).

The spheres of law and religion also 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, and 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, and pedagogical methods of transmitting the science and substance of their craft to students. Law and religion are institutionally related, through the multiple relationships between political and religious officials and the multiple institutions in which these officials serve.

Moreover, in the twentieth and early twenty-first centuries, Western Christians have remained forceful and effective legal advocates – albeit as minority voices today in much of the West. Catholic legal and political advocacy has grown in depth and power over the past century. Beginning with Pope Leo XIII (reign 1878–1903) and his successors, the Catholic Church has revived and reconstructed for modern use much of the religious, political, and legal thought of the thirteenth-century sage, Thomas Aquinas. This neo-Thomist movement, along with other revival movements within Catholicism, helped launch the early political experiments of the Christian Democratic Party, the rise of sophisticated subsidiarity theories of society and politics, and the powerful new natural law and natural rights theories of Jacques Maritain (1882–1973), John Courtney Murray (1904–1967), and their many students. These developments also helped pave the way for the Catholic Church's Second Vatican Council (1962–1965) with its transforming vision of religious liberty, human dignity, and democracy and with its ambitious agenda to modernize the Catholic Church's legal, political, and social teachings on numerous subjects. A good deal of the energy of these earlier Catholic reform movements are now captured in legally sophisticated Catholic 'social teachings' movements and in various schools of Catholic natural law theory as well as new forms of Catholic 'integralism'. Modern Catholicism has also developed a whole cottage industry of legal and political activism: Catholic non-governmental organizations (NGOs), news media, litigation and lobbying groups have become deeply embroiled in contested national and international legal issues of human rights, religious liberty, capital punishment, marriage, abortion, social welfare, education, and other causes (Shah and Hertzke 2016; Bradley and Brugger 2019).

Protestant teachings on law, politics, and society have also been influential, albeit less comprehensive. In the first half of the twentieth century, great Protestant figures like Abraham Kuyper (1827–1920), Karl Barth (1886–1968), Dietrich Bonhoeffer (1906–1945), and Reinhold Niebuhr (1892–1971) charted provocative new legal and political pathways for Protestantism, building on neo-Reformation models. But their successors

have not developed a comprehensive legal and political program on the order of Roman Catholicism after the Second Vatican Council – despite important advances made by the World Council of Churches and various world Evangelical gatherings. After World War II, most European Protestants tended to fade from legal influence, and many North American Protestants tended to focus on particular political issues, like abortion or prayer in schools, without developing a broader legal theory or political program.

Protestants have made some notable legal and political advances in recent times. One was the civil rights movement of the 1950s and 1960s, led by the Baptist preacher Martin Luther King, Jr (1929–1968) and others, that helped to bring greater political and civil equality to African Americans through a series of landmark statutes and cases. Another was the rise of the Christian right in America in the 1970s to 1990 – a broad conservative political and cultural campaign designed to revitalize public religion, restore families, reform schools, reclaim unsafe neighbourhoods, and support faith-based charities through new statutes and lawsuits. Another has been the recent energetic involvement of Protestant and other Christian intellectuals in campaigns of family law reform, human rights protection, environmental care, social welfare reform, and greater protections for women, children, and racial minorities. Contrasting movements of neo-Anabaptism, Christian socialism, chiliasm, and Radical Orthodoxy among various Protestant groups have pressed for more authentic, and often independent, forms of Christian legal and political living (McConnell, Cochran and Carmella 2001; Marty 1987; Huber 1996). Whether these recent movements are signposts for the development of a comprehensive new Protestant jurisprudence and political theology remains to be seen.

Attributions

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