

JOHN THE THEOLOGIAN: TOWARD INTEGRATING LAW AND RELIGION

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I first met John Makdisi when he became Dean of the St. Thomas University School of Law. He had been dean of two other law schools and a prolific scholar and teacher. His main area of interest was property law, but he also had a specific interest in Islamic Law. As dean, he emphasized scholarship and encouraged faculty writing and publication. I was in the process of evaluating law school mission statements—an interest I acquired while completing my MBA—and John gave the article a gentle push out of the nest. Although I did not feel it was ready to see the light of day, the article landed in the *Journal of Legal Education*.¹

Every dean leaves an impact on the law school they serve and its faculty. St. Thomas Law Dean Makdisi supported and encouraged Professor Siegfried Wiessner's effort in creating an LL.M. program in Intercultural Human Rights. While others will laud his many accomplishments as dean in the J.D. program, his impact on the religious heritage and Catholic mission of St. Thomas Law was greatest in the LL.M. program.

John currently teaches an important foundational course there—*Ethical Moorings: Philosophical & Religious Foundations*—in which he introduces the students to, among other sources, the contributions of St. Thomas Aquinas. The program opened the door for me to explore the impact of religion on human rights, and now I teach the course *Human Rights and Religion*, which identifies the impact of religion on the basic human right of religious liberty.

As a teacher, John demonstrated his broad interest in the law by teaching important basic courses, including Property, Contracts, Evidence, and Remedies. Adding to this his interest in teaching

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¹ Gordon T. Butler, *The Law School Mission Statement: A Survival Guide for the Twenty-First Century*, 50 J. LEGAL EDUC. 240 (2000).

natural law, he could almost be a law school in his own right. He was able to infuse a moral element into that course with the introduction of the thought of St. Thomas Aquinas² and Catholic social teaching.

With his academic and scholarly background in Islamic law and Catholic social teaching, as well as natural law, it is not surprising that John's interest led him to pursue advanced religious studies at Catholic University of America, where he earned a Master's and Ph.D. degree in Moral Theology and Ethics. His dissertation sprang from Pope John Paul II's reinterpretation in the encyclical, *Veritatis Splendor* ("The Splendor of Truth"), of St. Thomas Aquinas' statement that the "morality of the human act depends primarily and fundamentally on the 'object' rationally chosen by the deliberate will," and that, to grasp this object, one must "place oneself in the perspective of the acting person."³ John evaluates the writings of two contemporary scholars who reached inconsistent interpretations of Aquinas' statement. John's dissertation evaluates these interpretations in light of Aquinas' writings and the writings of certain precursors to Aquinas and concludes that, except for some misinterpretations of Aquinas, the contemporary scholars are largely faithful in their

² It was St. Thomas Aquinas (1225-1274) "who was to achieve the expression of the Christian ideology in Aristotelian terms, and who was to utilize Aristotelianism as an instrument of theological and philosophical analysis and synthesis" FREDERICK COPLESTON, A HISTORY OF PHILOSOPHY, VOL. II: MEDIEVAL PHILOSOPHY FROM AUGUSTINE TO DUNS SCOTUS 303 (Image ed. 1993) (1948). The reintroduction of Aristotle into the West caused challenges to Islam, Judaism, as well as Christianity. Islamic scholar Averroes (1126-1198) wrote extensive commentaries on Aristotle's writings and argued that philosophy was permissible in Islam and even compulsory for some elites. The great Jewish philosopher Moses ben Maimon—also called Maimonides and Rambam—(1135-1204) strove to reconcile Aristotelian philosophy and science with the teachings of the Torah. In his famous *The Guide for the Perplexed*, Maimonides argues that, contrary to Aristotle's suggestion that man's highest virtue is "to think," man's highest virtue is "to pray." Rabbi Pinchas Kantrowitz, *Maimonides and Aristotle: Virtue or Virtual?*, OHR SOMAYACH, <https://ohr.edu/1330> (last visited March 31, 2019). What Averroes did for Islam and Maimonides did for Judaism, St. Thomas Aquinas did for Christianity and deserves the love and thanks of every thinking person.

³ John Paul II, Encyclical Letter, *Veritatis Splendor*, § 78 (Aug. 6, 1993) [hereinafter *Veritatis Splendor*].

respective interpretations.

Leaving the details of the dissertation to others, John's efforts compel us as lawyers and law professors to reflect on the importance of concepts such as the morality of our acts, truth, freedom, natural law, and universality, so beautifully displayed in John Paul II's encyclical, *Veritatis Splendor*. Going a step further, we must embrace the centrality of religion and, in particular, the freedom of religion expressed in an earlier encyclical, *Dignitatis Humanae* ("Human Dignity"), referred to several times in *Veritatis Splendor*.

By pursuing excellence in both law and religion, John brings to mind a statue in the center of Porto, Portugal of Prince Henry the Navigator (1394-1460), pointing to the sea at the beginning of the age of European exploration. John the Law Professor and now John the Theologian,⁴ like Prince Henry, is pointing to a future time when law and religion will again come together and clearly reflect the truth and values shown in natural law.

