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Law and Religion

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Contents

Acknowledgements vii
Series Preface ix
Introduction xi

PART I RELIGIONS AS SOURCES OF HUMAN RIGHTS

1 Michael J. Perry (2005), 'The Morality of Human Rights: A Nonreligious Ground?', *Emory Law Journal*, **54**, pp. 97–150. 3
2 Paul Lehmann (1985), 'The Metaphorical Reciprocity Between Theology and Law', *Journal of Law and Religion*, **3**, pp. 179–91. 57
3 Daniel Friedmann (2002), 'From the Trial of Adam and Eve to the Judgments of Solomon and Daniel', in Daniel Friedmann, *To Kill and Take Possession*, MA: Hendrickson Publishers, pp. 9–31. 71
4 Giovanni Ambrosetti (1971), 'Christian Natural Law: The Spirit and Method Of', *American Journal of Jurisprudence*, **l6**, pp. 290–30l. 95
5 Harold J. Berman (1983), 'Religious Foundations of Law in the West: An Historical Perspective', *Journal of Law and Religion*, **l**, pp. 3–43. 107
6 Noel J. Coulson (1978), 'Law and Religion in Contemporary Islam', *Hastings Law Journal*, **29**, pp. l447–57. 149
7 Mahdi Zahraa (2000), 'Characteristic Features of Islamic Law: Perceptions and Misconceptions', *Arab Law Quarterly*, **15**, pp. 168–96. 161

PART II RELIGIONS AS TRADITIONS OF LAW

8 Robert M. Cover (1987), 'Obligation: A Jewish Jurisprudence of the Social Order', *Journal of Law and Religion*, **5**, pp. 65–74. 193
9 Luke T. Lee and Whalen W. Lai (1978), 'The Chinese Conceptions of Law: Confucian, Legalist, and Buddhist', *Hastings Law Journal*, **29**, pp. 1307–29. 203
10 Ludo Rocher (1978), 'Hindu Conceptions of Law', *Hastings Law Journal*, **29**, pp. l283–305. 227
11 Rebecca R. French (2001), 'A Conversation with Tibetans? Reconsidering the Relationship between Religious Beliefs and Secular Legal Discourse', *Law and Social Inquiry*, **26**, pp. 95–112. 251
12 John R. Bowen (2000), 'Consensus and Suspicion: Judicial Reasoning and Social Change in an Indonesian Society 1960−1994', *Law and Society Review*, **34**, pp. 97–127. 269
13 Karine Barzilai-Nahon and Gad Barzilai (2005), 'Cultured Technology: The Internet and Religious Fundamentalism', *Information Society*, **21**, pp. 25–40. 301

Proof Copy

PART III RELIGIONS AND HUMAN RIGHTS: CONFLICTS

14 Jessica A. Platt (2002), 'Female Circumcision: Religious Practice v. Human Rights Violation', *Rutgers Journal of Law and Religion*, **3**, pp. 1–16, [1–30]. 319

15 Nayer Honarvar (1988), 'Behind the Veil: Women's Rights in Islamic Societies', *Journal of Law and Religion*, **6**, pp. 355–87 335

16 Sally Engle Merry (2001), 'Rights, Religion, and Community: Approaches to Violence Against Women in the Context of Globalization', *Law and Society Review*, **35**, pp. 39–88. 369

17 Robert M. Cover (1983), '*Nomos* and Narrative', *Harvard Law Review*, **97**, pp. 4–68. 419

18 Austin Sarat and Roger Berkowitz (1994), 'Disorderly Differences: Recognition, Accommodation, and American Law', *Yale Journal of Law and the Humanities*, **6**, pp. 285–316. 485

19 Shashi Tharoor (1999), 'Are Human Rights Universal?', *World Policy Journal*, **16**, pp. 1–6. 517

Name Index 523

Proof Copy

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Series Preface

The International Library of Essays in Law and Society is designed to provide a broad overview of this important field of interdisciplinary inquiry. Titles in the series will provide access to the best existing scholarship on a wide variety of subjects integral to the understanding of how legal institutions work in and through social arrangements. They collect and synthesize research published in the leading journals of the law and society field. Taken together, these volumes show the richness and complexity of inquiry into law's social life.

