

OF SEPTEMBER 11 and  
THE MAKING OF MANY BOOKS

GUEST EDITOR'S INTRODUCTION

This issue of the journal represents the second installment of a project to review some of the important books on law and religion that appeared in the past decade. The first installment appeared in volume 15, a special double issue of the journal devoted to the exploration of Islamic law and its pertinence to our world. The third installment—on biblical law and Jewish law (broadly conceived to encompass not only *halakah*, but also modern Jewish social ethics and religious reflections on the *Shoah*) will appear shortly in volume 17.

This entire project has been made possible by a generous grant from the Lilly Endowment. All of us at the journal are deeply grateful to the officers of the foundation, particularly to Dr. Craig Dykstra, Vice-President for Religion, for enabling the journal to undertake this project and to disseminate these issues of the journal broadly.

I am also grateful to the international community of scholars who have contributed their insights to this important project, and to my support staff at Valparaiso University—Nancy Young and Debbie Bercik—and to the superb staff of the journal at Hamline University—Marie Failing, Howard Vogel, Linda Berglin, and Steve Liebo, as well as our student staff—without whom this ambitious project could never have come to this conclusion.

To return to the first installment on Islamic law, I would like to emphasize the commitment of the journal to explore the relevance of this theme in our future endeavors. For example, two books on Islamic law are reviewed in this issue by Anver Emon. From the beginning of the journal, we have been aware that *Shari'ah* law is one of the oldest religious legal traditions in the world. But the efforts of our colleague, Dr. Azizah Al-Hibri, to dedicate an entire volume to this theme have transformed the journal into a respectable place for serious scholars to sustain an important conversation about the authoritative and the authoritarian in this religious tradition—a phrase I borrow from the title

of a recent work by Khaled Abou El Fadl,<sup>1</sup> a distinguished Islamic scholar at UCLA Law School—as well as in other traditions such as Jewish law and canon law. I also wish to acknowledge gratefully the generous assistance that Dr. Abou El Fadl gave me in organizing the categories of the books reviewed in volume 15 of the journal, and in suggesting names of potential reviewers.

Rarely has the importance of this distinction between legitimate religious authority and its abuse been more urgent than the present moment. One thinks of the Crusades, the Thirty Years War, and the rise of the Third Reich as obvious examples of atrocities that occurred in part because religious discourse was uncritically appropriated and applied by secular rulers to their own ends. Each of these moments of history can be thought of as a blend of religion and law. Indeed, they are frequently invoked by secularist thinkers as proof of the danger of the enterprise that early scholars on the interaction of law and religion, like Harold Berman and this journal, have stood for in the past two decades.

See what happens, they say. Christians killed Jews in the Rhineland even before any of the crusaders set foot in Jerusalem. When they got to the city of peace, they overwhelmed the Muslim inhabitants of the place of the Prophet's ascension. And they locked the Jewish community into a synagogue and burned it with its precious human contents to ashes, setting a precedent for the crematoria in the Nazi death camps. In a series of conflicts between 1618 and 1648 Lutherans killed Catholics and Catholics killed Lutherans, claiming the lives of 15% of the population in the contested areas of Europe. And the Nazi plan to eliminate the Jewish population of Europe was the logical culmination of the world's oldest hatred. The Nazis did not invent anti-Semitism; they built upon the widely held Christian heresy that Jews are a rejected people, a deicide race.

But the secularist claim that law and religion are a lethal brew needs much more refinement. For one thing—in the wake of the wars of mass destruction waged in the twentieth century by secular governments of the political Left, Right, and Center—it is difficult to verify the hypothesis that the political order would be safer if it were wholly secular. For another, religious freedom is now widely cherished as a secular good protected not only in the American constitution and in constitutions all over the globe, but also in international covenants such as those sponsored by the United Nations and the European Union.

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1. See Khaled Abou El Fadl, *The Authoritative and Authoritarian in Islamic Discourses*, reviewed in 15 *J. L. & Relig.* 397. See also Joseph Vining, *The Authoritative and the Authoritarian* (U. of Chi. Press 1986).