Veritatis Splendor, from which John received the inspiration for his dissertation, describes the current state of affairs wherein religion has lost the ability to shape and impact culture. It is said that one great advantage of Western Christian culture over other cultures is that Christianity gave the West a well-formulated set of moral values. The impact of Christianity on moral consciousness is described in an observation by historian John Lukacs:

The Great Jakob Burckhardt was probably quite right when he wrote that the Christian feelings of sinfulness and humility were feelings of which the ancient world had not been capable. This was a mutation of consciousness more important, and more profound, than the two great changes of the Modern Age: the development of the scientific method and the evolution of historical consciousness . . .⁵

These values, summarized in the Ten Commandments, are now being challenged. As Pope John Paul II reflects:

⁴ Technically, John the Second Theologian, not to be confused with the Apostle John who is often referred to as "John the Theologian."

⁵ JOHN LUKACS, CONFESSIONS OF AN ORIGINAL SINNER 323 (1990).

The *fundamental question* . . . is ultimately the question of the *relationship between freedom and truth*.

According to Christian faith and the Church's teaching, "only the freedom which submits to the Truth leads the human person to his true good. The good of the person is to be in the Truth and to *do* the Truth".

A comparison between the Church's teaching and today's social and cultural situation immediately makes clear the urgent need *for the Church herself to develop an intense pastoral effort precisely with regard to this fundamental question*. "This essential bond between Truth, the Good and Freedom has been largely lost sight of by present-day culture."⁶

Recalling Pilate's question to Jesus, "What is truth?," Pope John Paul II sees the current social situation as one in which individuals fail to know who they are, where they are from, or where they are going, resulting in a downward spiral of self-destruction. His concern is that people no longer acknowledge the absolute nature of moral values and are left to decide for themselves what is good and what is evil. They can no longer recognize that the law of God is always the one true good of man.⁷

Veritatis Splendor looks to the creation narrative of Genesis,

⁶ *Veritatis Splendor*, *supra* note 3, at § 84. One Protestant Christian historian also connects freedom to law through a study of Paul's letter to the Galatians, where Paul likens law to a schoolmaster that:

[p]repare[s] one for freedom, "rough, but a good nurse of youths," to use the words of Homer, whereas on the contrary a premature entrance into the life of apparent freedom can only be the beginning of a life-long slavery. Freedom, as Paul taught, must be the culmination of a long preparation under servitude to the Law; otherwise it can only be injurious, and cannot even be freedom, but only a worse form of servitude. Degeneration is the inevitable result of servitude, whether it be servitude to an external master or to one's own insufficiently educated nature.

WILLIAM MITCHELL RAMSAY, *THE CITIES OF ST. PAUL: THEIR INFLUENCE ON HIS LIFE AND THOUGHT; THE CITIES OF EASTERN ASIA MINOR* 3 (James Family Publishing ed. 1908).

⁷ *Veritatis Splendor*, *supra* note 3, at § 84.

where Adam is told that he must not eat of the tree of knowledge of good and evil, “for in the day that you eat of it you shall die.”⁸ Pope John Paul II sees in this imagery the teaching that “the power to decide what is good and what is evil does not belong to man, but to God alone.”⁹ He sees the connection between law and freedom and recognizes that man’s freedom:

must halt before the “tree of the knowledge of good and evil”, for it is called to accept the moral law given by God. In fact, human freedom finds its authentic and complete fulfilment precisely in the acceptance of that law. God, who alone is good, knows perfectly what is good for man, and by virtue of his very love proposes this good to man in the commandments.¹⁰

Veritatis Splendor recognizes that God’s law—and consequently natural law—is imprinted in the “nature of man” and is therefore “universal,” a truth which is obscured by the alleged conflict between freedom and nature. Nevertheless, Pope John Paul II emphasizes the universality of natural law:

Precisely because of this “truth” *the natural law involves universality*. Inasmuch as it is inscribed in the rational nature of the person, it makes itself felt to all beings endowed with reason and living in history. In order to perfect himself in his specific order, the person must do good and avoid evil, be concerned for the transmission and preservation of life, refine and develop the riches of the material world, cultivate social life, seek truth, practise good and contemplate beauty.

The separation which some have posited between the freedom of individuals and the nature which all have in common, as it emerges from certain philosophical theories which are highly influential in present-day culture, obscures the perception of the universality of

⁸ GENESIS 2:16-17.

⁹ *Veritatis Splendor*, *supra* note 3, at § 35.

¹⁰ *Id.*

the moral law on the part of reason. But inasmuch as the natural law expresses the dignity of the human person and lays the foundation for his fundamental rights and duties, it is universal in its precepts and its authority extends to all mankind.¹¹

Veritatis Splendor goes on to define the morality of an act in relation to man's freedom and truth:

The *morality of acts* is defined by the relationship of man's freedom with the authentic good. This good is established, as the eternal law, by Divine Wisdom which orders every being towards its end: this eternal law is known both by man's natural reason (hence it is "natural law"), and--in an integral and perfect way--by God's supernatural Revelation (hence it is called "divine law"). Acting is morally good when the choices of freedom are *in conformity with man's true good* and thus express the voluntary ordering of the person towards his ultimate end: God himself, the supreme good in whom man finds his full and perfect happiness.¹²

Citing *Dignitatis Humanae*, *Veritas Splendor* recognizes that people are increasingly insisting on the exercise of their own judgment and freedom in reaching decisions without external pressure or coercion. Pope John Paul II adds: "In particular, the right to religious freedom and to respect for conscience on its journey towards the truth is increasingly perceived as the foundation of the cumulative rights of the person."¹³

Dignitatis Humanae, which was the encyclical of Pope Paul VI of December 7, 1965, was the Vatican Council's Declaration on Religious Freedom. Based on human dignity, it provided:

The council further declares that the right to religious freedom has its foundation in the very dignity of the human person as this dignity is known through the

¹¹ *Id.* at § 51.