Each volume is edited by a recognized expert who has selected a range of scholarship designed to illustrate the most important questions, theoretical approaches, and methods in her/his area of expertise. Each has written an introductory essay which both outlines those questions, approaches, and methods and provides a distinctive analysis of the scholarship presented in the book. Each was asked to identify approximately 20 pieces of work for inclusion in their volume. This has necessitated hard choices since law and society inquiry is vibrant and flourishing.

The International Library of Essays in Law and Society brings together scholars representing different disciplinary traditions and working in different cultural contexts. Since law and society is itself an international field of inquiry it is appropriate that the editors of the volumes in this series come from many different nations and academic contexts. The work of the editors both charts a tradition and opens up new questions. It is my hope that this work will provide a valuable resource for longtime practitioners of law and society scholarship and newcomers to the field.

AUSTIN SARAT
William Nelson Cromwell Professor of Jurisprudence and Political Science
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Introduction

A Challenge

Modern law and religion are essential sociopolitical phenomena that have in common some veiled elements. Both aspire to constitute, or at least to frame, human consciousness and behaviour in all spheres of private and public life. Accordingly, modern law and religion are complementary, contradictory and simultaneous sources of rule-making, adjudication and execution. Both embed obedience and obligations, leadership, institutions and legal ideology as foundations of their maintenance and prevalence, based on a strict structure of commands. Modern law and religion are engendered through written and oral intergenerational – sometimes transnational – texts that are enforceable through authorities, and are subjected to authoritative, corresponding and alternative hermeneutics. Since modern law and religion are infinitely dynamic bounded spaces of institutions, professionalism and social mobilization, they are carriers and subjects of political power. They colonize through, and are colonized in, political power. Hence, as we will discover below, in various contexts they may, paradoxically, challenge, maintain and generate state political power.

From antiquity to current modernity amid various historical transformations, some of which have been revolutionary, law and religion have never been completely separated. They have never been so independent as to achieve complete autonomy from each other. Religion has essentially been embodied in modern legal systems, even in those that have aspired to privatize religion. Religions are embedded in daily practices in various regions, from the Middle East through Africa to Europe, from Latin America to North America and Asia, in Western regimes and post-communist regimes alike.

The compound interactions and multifaceted mutuality between law and religion, as excavated in this volume, deserve a distinctive scholarly attention on account of their immense sociopolitical significance. This volume aims to exhibit different voices of various scholars who are responding to the challenge of comprehending those interactions and mutuality. Religion and law should be redeemed from their imagined setting as metaphysical mythological entities and be conceptualized as relative sociopolitical phenomena.

Beyond the Myth of State–Church Separation

Some years ago the US Federal Supreme Court ruled in two salient legal cases on education and religion. Notwithstanding differing legal rulings, they both lay bare the need for, and inevitability of, going beyond the myth of separation between state and religion. In 1971 the Amish community argued before the Court that its children should be exempted from attending state public schools after the eighth grade.[1] Counterintuitively to the First Amendment and its

[1] *Wisconsin* v. *Yoder* 406 US 205 (1972).The case was argued on 8 December, 1971 and decided on 15 May, 1972.

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anti-establishment clause, the Court upheld the Amish's religious arguments, defying the state of Wisconsin's claims against the constitutionality of religious exemptions from equal state education.

The main reasoning behind the ruling was articulated in Chief Justice Burger's decision:

> In sum, the unchallenged testimony of acknowledged experts in education and religious history, almost 300 years of consistent practice, and strong evidence of a sustained faith, pervading and regulating respondents' entire way of life support the claim that the enforcement of the State's requirement of compulsory formal education after the eighth grade would gravely endanger if not destroy the free exercise respondents' religious beliefs.[2]

In 1994 in the *Kiryas Joel* case, the Satmar Hasidik Jewish community in Brooklyn, NYC, asked the Court to recognize the legality of New York law, which had designated the establishment of a public school. The community argued for the need in such a designated school since ultra-Orthodox physically challenged children could not attend any other school for lack of appropriate facilities.[3] As might have been expected, based on the anti-establishment clause, the Court dismissed the community's claims and tailored the legislation as null and void.