Thus the failure of law to secure religious freedom is the denial of a secular good.

It does not follow that the deprivation of a secular good such as religious freedom justified the use of force by the crusaders, the combatants in the Thirty Years War, or by the Nazis. It is, however, sobering to recall that secular justifications, not religious ones, played a role in the history of the Crusades, the Thirty Years War, and the war against the Jews. The Crusades were launched as an effort to restore freedom of movement, the right to travel, access to a land deemed holy not by one religion, but by three world religions.

The Thirty Years War began as a response to an outrageous act of sectarian violence. But to characterize this war as a religious crusade is mistaken for several reasons. First, freedom from violence inflicted because of religious hatred is a civil right or a secular good. Second, the decisive intervention in this long, dragged-out affair was the participation of the Catholic King of France against the Catholic Holy Roman Emperor in order to inflict a fatal blow upon Catholic Spain, the enemy of France. This fact suggests that secular considerations such as nationalist lust for territorial control were as prominent a feature in this war as sectarian violence. Third, when the war came to an end in 1648, secular power again emerged as the central principle in the secular document known as the Peace of Augsburg, which stated succinctly in Latin: "cuius regio, eius religio" (whose rule, his religion). Douglas Laycock describes this principle as follows:

Each ruler in the empire would choose the religion of his realm; all his subjects would have to conform or emigrate . . . . This principle made the State supreme over fundamental religious choices, and to the extent it could be enforced, it required State suppression of minority faiths and made the population of each state religiously uniform . . . .<sup>2</sup>

The Peace of Augsburg led to state supremacy over the established church. Some peace! Some domination of law by religion!

Nazi Germany cloaked its manifestly secular ends under the guise of religious discourse. For example, it adapted the right arm salute of ancient Rome as a symbol of totalitarian loyalty to the Führer. Joseph Göbbels, the Reich's Minister of Propaganda, made every effort both to ground Nazi ideology about the Jews in Christian anti-Semitism (especially that of Martin Luther) and literally to demonize the Jews. And

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2. Douglas Laycock, *Continuity and Change in the Threat To Religious Liberty: The Reformation Era and the Late Twentieth Century*, 80 Minn. L. Rev. 1047, 1052-1053 (1996).

as early as 1932, the Nazis established the Faith Movement of German Christians for the purposes of stirring up intense German nationalism and hostile attitudes to Jews, Catholics, and Communists. But governmental invocation of religious authority does not render this use of religion authentic or legitimate. The war against the Jews—first through the *Einsatzgruppen* in the East and then in the death camps in Poland—was not a religious war, but one waged on secular grounds, invoking the same myth of racial superiority that reigned in American law at the time.

These three episodes in military history do not demonstrate that significant links may not be forged between religion and law. They only illustrate that religious arguments in the hands of self-interested secular leaders can lead to serious mischief, and—worse yet—that unthinking submission of religious leaders to secular authority can lead to atrocity, for the power of the sword is then subject to no transcendental restraint upon its exercise.

Which brings us to the relevance of these reviews for the present moment. The articles and reviews on Islamic law that Dr. Al-Hibri and I solicited and edited provided an unintended but timely comment by scholars all over the world on the distinction between the authoritative and the authoritarian that erupted into our horizon of consciousness on September 11, 2001. Interest in Islam had been growing steadily in this country throughout the past decade. But the events of September 11 caused a quantum leap of interest in Islam far beyond the growing population of Muslims in America and the relatively small number of scholars in religious studies knowledgeable about Islam. After September 11, focus in the United States was riveted on Islam as never before, and at all levels from mass communication in the popular media to the highest levels of governmental power.

It is curious that some of our political leaders appeared to have no comprehension of the many reasons that could be adduced for widespread dissatisfaction with American policy in the Muslim world. “Why do they hate us so much?” is a question one might expect to arise from uninformed masses in the immediate aftermath of a stunning atrocity. But it seems misplaced on the lips of highly placed officials with responsibility for shaping the very policies that the terrorists were attacking: American involvement in the Gulf War and our tilt toward Israel in the Middle East.