¹² *Id.* at § 72.

¹³ *Id.* at § 31.

revealed word of God and by reason itself. This right of the human person to religious freedom is to be recognized in the constitutional law whereby society is governed and thus it is to become a civil right.¹⁴

Dignitatis Humanae asserts man's innate obligation to pursue truth and to obey that truth, once it becomes known. To carry out this obligation, man must have religious freedom to pursue the truth:

It is in accordance with their dignity as persons—that is, beings endowed with reason and free will and therefore privileged to bear personal responsibility—that all men should be at once impelled by nature and also bound by a moral obligation to seek the truth, especially religious truth. They are also bound to adhere to the truth, once it is known, and to order their whole lives in accord with the demands of truth. However, men cannot discharge these obligations in a manner in keeping with their own nature unless they enjoy immunity from external coercion as well as psychological freedom. Therefore, the right to religious freedom has its foundation not in the subjective disposition of the person, but in his very nature.¹⁵

A recognition of the universality of truth as it applies to natural law, human dignity, and moral acts goes hand-in-hand with parallel concepts in the human rights regimes. For this reason, it is no wonder that, during his deanship, John supported the creation of the LL.M. program in Intercultural Human Rights. In looking at the morality of individual acts, the focus is, of course, on the individual who can understand the simple proposition put forth by Paul the Apostle in his letter to the Hebrews: “But without faith it is impossible to please him, for anyone who approaches God must believe that he exists and that he rewards those who seek him.”¹⁶

It is one thing to speak of morality at the level of the individual

¹⁴ Paul VI, Encyclical Letter, *Dignitatis Humanae*, § 2 (Dec. 7, 1965) [hereinafter *Dignitatis Humanae*].

¹⁵ *Id.*

¹⁶ HEBREWS 11:6.

actor. It is more difficult, however, to speak of morality when people form societies and grow closer together and groups form and grow larger. Now the problem of maintaining a level of morality becomes complicated.

Human rights are an attempt to introduce morality into national thinking by opening the door to how human dignity—which is necessary for free moral acts—can be protected in a community. In society, the individual faces a whole new set of challenges that repress his freedom. Take one phenomenon that can be observed by anyone. Some might call it “peer pressure” that influences individuals to act against their best judgment. Carl Gustav Jung (1875-1961), a Swiss psychiatrist and founder of the school of analytical psychology, observed that the morality of an organization varies inversely with its size. It is no wonder that a sense of moral imperative has been lost as our societies—as social organizations—have grown so large. Think of 40,000-student universities, churches with 15,000 attendees each Sunday, and neighborhoods with hundreds of homes where no one knows their neighbor. Jung discusses the development of the personality of the individual and states:

The element of differentiation is the individual. All the highest achievements of virtue, as well as the blackest villainies, are individual. The larger a community is, and the more the sum total of collective factors peculiar to every large community rests on conservative prejudices detrimental to individuality, the more will the individual be morally and spiritually crushed, and, as a result, the one source of moral and spiritual progress for society is choked up . . . It is a notorious fact that the morality of society as a whole is in inverse ratio to its size; for the greater the aggregation of individuals, the more the individual factors are blotted out and with them morality, which rests entirely on the moral sense of the individual and the freedom necessary for this. Hence every man is, in a certain sense, unconsciously a worse man when he is in society than when acting alone; for he is carried by society and to that extent relieved of his individual responsibility.

Any large company composed of wholly admirable persons has the morality and intelligence of an unwieldy, stupid, and violent animal. The bigger the organization, the more unavoidable is its immorality and blind stupidity (*Senatus bestia, senators boni viri*). Society, by automatically stressing all the collective qualities in its individual representatives, puts a premium on mediocrity, on everything that settles down to vegetate in an easy, irresponsible way. Individuality will inevitably be driven to the wall. This process begins in school, continues at the university, and rules all departments in which the State has a hand. In a small social body, the individuality of its members is better safeguarded, and the greater is their relative freedom and the possibility of conscious responsibility. Without freedom there can be no morality.¹⁷

The preamble to the Universal Declaration of Human Rights (“UDHR”) adopted in 1948 is an expression of the aspirations of the world after the horrendous events that led to the Second World War. Briefly, the preamble and Article I state:

Whereas recognition of the *inherent dignity* and of the equal and *inalienable rights of all members of the human family* is the foundation of freedom, justice and peace in the world . . .

Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the *rule of law* . . .