Justice Souter argued for the rationale embedded in the Court's ruling:

> The fundamental source of constitutional concern here is that the legislature itself may fail to exercise governmental authority in a religiously neutral way. The…. case specific nature in creating this district for a religious community leaves the Court without any direct way to review such state action for the purpose of safeguarding a principle at the heart of the Establishment Clause, the government should not prefer one religion to another, or religion to irreligion.[4]

In both rulings the Court admits the crucial importance of religion in American public life and accordingly emphasizes the need to protect religious educational practices even of non-liberal fundamentalist religious communities. The Amish desired to gain an autonomous system of education based on their religious dicta. The Court granted the alleged constitutional remedy, albeit founded upon the rhetorical argument of federal non-interference in communal religious autonomy due to the anti-establishment clause. The Satmar claimed to assist physically challenged ultra-Orthodox students who could not learn in the state's (secular) non-Jewish schools. They were denied their claim on the basis of a similar rhetorical judicial argument of the anti-establishment clause. In both legal cases, however, the Court had to face difficulties embedded in liberal jurisprudence in order to acknowledge the democratic pressures to embrace non-liberal religious collectivities.

The Western liberal constitutional myth of the separation of religion from the state is utterly problematic (Barzilai, 2003; Carter, 1995) since religion is irreducibly significant in formation of modern states, laws and legal ideologies. Thus, surveys in Europe, for example, demonstrate to what degree religion is prominent in both liberal and post-communist political regimes. In relation to religious practices of praying in church, the figures are illuminating: 88 per cent

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[2] Ibid.

[3] *Board of Education of Kiryas Joel* v. *Grumet* (1994). The case was argued on 30 March 1994 and decided on 27 June 1994.

[4] Ibid.

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in Ireland, 85 per cent in Poland, 69 per cent in Northern Ireland, 51 per cent in Italy, 43 per cent in Switzerland, 41 per cent in Portugal, 39 per cent in Spain, 34 per cent in Hungary, 34 per cent in West Germany, 30 per cent in the Netherlands, 24 per cent in the UK, 20 per cent in (East) Germany and 17 per cent in France attended church 'at least monthly' (Bruce, 1999, p. 90, Table 4.1). Obviously, fluctuations in levels of secularization and religiosity are to be expected. Yet the significance of religion as a central political and legal phenomenon in modernity is far from being marginal.

Although there are institutional, organizational and cultural variances between and among political regimes and religions, religion amidst neo-liberal transnational and international expansion ('globalization') is prominent as a sociopolitical legal force. This diverse volume with its multiplicity of intellectual voices, explores some facets of religion in the local–global nexus. Religion is conspicuous despite of, in reaction to, and even as part of, ethos and practices of secular rationality and teleological modernity at the outset of the third millennium. Intriguingly, religion is even fused in modernity. It is constructing for its needs and interests some major aspects of modernity, such as the transnational world economy, nation-state law and the language of liberal human rights, as well as communications technology and the Internet. Nevertheless, callous conflicts between liberalism as values, norms and practices and non-liberal non-ruling religious communities are common. *Inter alia,* such conflicts have erupted in Belgium, England, France, Germany, India, Israel, the Netherlands, Spain, Turkey and the USA. These conflicts are significantly meaningful even in states where a formal liberal separation between state and Church is professed, as in France and the USA. This volume, through its various prisms and inclusive spirit, is committed to elucidating the multifaceted aspects of modernity and religion in and towards law.