Nothing in volume 15 or this issue of the journal supports or justifies the outrageous events of September 11. But much in these issues of the journal can help reflective people to ask important questions about the interaction of law and religion in the wake of these

tragic events.

The invocation of Islam by Osama bin-Laden is itself a call for a deeper search for authentic voices to interpret Islamic law. It also serves as a chastening reminder of the terrible consequences of the imperialism of a former day. As Dr. Abou El Fadl has reminded us, naive literalist interpretations of the Qur'an are a deeply regrettable by-product of the destruction of Islamic schools throughout the British and French empires, leaving behind a vacuum into which untrained and unsophisticated authoritarians could pose as though they were authoritative.<sup>3</sup>

Many things changed on September 11, 2001. Hijacking was not invented that morning. But before that, it meant the seizure of an airplane in transit to take its passengers hostage or to force it to land at a new destination. Now it meant the transformation of a civil aircraft into a weapon of mass destruction, with ripple effects throughout the economy of an entire nation. We need also to acknowledge that the group responsible for planning and executing the terrorist attacks on September 11 did not only hijack the property of American Airlines and United Airlines. They also hijacked the very tradition they purport to represent, for Islamic faith—authentically heard and accepted—unambiguously condemns as evil the destruction of innocent civilian lives perpetrated on September 11. Al-Qaida is no more authentic a representative of Islam than the Ku Klux Klan is of Christianity.

On September 17, President Bush visited the Islamic Center of Washington, D.C., where he put the issue of theological authenticity this way:

These acts of violence against innocents violate the fundamental tenets of the Islamic faith. And it's important for my fellow Americans to understand that. The English translation is not as eloquent as the original Arabic, but let me quote from the Koran, itself: In the long run, evil in the extreme will be the end of those who do evil. For that they rejected the signs of Allah and held them up to ridicule. The face of terror is not the true faith of Islam. That's not what Islam is all about. Islam is peace. These terrorists don't represent peace. They represent evil and war.<sup>4</sup>

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3. See Khaled Abou El Fadl, Introduction, in *And God Knows the Soldiers: The Authoritative and Authoritarian in Islamic Discourses* 1 (U. Press of Am. 2001); Khaled Abou El Fadl, *The Place of Tolerance in Islam: On reading the Qur'an—and misreading it*, 26 *Boston Rev.* 34-36 (Dec. 2001/Jan. 2002); Khaled Abou El Fadl, *Islam and the Theology of Power*, 221 *Middle E. Rpt.* 28-33 (Winter 2001).

4 *'Islam is Peace' Says President*, Remarks of President Bush at Islamic Center of Washington, D.C., Sept. 17, 2001. (<http://www.whitehouse.gov/news/releases/2001/09/20010917>)

Forces within Islam are now contending with one another for legitimacy. In December of 2001, a group of Pakistani terrorists launched an attack on the Parliament of neighboring India. Both countries massed troops on their borders. Neither renounced the use of the nuclear weapons each has recently acquired. After intense negotiations, both sides have withdrawn from the brink of a war of full-scale terror that neither they nor any nation can afford. In a lengthy address on January 12, 2002, Pakistan's President Pervez Musharraf assured his neighbors that he would crack down on Pakistani organizations that use Islam as a justification for terrorist operations against India. Musharraf cited language from his first inaugural address in 1999:

Islam teaches tolerance, not hatred; universal brotherhood, not enmity; peace, and not violence. I have a great respect for the Ulema and expect them to come forward and present Islam in its true light. I urge them to curb elements which are exploiting religion for vested interests and bringing a bad name to our faith.