Now, therefore, The General Assembly proclaims this Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote

¹⁷ CARL JUNG, THE PORTABLE JUNG 100-01 (Joseph Campbell ed., Penguin Classics 1976).

respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance

All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.¹⁸

The italicized words are what can be called the three pillars of the human rights regime: Human Dignity, Universality, and Rule of Law. In light of the world's diverse cultures, is it possible for the UDHR to meet the following lofty expectation:

In brief, the current surge of concern for human rights represents the potential development of a universal "doctrine" about humanity in community, implying a social ethic. Contained in this doctrine is the implicit assertion that certain principles are true and valid for all peoples, in all societies, under all conditions of economic, political, ethnic, and cultural life. Further, human rights implies that these principles are somehow present in the very fact of our common humanity, properly understood.¹⁹

The word "religion" has many meanings. For example, it often means the scrupulous attention to detail in worship or observance. The root of the word "religion" comes from the verb "*religare*, meaning to bind things closely together, which tells us something very important about religions. Religions bind people together in common practices and beliefs."²⁰

Religions organize to protect information about this life and how to live this life, as well as the afterlife and how to attain it.

¹⁸ G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948) (emphasis added).

¹⁹ MAX L. STACKHOUSE, CREEDS, SOCIETY, AND HUMAN RIGHTS: A STUDY IN THREE CULTURES 1 (1984).

²⁰ JOHN BOWKER, WORLD RELIGIONS: THE GREAT FAITHS EXPLORED AND EXPLAINED 6 (2003).

Religions protect and pass this information on from generation to generation.²¹ The safe place that religions create allow people to explore their life inwardly, as in the Buddhist exploration of enlightenment, peace, and emptiness, as well as outwardly, as in the three great monotheistic religions of Judaism, Christianity, and Islam that have found ways to relate to God as the supreme source of all life and all creation.²² The information collected and protected enables people to live in this world and plan for the next.

Every aspect of life can be incorporated into a religious expression, such as controlled breathing in Buddhism. Information is collected in written form, such as the Bible (Christianity), the Tanakh (Judaism), the Qur'an (Islam), the Struti (Hinduism), the Angas (Jainism), and the Sri Guru Granth Sahib (Sikhism). Rituals and music also present information, facilitate worship, and serve as reminders of what is important.

Christianity, for example, emphasizes three God-ordained authorities that organize life and provide for the protection and development of the next generation. These are the *Family* (covenant between man and woman, which teaches all of the Ten Commandments and is established in Genesis 2); *Civil Government* (covenant with Noah, which enforces Commandments 6-10 with the civil sword and is established in Genesis 9); and *the Church* (covenant with Abraham, which enforces all of the Ten Commandments with spiritual power only and is established in Genesis 15-17).

If religions have this binding effect on society, but vary so

²¹ The importance of the collection of information and passing it on from generation to generation cannot be overstated. To recognize the importance of a single event one must look at it over extended periods of time. For example:

A holiday is always a political creation and a political instrument. It is true, the importance of a calendar and a change in the calendar are not visible in the history of some ten or thirty years. Neither does creative history begin until at least three or four generations have collaborated toward the same goal. No individual can go very far. Real achievements must be based on the continuity of many generations.

EUGEN ROSENSTOCK-HUESSY, *OUT OF REVOLUTION: AUTOBIOGRAPHY OF WESTERN MAN* 8 (1938).

²² BOWKER, *supra* note 20, at 7.

greatly in doctrine, belief, and practice, can it be said there are “universal” principles governing society? The following question may be appropriate: Can a democratic government be maintained without the support of a commonly acknowledged religious value system?

In one way or another, religion, like law, is a part of every culture and, even though an individual culture may try to eliminate it from society, such an effort would likely be futile. Take the observation by Plutarch in A.D. 46:

And if you will take the pains to travel through the world, you may find towns and cities without walls, without letters, without kings, without houses, without wealth, without money, without theatres and places of exercise; but there was never seen nor shall be seen by man any one city without temples and Gods, or without making use of prayers, oaths, prophecies, and sacrifices for the obtaining of blessings and benefits, and the averting of curses and calamities. Nay, I am of the opinion, that a city might sooner be built without ground to fix it on, than a commonweal be constituted altogether void of any religion, and opinion of the Gods; or being constituted, be preserved.²³

Not only is religion a part of society (providing support for “group” rights), but it may also be inherent in the nature of man (providing support for “individual” rights). Consider Carl Jung, who, after many years of practice of psychiatry, observed:

During the past thirty years, people from all the civilized countries of the earth have consulted me. I have treated many hundreds of patients, the larger number being Protestants, a smaller number Jews, and not more than five or six believing Catholics. Among all my patients in the second half of life—that is to say, over thirty-five—there has not been one whose problem in the last resort was not that of finding a

²³ Plutarch, *Against Colotes, the Disciple and Favorite of Epicurus*, in *PLUTARCH’S MORALS VOL. V* 379-80 (William Goodwin ed., A.G. trans., 1878).

religious outlook on life. It is safe to say that every one of them fell ill because he has lost that which the living religions of every age have given to their followers, and none of them has been really healed who did not regain his religious outlook. This of course has nothing whatever to do with a particular creed or membership of a church.²⁴

Without judging the correctness of such matters, the strength of religious commitment can be seen in Protestant biblical commentator James Stifler's comment:

Jesus Christ is not only the central figure in history, he is its source. Without him the course of events from the first century to the present time cannot be explained. Judea has given the world the men, the literature and the institutions which have made it.²⁵

Similarly, the strength of commitment is also seen in the comment of Roman Catholic historian John Lukacs:

I am a historian: and I also believe that the coming of Christ to this world two thousand years ago was the central event in the history of the entire universe—a historical event, and not merely an article of a historically disembodied belief—and that consequently the entire history of mankind divides into two chapters, the first one from Adam and Eve to the First Coming of Christ and the Second until the end of the world, until the Second Coming, when mankind will again be divided between the camps of the Anti-Christ and the minority belonging to Christ. What this means is that believing Christians are even now living a destiny comparable to that of the Jews before the First Coming.²⁶

²⁴ CARL JUNG, *MODERN MAN IN SEARCH OF A SOUL* 264 (1933).