This volume differs from studies that have conceived religion in singular constitutional terms of 'freedom of religion', 'freedom from religion', 'anti-establishment clause' and 'state neutrality'. Furthermore, it diverges from, and is critical of, studies that portray religion and religious law as chiefly non-modern and primordial social phenomena that are driven to constitute an image of savagery and terrorism. Rather, this anthology advances a theoretical and empirically-based concept that inquiries into religion and law should be sensitive to the versatilities of religious law and the pluralities of religions, and their possible adaptations to, and reconciliation with, modernity. Our capacity to generalize important aspects of law and religion should be subjected to such a theoretical, empirical and methodological sensitivity to contexts of meanings.

This volume has as a lucid intellectual context. About 30 years after Max Weber's death in 1920 his studies of Buddhism, Christianity, Confucianism, Hinduism, Islam, Judaism and Taoism (Weber, 1951, 1952, 1956, 1960) had remained unmatched and only infrequently touched by law and society scholars. Only with the rising influence of anthropological studies, largely by Adamson Hoebel and his students, was our knowledge enriched with insights on religions and religious law (Hoebel, 1954; Pospisil, 1973). However, since the 1980s legal pluralism has highlighted cultural disharmonies that generate normatively justified cultural relativism. It has called for an understanding of different legal traditions in their interactive relations through unveiling and decentring state law and legal ideology as relative traditions as well (Merry, 1988; Sarat and Berkowitz, Chapter 18, this volume; Twining, 1986, 2000; Santos, 1995). In the context of legal pluralism and political power, this volume encourages us to look into whether the multiplicity of religious practices – possibly even fundamentalist

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religious practices – is reconcilable with democratic order (see Sarat and Berkowitz, Chapter 18).

Religion offers epistemological guidance for viewing the universe through a set of communal and individual practices, driven by faith in transcendental, sacred and invincible forces. It constitutes and reflects meanings of existence in every domain of private and public human life. It can neither be comprehended solely based on criteria of 'rational' and 'irrational', nor can it be understood as secluded from other sociopolitical phenomena (Asad, 1993).

The Veiled Alliance: Law and Religion

Intimate relations between law and religion have been constituted and constantly transformed throughout history. According to natural religious law – a law driven from a faith in God or in divine forces – morality and legality are embedded in religion. Sacred law formulates a space for human choices and judicial discretion in the articulation of a celestial divine order. Such a natural religious prism of law – prominent in the writings of theological thinkers in different religions such as St Augustine, Thomas Aquinas and Maimonides – has not only been a normative indicator of a good faith and a virtuous behaviour, but also the absolute criterion for obedience and disobedience to human-made law. Thus, St Augustine has been a very influential religious thinker over Western thought. His religious concept of *De Civitate Dei* has generated a religious normative model for the perfection of human society and expectations that political power in the 'City of God' should be legitimated through a religious faith. His model has influenced a diversity of philosophers and scholars, including Enlightenment and contemporary philosophers.

Spurred by post-medieval science and the rationalization of law as science, natural law, as distinct from what has remained as religious natural law, has been secularized, particularly since the fourteenth century AD. In a gradual process, which was imprinted, *inter alia*, by the sixteenth-century Copernican revolution, followed by such rationalizations of faith as in seventeenth-century Descartes and Kant's philosophies of the eighteenth century, religious ethics and religious law were reproduced based on human consciousness and rationality. While the importance of religious faith was regenerated as part of human experience, questions revolving around the existence of God were marked as unique and separated from the routinely rational endeavours of humanity. Hence, human law and religion were distinguished from one another. Whichever human legal categories we construct, they are significantly a matter of our own morality and consciousness.

The partial divorce of law from religious dicta and its construction as an 'autonomous' professional field have framed law as a ruling setting. Accordingly, a concept of divine sovereignty, an earthly sacred religious ruling authority, was replaced by a concept of the secular state's sovereignty. Especially during the seventeenth century and onwards, the latter was imagined as an aggregation of individual wills embedded in contractual metaphorical relations. Although religious institutions could have been separated from the state through various institutional arrangements, which may significantly vary from one country to another, religious identities and virtues of religious faith have remained cemented in state law and its legal ideology. Hence, an additional reasoning underlying this volume is that any understanding of modern law should deconstruct an imagined separation between religion and modern state law.