He added:

Sectarian terrorism has been going on for years. Every one of us is fed up with it. It is becoming unbearable. Our peace-loving people are keen to get rid of the Klashinkov and weapon culture. Everyone is sick of it.<sup>5</sup>

Serious theological training turns out to be relevant not only to differentiating the authoritative and the authoritative within Islamic culture, but also to the task of naming an American military operation. The first name the Pentagon gave to the military campaign in response to the events of September 11 was "Crusade against Terrorism." This cultural gaffe evoked throughout the Muslim world a vivid memory of six wars waged by soldiers from Christian Europe in the "Holy Land" from the eleventh to the thirteenth century. The distinguished Cambridge historian, Sir Steven Runciman, concluded his magisterial treatment of the Crusades as follows:

The triumphs of the Crusade were the triumphs of faith. But faith without wisdom is a dangerous thing. By the inexorable laws of history the whole world pays for the crimes and follies of each of its citizens. In the long sequence of interaction and fusion between Orient and Occident out of which our civilization has grown, the Crusades were a tragic and destructive episode. The historian as

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-11.html).

5. English Rendering of President General Pervez Musharraf's Address To the Nation, Jan. 12, 2002. ([http://www.pak.gov.pk/public/President address.htm](http://www.pak.gov.pk/public/President%20address.htm)).

he gazes back across the centuries at their gallant story must find his admiration overcast by sorrow at the witness that it bears to the limitations of human nature. There was so much courage and so little honour, so much devotion and so little understanding. High ideals were besmirched by cruelty and greed, enterprise and endurance by a blind and narrow self-righteousness; and the Holy War itself was nothing more than a long act of intolerance in the name of God, which is the sin against the Holy Ghost.<sup>6</sup>

Whether one accepts Runciman's final verdict on the Crusades, the use of this term in the present context played into the hand of Osama bin-Laden, who knew what he was doing for Islamic ears when he kept referring to the military operations in Afghanistan as a western "crusade." General Eisenhower could get away with calling the American involvement in World War II a "Crusade in Europe." No longer can the Pentagon afford to make a mistake like that. The first name for the response to terrorism was quickly withdrawn.

The second name given to the American-led military campaign was "Infinite Justice." It is hard enough to achieve a very rough, finite justice in a case as immensely complicated as the terrorist attacks of September 11. Why call the task "infinite"? It is one thing to ask religious leaders to the White House to ponder the troubling moments we are living through. It is another to invoke an attribute of the Transcendent and to identify it with the purposes of the nation state. Perhaps to avoid the near occasion of sin—the masses falling into idolatry—this denominator was short-lived as well.

Then came "Enduring Freedom." Who can be against the hope that fundamental freedoms assaulted on September 11 would endure? On September 12 Paul McCartney wrote a song called "Freedom."

This is my right, a right given by God, to live a free life, to live in freedom . . . . Anyone who tries to take it away will have to answer 'cause this is my right. I'm talking about freedom . . . . I will fight for the right to live in freedom.

My oldest daughter Mairéad and I swayed with the crowd in Madison Square Garden when McCartney performed this song at the end of the Concert for New York City on October 20. All the artists and celebrities contributed their talents to the cause, and every penny from the ticket sales and from the contributions that poured in from the television audience around the world was donated to the 911 Fund to aid the victims of September 11. The event did untold good, not least of

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6. Steven Runciman, *3 A History of the Crusades* 480 (Cambridge U. Press 1954).

which was the catharsis I observed among the New York firefighters in the first several rows in front of the stage. It was sweet to see some relief from all that grief and mourning for fallen comrades. As Richard Gere reminded us that night, these heroes never ask whether those trapped in a burning building are Catholics or Protestants, Jews or Muslims, Republicans or Democrats, black or white; they just help people in trouble by providing service at risk to their own lives. That was as strong a statement about the goals of law as I have heard in several decades as a student of law. And as brief and powerful a sermon about the ends of religion at its best.

Months later, I am left with questions. Not about whether life, liberty, and the pursuit of happiness are—in the words of the Declaration of Independence—“unalienable rights” given to us not by government but by the Creator. Nor even about the obvious difference between talking about freedom and fighting for it. But questions about where and how those who try to take away freedom will have to answer: in criminal courts such as those that convicted the earlier assailants upon the World Trade Center, or in military tribunals shrouded in secrecy. As this issue appears, bin-Laden and his closest associates remain beyond the power of law to require them to answer for the enormous crimes with which they stand accused. Even more fundamental questions still haunt us. Does fighting for the right to live in freedom mean that we are or should be in a state of war, and if so, against whom?