²⁵ J. M. STIFLER, *AN INTRODUCTION TO THE STUDY OF THE ACTS OF THE APOSTLES* 1 (1892).

²⁶ LUKACS, *supra* note 5, at 323. Lukacs' insight as a historian is also demonstrated in the following comment:

If religious truth, as it appears in the natural law, is truly a universal phenomenon, and man's acts cannot be deemed good without conformity to the divine mandate, how can the extreme differences in individual as well as group practices and beliefs be explained? Indeed, although wide differences do exist between religions, scholars of comparative religion have identified many common characteristics found in most religions.²⁷ It is through these

For a long time I thought that the Western European and the English-speaking nations still had most of the makings of a long and prosperous future, for many reasons, the main one being that the appeal of Communism would diminish and disappear—which is what happened. What I did not know in 1947 but what I surely knew a few years later was that the main threat to the Western world no longer came from the Soviet Union but from divers populations of the Third World.

Id. at 303.

²⁷ Common characteristics include the following:

Most religions include belief in the supernatural (spirits, gods, God) or in some other Ultimate Reality beyond, yet connected to human experience or existence.

Religions distinguish between the sacred and profane (or ordinary) in terms of time, space, objects, and people.

Religions strongly encourage or require prescribed ritual activities for individuals and communities of faith.

Religions commonly promote a moral code or ethical principles to guide individuals and communities.

Religious life engages and incorporates common emotional and intuitive human feelings.

Religions both encourage communication and provide ways to communicate or connect with the divine.

Through sacred stories, the religions provide a coherent world view.

Religions organize life for individuals—including dress codes, personal sacrifices, and appropriate occupations—in the context of their respective worldviews.

Religions require and promote social organization and institutional forms to carry out the necessary functions of worship and leadership, preserving orthodox teachings and practices.

Religions promise an inner peace and harmony despite the vicissitudes of life.

Religions typically offer a future hope through the coming of a new age or a better existence in the afterlife.

common elements that threads of consensus are found. Professor John Witte, Jr. has outlined such an approach as it applies to human rights standards and has described elements within Hinduism, Buddhism, Confucianism, Judaism, Islam, and Christianity.²⁸

That religion and law interact is central to the social fabric.²⁹ Scholars have recognized this need for interaction. Professor Harold Berman has identified four characteristics of both law and religion: tradition, authority, ritual, and universality. His thesis is that, as law and religion interact, both will thrive and benefit society, but, when they are seen as antagonistic to each other, both (and hence society) will wither and break apart.³⁰ Religion has lost its vitality, and the way to recover its recognition and vitality is through its legal

Religions must propagate themselves through the recruitment of new members and procreation within the community of faith.

CHARLES KIMBALL, COMPARATIVE RELIGION COURSE GUIDEBOOK 9-11 (2008) (citing NIELS NIELSEN ET AL., RELIGIONS OF THE WORLD (1988)) (examples omitted).

²⁸ John Witte, Jr., *Religion 1* (Emory University School of Law Legal Studies Research Paper No. 14-314, 2013), <http://ssrn.com/abstract=2517762>.

²⁹ The self-destructive tendency of lawlessness is widely recognized among Christian writers. It is pointed out that:

all law is enacted morality and presupposes a moral system, a moral law, *and* all morality presupposes a religion as its foundation. Law rests on morality, and morality on religion. Whenever and wherever you weaken the religious foundations of a country or people, you then weaken the morality also, and you take away the foundations of its law. The result is the progressive collapse of law and order, and the breakdown of society.

R. J. RUSHDOONY, LAW & LIBERTY 4 (reprint 2009) (1984).

³⁰ HAROLD J. BERMAN, THE INTERACTION OF LAW AND RELIGION 78 (1974). Berman points out that he does not speak of the union of law and religion but of their dialectical interdependence:

It is true that in some cultures, like those of ancient Israel and Islam, religion and law are identified with each other. A similar tendency may be found in Hinduism and in many contemporary nonliterate cultures. The initial Buddhist revolt against Hinduism, like the initial Christian revolt against Judaism, was in part a revolt against the excessive sanctification of law and the excessive legalization of religion.

Id.

dimension. That dimension is described as follows:

The principal ways in which law channels and communicates transrational values are fourfold: first, through *ritual*, that is, ceremonial procedures which symbolize the objectivity of law; second, through *tradition*, that is, language and practices handed down from the past which symbolize the ongoingness of law; third, through *authority*, that is, the reliance upon written spoken sources of law which are considered to be decisive in themselves and which symbolize the binding power of law; and fourth, through *universality*, that is, the claim to embody universally valid concepts or insights which symbolize the law's connection with an all-embracing truth. These four elements . . . are present in all legal systems, just as they are present in all religions. They provide the context in which in every society (though in some, of course, to a lesser extent than in others) legal rules are enunciated and from which they derive their legitimacy.³¹