Questions such as these are not definitively answered in this issue of the journal. But the reviews collected here should help to sustain the habit of reflection on the connections between law and religion not only in American public life, but in the world around us, with which we are so much more intimately connected after September 11. No longer is there much loose talk about isolationism or easy, unilateral repeal of flawed treaties. Now the watchwords in international law are “coalition” and “mutual interest in repudiating terrorism.”

I suppose that these important goals could be pursued without either law or religion guiding the quest, let alone an endeavor in which law and religion are seen as correlates. But it seems to me that the pursuit of these goals in that way is a sure path toward anarchy (lawlessness) or tyranny (authoritarianism). The intermediate position between these mirror images of social evils is, of course, freedom. In the creative imagination of Thomas Jefferson and Paul McCartney (and lots of others in between, such as Sojourner Truth, Elizabeth Cady Stanton, Frederick Douglass, and Martin Luther King, Jr.), freedom is God-given, inherent in the dignity of the human person.

A little over a decade ago the Berlin Wall came tumbling down. It is said that this happened because the wall could no longer support the weight of the single word, "freedom." This word, "freedom"—with all of its rich ambiguity and challenge for critical thought—forms a common thread running through virtually all of these reviews of books written in the past decade.

The world in which we now live, move and have our being is more dangerous than it used to be, or at least it seems so to Americans now that the dangers of the modern world have exploded in our homeland for the first time since Pearl Harbor or—if one notes that Hawaii was a possession, but not a state in 1941—since the British assault upon the nation's capital in the War of 1812.

But the mere fact that we are now more aware that our lives are fragile, our movements are somewhat restricted, and our very collective being is imperiled is no excuse to withdraw from the duty to live a free life, to live in freedom. The present moment offers us not an excuse for narcissism, but a duty to sustain our connections with others. All of this suggests that the present moment offers us no excuse to take an anti-intellectual turn or a vacation from rigorous thinking.

Now above all is not the moment to retreat into the pessimistic thinking of Qoheleth, who characterized life as utter futility. The famous Irish song, "Galway Bay," describes the futility of British imperialism this way: "You might as well go chasing after moonbeams or light a penny candle from a star." With a similar metaphor Qoheleth casts doubt on the entire human enterprise: "Then I considered all that my hands had done and the toil I had spent in doing it, and again, all was vanity and a chasing after wind, and there was nothing to be gained under the sun." (*Ecc* 2:11). Within this world view, it is unsurprising that Qoheleth famously challenged the usefulness of writing and studying books, characterizing this project as one of the many vanities that make up our absurd existence: "Of making many books there is no end, and much study is a weariness of the flesh." (*Ecc* 12:12).

If we are all going to die and that is the end of the matter, why bother writing or reading many books? One can readily agree with this text if what the author meant is that an awful lot of junk gets published, and that no one should be bothered with stuff like that. Or one could learn a lot from this text if its point was self-deprecating humility, that his readers have enough wisdom collections without bothering with his own reflections on life and death. Even if later rabbinical judgments proved him wrong on this score by including his work in the portion of the Hebrew Bible known as "*haketubim*," or "the writings,"—despite the

skepticism and pessimism of the book—it is refreshing to hear from a biblical author that it is not a good thing to go prancing about as though each word we write or speak is divinely inspired.

Whatever ones makes of the biblical text I have invoked as the title of this introduction to these reviews, we need to get away from the instant analysts and the spin-doctors. Now is the time to find excellent books that stretch the mind and open the heart. I hope that these reviews will inspire a lot of reading and rereading of many worthwhile books on the interaction between law and religion, for now is a time when authentic connections of this sort need to be differentiated from the inauthentic, when the authoritative needs to be distinguished from the authoritarian.