Of course, the modern secular state seems to be built on the concept that it can be operated without a formal recognition of religions. Professor W. Cole Durham, in an insightful article, demonstrates how the state-religion relationship behaves along an elliptical continuum, beginning with situations of positive identification of religion with a state, such as Vatican City, and continuing around the elliptical pattern and returning to the beginning, where you find negative identification (freedom from religion) with states, such as China, Cuba, and North Korea. Around the continuum, you proceed through states with established religions (Spain), states recognizing the jurisdiction of various religions over certain matters (millet system in Israel, India, Lebanon, etc.), states with endorsed religions (Poland, Russia, Paraguay, etc.), states with endorsed religions and preferred religions, and states that cooperate with or accommodate religion, until we approach the far right end of the ellipse. There, we encounter states with positive attitudes toward

³¹ *Id.* at 31 (emphasis added).

religion, but establishing a separationist model, such as the United States. However, as we proceed past the far end, we begin to encounter states following separationist models, but with negative attitudes, such as France. Finally, proceeding further around the ellipse and toward the beginning, where we will find the negative identification states, we pass through states that hold extreme secular control over expressions of religion, such as Turkey.³²

Contrasting Professor Durham's survey approach to state-religion relationships is that of Professor Gábor Halmai, who examines in detail three state-religion relationships: Hungary, Israel, and Egypt. His work addresses the question of whether secularism is a nonnegotiable aspect of liberal constitutionalism. His hypothesis is that "[t]he model of state-religion relations determines the state of religious freedom of a given country."³³ Hungary does not have a constitutionally established church, but has instituted laws that privilege the Roman Catholic Church and hinder other churches. Israel considers itself a "Jewish and Democratic state."³⁴ Professor Halmai sees Israel as a religiously deeply divided state in which the secular government has lost control of any Jewish religious establishment.

With the failure of the two-state solution, Professor Halmai sees as the only solution that Israel "remain[] Jewish but cease[] to be a democracy, or else [that] it become[] a genuinely multi-ethnic democracy but would in that case cease to be 'Jewish.'"³⁵ Finally, Egypt is an example of a Muslim state that uses "[I]slam for national legitimation by claiming their nation needs to be Muslim in the sense that Shari'a must be the law of the land."³⁶ Through various political regimes, the Egyptian Supreme Court has—by means of creative decisions—been able to construe Shari'a in a manner consistent with

³² W. Cole Durham, Jr., *Patterns of Religion State Relations*, in RELIGION & HUMAN RIGHTS: AN INTRODUCTION 360 (John Witte, Jr. & M. Christian Green eds., 2012).

³³ Gábor Halmai, *Varieties of State-Church Relations and Religious Freedom Through Three Case Studies*, 2017 MICH. ST. L. REV. 175, 175 (2017).

³⁴ See generally Asher Maoz, *The Values of a Jewish and Democratic State*, 26 ISRAEL Y.B. HUM. RTS. 289 (1996).

³⁵ Halmai, *supra* note 33, at 192.

³⁶ *Id.* at 194.

human rights. Whether under the current military regime the continued protection will exist remains to be seen.³⁷

Professor Robin Fretwell Wilson questions the wisdom of privatizing family law to accommodate diverse religious social values. Many countries address the issues raised when multiple religiously diverse populations live under the same jurisdiction by adopting what has been called under the Ottoman Empire the “millet system.” It is also referred to as a system of “plural jurisdictions.” Under this system, family law matters are adjudicated under religious courts rather than under the civil courts of the country. Matters such as marriage, divorce, child custody, and inheritance rights are decided under the religious courts of the person’s religion. Israel, for example, and Western Thrace, a part of Greece, allow the millet system. Great Britain recognized the authority of Jewish Beth Din courts for over 100 years and have enforced judgments of those courts under Great Britain’s Arbitration Act. With a Muslim population of more than 1.5 million people, Great Britain has recognized eighty-five Shari’a courts. Wilson’s article compares the treatment women receive in divorce settlement and in inheritance under Great Britain’s law and the treatment under Shari’a. It concludes that the treatment of women is much better under the secular laws throughout Great Britain than under the most liberal school of Shari’a.³⁸ Arguing against the adoption of the millet system, Professor Wilson observes:

States should weigh carefully the risks to women and children before ceding jurisdiction over family matters to bodies that may be unwilling or unable to vindicate their rights. The movement to introduce religious fundamentalism into the family will have dire consequences for traditionally dependent groups,

³⁷ *Id.*

³⁸ Robin Fretwell Wilson, *Privatizing Family Law in the Name of Religion*, 18 WM. & MARY BILL RTS. J. 925 (2010). A recent article describes an attempt at privatization of law in Muslim communities in the Philippines to bring about peace between the Roman Catholic majority and Muslim minority. Jake Maxwell Watts, *Philippine Vote on Muslim Self-Rule Puts Christians on Edge*, WALL ST. J., Jan. 21, 2019, <https://www.wsj.com/articles/philippine-vote-on-muslim-self-rule-puts-christians-on-edge-11548039823>.