The themes explored here illustrate how far we have come since the inauguration of this journal. The law and religion movement was never content to be confined within the boundaries of church-state law, especially as that project has been conceived of by the United States Supreme Court. For example, although Harold Berman was well aware of the Court's cases on the Religion Clause of the First Amendment when he delivered his seminal lectures entitled *The Interaction of Law and Religion*, he wrote more expansively of religion in 1974: "Religion is not only a set of doctrines and exercises; it is people manifesting a collective concern for the ultimate meaning and purpose of life—it is a shared intuition of and commitment to transcendent values."<sup>7</sup> I have long thought that the most important word in the title of this journal is "and." *The Journal of Law and Religion* highlights the *conjunction* of two disciplines that had too long been regarded as autonomous. This issue of the journal is a felicitous, if modest, attempt to further the discussion about the myriad ways in which law and religion may legitimately be conjoined.

The books reviewed in this issue of the journal are grouped alphabetically by title in categories that sometimes overlap: American Constitutional Law, Canon Law, Civil and Human Rights, Criminal Justice, Education, Family Law, Historical Studies: Church History and Legal History, International Law, Islamic Law, Jurisprudence, Law and Religion, Native American Religion, The Professions, Religion and Public Life, Science and Religion, Sociology of Religion, and War and Peace. Only a sampling of the books published in the last decade are

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7. Harold J. Berman, *The Interaction of Law and Religion* 24 (Abingdon 1974); for a discussion of the Court's case law on the Religion Clause of the First Amendment, see *id.* at 140-141. See also Harold J. Berman, *Faith and Order: The Reconciliation of Law and Religion* 8-20 (Scholars Press 1993).

reviewed here, but we provide an extensive bibliography in each section that can assist both avid readers and librarians seeking to expand their collections to enable others to read more broadly and more deeply.

To return to September 11, it is an unplanned accident, but a fortunate one, that the last reviews in this issue focus on war and peace. None of these reviewers was asked to reflect on the events of September 11 and the implications of these events for both law and religion. But their reflections have a powerful resonance in the world in which we now find ourselves. The list of authors and editors represented in this section is an impressive one: Scott Appleby, Stanley Hauerwas, Chris K. Huebner, Harry J. Huebner, James Turner Johnson, John Kelsay, Mark Thiessen Nation, Glenn Stassen, Michael Walzer, and John Howard Yoder. So are the reviewers: Lisa Sowle Cahill, John Carlson, Martin Cook, Scott Davis, Stanley Hauerwas, Steve Long, Richard Miller, Tom Shaffer, J. Alexander Sider, and Doug Sturm. Taken as a whole, these thoughtful reflections on the just war tradition and its pacifist critics offer much food for thought about the kind of world we now live in.

Immediately after September 11, repudiation of terrorism was widespread. In this atmosphere, the Irish Republican Army put its weapons certifiably and irrevocably beyond use. Perhaps the paramilitaries on the other side will join suit and lay down their weapons as well.

The precious moral insight about the evil of terrorism can easily be lost if the nations return to policies of getting even with the terrorists by bombing them back to the stone age. Deeds of revenge are incompatible with both the just war tradition and with the tradition of nonviolent resistance to evil. In the long run, they will serve as recruiting tools for the likes of Osama bin-Laden.

If bellicose deeds outstrip rhetoric about the search for justice, we will needlessly surrender the position that terrorism is evil. And if we squander this opportunity for worldwide moral development, we will vindicate Qoheleth's skepticism about the attainability of wisdom. It is, however, still possible that through the writing and the reading of many books we may discover that even wars waged for a just cause can turn sour and inflict greater harm than the good they seek to achieve. This truth is as ancient as Augustine of Hippo and as modern as the many international treaties and covenants that embody it. If this truth takes root again at this critical moment of world history, we will become witnesses in this new century to a world in which both law and religion are effective means of securing freedom. It is my strong hope that the journal's modest effort may somehow contribute to this desirable result.

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