women and children, who are deserving the state's protection.³⁹

Even the foundational concept of "human dignity" encounters challenging definitional differences. For example, *Dignitatis Humanae* embraces a concept of universal religious liberty based on an objective view of human dignity tied to universal conceptions of intrinsic human nature.⁴⁰ Other approaches to human dignity include the Russian Orthodox Church that ties human dignity to moral behavior, which is identified with the nation's cultural and religious heritage.⁴¹ The Organization of Islamic Cooperation would tie human dignity to the practice of Islam.⁴² These three approaches share an objective view of the standards of conduct and would root human dignity in the fact of divine creation and objective moral standards. A fourth approach to human dignity is subjective and inheres in the individual's choice as an autonomous agent who can legitimately construct his or her own identity. Here, there is no attempt to conform oneself to objective moral reality (whether essential human nature, perduring communal traditions, or the true faith), but simply "[a]cting in a way that realizes one's authentic self."⁴³

Professor John Witte, Jr., a protégé of Professor Berman, asserts that human rights (law) and religion need each other. A summary of how he identifies the interrelationship is as follows:

Human Rights Culture Needs Religion

Without religion, many rights are cut from their roots;

Without religion, the regime of human rights becomes infinitely expandable;

Without religion, human rights become too captive to Western libertarian ideals;

Without religion, the state is given an exaggerated role

³⁹ Wilson, *supra* note 38, at 952.

⁴⁰ Mark L. Movsesian, *Of Human Dignities*, 91 NOTRE DAME L. REV. 1517, 1519, 1522 (2016).

⁴¹ *Id.* at 1524-25.

⁴² *Id.* at 1525-27.

⁴³ *Id.* at 1527-28.

to play as the guarantor of human rights; and

Without religion, human rights norms have no enduring narratives to ground them.

Religion Needs Human Rights

Religion needs human rights to protect and challenge them;

Religious communities must reclaim their own voices within the secular human rights dialogues;

Religions must be progenitors and practitioners of human rights;

Human rights are the modern political fruits of ancient religious beliefs and practices; and

Religious traditions cannot allow secular human rights norms to be imposed on them from without; they must (re)discover them from within.⁴⁴

The individual and group freedoms known in the West are the result of the interaction of church and state. Historically, the Roman Catholic Church's asserted right to choose its leaders without interference by the local kings and other civil authorities occurred in the eleventh century A.D.:

The seminal event in the separation of sacred and secular authorities is the Investiture Controversy of 1076, in which the Roman Catholic Church asserted its independence from secular authorities and claimed the exclusive right to control all ecclesiastical appointments. Because the Church also asserted authority over the civil authorities, a struggle ensued that lasted until the Reformation. The Investiture Controversy created a corporate institution separate and apart from the civil authorities. It was to this "centralized ecclesiastical government to which every person had the right of appeal beyond feudal authority,

⁴⁴ Witte, Jr., *supra* note 28, at 31-33. See also John Witte, *Religious Sources and Dimensions of Human Rights* 25-27 (Emory University School of Law Legal Studies Research Paper No. 14-317, 2013), <http://ssrn.com/abstract=2517738>.

regional ruler, disobedient clergy, and civic order.” The controversy created a civil space which, over the long term, allowed organizations to develop free of civil or ecclesiastical control and in promotion of the rule of law.⁴⁵

Perhaps with only slight exaggeration, it has been said that, “[i]n western civilization, at least since Gregory VII, two sovereign powers have always balanced each other. This, and this alone, has created European freedom.”⁴⁶ Another commentator notes:

The separation and recurring clashes between church and state that typify Western civilization have existed in no other civilization. This division of authority contributed immeasurably to the development of freedom in the West.⁴⁷

This clash over the appointment of ecclesiastical leadership continues today. It is raging in China, where the Roman Catholic Church has recently agreed to government involvement in the selection of Roman Catholic Bishops.⁴⁸

Economic prosperity in the West is seen to result from religious activity. Max Weber famously asserted that capitalism resulted from the Protestant doctrine of predestination:

The relationship between development of modern capitalism and the Reformation has been debated for more than a hundred years, in large measure because of Max Weber’s *Protestant Ethic and the Spirit of*

⁴⁵ Gordon T. Butler, *The Essence of Human Rights: A Religious Critique*, 43 U. RICH. L. REV. 1255, 1305-06 (2009).

⁴⁶ ROSENSTOCK-HUESSY, *supra* note 21, at 543.

⁴⁷ SAMUEL HUNTINGTON, *THE CLASH OF CIVILIZATIONS AND THE REMAKING OF WORLD ORDER* 70 (1996).

⁴⁸ Adam B. Summers & Lawrence J. McQuillan, *The Pope Bows to Beijing*, INDEP. INST., Mar. 2, 2018, <https://www.independent.org/news/article.asp?id=9318>. The authors estimate there are 70 million Christians in China of which 12 million are Roman Catholic. *Id.* In the United States, there is a ministerial exception to employment discrimination laws allowing members of a religious group to select their own ministers. *See generally* *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 132 S.Ct. 694 (2012).

Capitalism (1904-1905), one of the twentieth century's most influential works of historical sociology. Working backward from sociocultural divergences between Catholics and Protestants in various regions of central Europe in the late nineteenth century, Weber argued that Reformed Protestantism in particular unintentionally and indirectly precipitated the takeoff of Western capitalism. Radicalizing the notion of the "calling" (*Beruf*) that Luther had expanded from vowed religious life to encompass all Christians, Calvin emphasized double predestination, which promoted psychological anxiety and a desperate quest to discern in one's own behavior the signs of God's election. Anxious self-scrutiny about one's status in God's eyes thus generated the Reformed Protestant "innerworldly asceticism" characterized by self-conscious hard work, diligence, self-discipline, and frugality that seemed to betoken elect status in proportion as such virtues were consistently practiced. The behaviors driven by this Protestant ethic also generated wealth and profits, especially among English Puritans, which in turn contributed to a sense of God's individually tailored providential favor. Once the original religious impulse about the discernment of one's election was secularized . . . the established behavioral patterns remained as a residue: hence the acquisitive, entrepreneurial zeal of modern capitalists, those "specialists without spirit, hedonists without heart" who fashioned the inescapable "steel-hard casing" . . . of modern society that Weber excoriated at the end of his work.⁴⁹

Weber's thesis has sparked a hundred years of intense debate. Nevertheless, the impact of religion on the development of prosperity cannot be denied. In fact, in their effort to duplicate or exceed the

⁴⁹ BRAD S. GREGORY, *THE UNINTENDED REFORMATION: HOW A RELIGIOUS REVOLUTION SECULARIZED SOCIETY* 240 (2012).

West in economic strength, scholars in China have been studying the West for clues of how to duplicate its prosperity. Niall Ferguson recently described the major features of Western civilization. In a chapter entitled “Work,” he describes Weber’s thesis and notes the interest of Chinese scholars in Western religion. He quotes an anonymous Chinese scholar:

We were asked to look into what accounted for the . . . pre-eminence of the West all over the world . . . At first, we thought it was because you had more powerful guns than we had. Then we thought it was because you had the best political system. Next we focused on your economic system. But in the past twenty years, we have realized that the heart of your culture is your religion: Christianity. That is why the West has been so powerful. The Christian moral foundation of social and cultural life was what made possible the emergence of capitalism and then the successful transition to democratic politics. We don’t have any doubt about this.⁵⁰

The point is made here is that religion is universal and that it is the root of personal morality and freedom and social prosperity. It is important in every society and in the life of individuals and social groups. Religion has supported personal and collective freedom, the mental health of the individual, and economic prosperity. While religions can and are often associated with controversy, war, destruction, and death, it also calls man to his highest achievements,⁵¹ and has been a major vehicle in the development of life in the West

⁵⁰ NIALL FERGUSON, *CIVILIZATION: THE WEST AND THE REST* 287 (2012) (citation omitted).

⁵¹ Orson Welles is a legend of the film industry due to *Citizen Kane*, in addition to the rest of his body of work. In *The Third Man*, he added an unplanned monologue. He wrote, “In Italy, for thirty years under the Borgias, they had warfare, terror, murder, bloodshed, but they produced Michelangelo, Leonardo da Vinci and the Renaissance. In Switzerland, they had brotherly love, they had five hundred years of democracy and peace - and what did that produce? The cuckoo clock.” *The Third Man* (London Films 1949).

during the Modern Age.⁵² As that age quickly closes,⁵³ and some new age begins, we can rest assured that man's religious nature will demand recognition and that man's quest for truth will continue. Thus, it is vitally important that students recognize the importance of religion and learn how to incorporate it into their lives and practices.

Finally, as John Bowker, in his comprehensive and colorful study of the world's religions, concludes:

We can decide to abstain from religion, just as we can decide to abstain from sex or (for short intervals) from food. But perhaps to abstain completely from something so basic as religion is to make oneself less

⁵² The European conquest of the world began when Prince Henry of Portugal (1394-1460), better known as Henry the Navigator, built a school for navigators at Sagres near Cabo de São Vicente in Portugal (the western most point in Europe). The purpose of the school was to train men to explore the Atlantic Ocean and find ways to riches in the unknown. That the effort was so effective was that the exploration was the result of not only material conquests, but also spiritual:

Roman Catholic doctrine revolved around the notion of "Two Swords." Put forward by Pope Boniface VIII, the doctrine holds that there is the sword that wields power in the material world and is held by the state. There is also the sword held by the Church that wields power in the spiritual world. This does not mean divided rule. Each sword supports the other. It means that where one goes, the other goes as well, and that political and spiritual power can't be divided. This drives the evangelical spirit of the Church. Christianity was prepared to use the sword to convert, but it also saw conversion as being led by clerical evangelists who brought Christianity to the heathen. Christianity seduced the heathen by the richness of its thought, and the discipline and conviction of its warriors. Christianity, like Islam, was not only something to submit to, but something worth emulating.

GEORGE FRIEDMAN, *FLASHPOINTS: THE EMERGING CRISIS IN EUROPE* 39-40 (2015).

⁵³ Around the year 1500 A.D., the world moved out of the Middle Ages and into what has since become known as the Modern Age. At the time, people hardly knew what was happening in the world, but the changes were monumental. Some historians would call this the Bourgeois Age and the principal characteristics were: the State; Money; Industry; Cities; Privacy; the Family; Schooling; the Book; Representation; Science; and an evolving historical consciousness. The Modern Age is ending and even the casual observer can see the fading of all these characteristics except the last two. *See generally* JOHN LUKACS, *AT THE END OF AN AGE* (2002).

than fully human.⁵⁴

John the Theologian understands this final point and stands ready to point the way into a future, not yet understood or seen, but with a certainty that it will only become known through the moral acts of individuals seeking to integrate law and religion.

⁵⁴ BOWKER, *supra* note 20, at 9.