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These genealogical facets of religion in law and law in religion that have been expounded above are not progressively ordered in a linear historicity of teleological modernity. Rather, they are complementary in any historical period, despite some significant variance in the intimacies of law, religion and power in various historical periods. Yet, clearly religion has been a certain noteworthy source of human rights.

Religions as Sources of Human Rights

The essays in Part I of this volume address the religious origins of modern human rights and explicate interactions between religious origins and contemporary modern law. In Chapter 1 Michael J. Perry argues that, and explains why, the concept of human dignity and human rights is inescapably religious. Furthermore, he demonstrates how alternative arguments for atheistic foundations of modern human rights collapse unless they acknowledge the religious origins of modern human dignity. Modern human dignity is based on the notion of the (religious) sacredness of every human being.

The embedded affinities between law and religion are not singularly historically ontological but metaphorical as well. Paul Lehmann (Chapter 2) shows how religion is embedded in modern law through framing its epistemology and language. Law with no religion causes legalistic formulations to prevail over justice. Hence, responsibility for power may triumph over power of responsibility. The function of religious metaphors in law is crucial since they contribute to the virtues that might generate justice as the marker of the essence of law.

Whereas Perry and Lehmann have deconstructed the rigid boundary between modernity and religion, and between religious law and modern law, the remainder of the essays in Part I analyse specific historical developments of religious law from antiquity to modernity in several civilizations. In Chapter 3 Daniel Friedmann excavates the logic in the Halachik law of trials. Through analysing biblical narratives Friedmann demonstrates how Jewish law has allowed the evolution of judicial discretion within the meta-narrative of the Torah as a divine constitution. Accordingly, biblical stories constructed a belief in God and in its dicta to constitutionally engineer social mechanisms of communal disciplinary powers. A similar process is traced in ancient Greek mythologies. Once religion and law are understood as part of sociopolitical power, legal developments in rules of evidence, trial procedures, judicial discretion, criminal investigation and executive mechanisms are better understood.

Giovanni Ambrosetti (Chapter 4) conceives natural religious law as a junction of reason, theology and history. His essay turns the focus on to Christian natural law that originated in religious scriptures and was only later – especially after the seventeenth century – conceptualized as a rationalistic enterprise. Natural law is not a dogmatic myth; rather, it is constantly and dynamically unveiled through a faith in Christian revelation. The practice of revealed natural law is shaped through obedience, rights and duties of daily legality that have practical meaning in the light of social contexts in which obedience to religious law is being cultivated.

More generally, Harold Berman argues in Chapter 5 that Western legal tradition was founded on religious Christian–Judaic fundamentals. He traces its history from 1050 AD when the Roman Catholic Church was established. Canonical law and the first legal books and universities in Europe were established in the eleventh century around the corpus of law which was created by the Church in order to control its property, personnel and knowledge and to

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enforce its religious faith. Hence, religious law was the main source of modern European law. The secularization of Western law since the sixteenth century was advanced through the Reformist Lutheran, English, French, American and Russian revolutions. These revolutions have altered the structure of Western law through greater institutional separation of law from the Church, but have not drastically diminished the importance of religion in law. Calvin and Luther had resisted the Roman Catholic Church's political domination and religious monopoly, but had recognized and reinforced the intimate relations between various usages of law and religious faith. Thus, Calvinism preached the usage of law as a method of reform, which in turn led to the emergence of John Locke's seventeenth-century liberalism. Berman argues that liberalism was the first secular religion to disengage itself from some religious fundamentals although it has nevertheless relied on quite a few religious elements. Those elements, excavated by Berman, may be the basic elements that will constitute the future of international law of human rights.

In Chapter 6 Noel J. Coulson explores law and religion in Islam. Islamic religious law is composed of different, but reconcilable, elements of (traditional) Shari'a and judge-made law in the Muslim state. Shari'a has conceived its law as entirely comprehensive, concerning all aspects of human life and exclusively reflecting the divine will. Since the nineteenth century, Islam has been divided between Shari'a legal ideology that is aimed to be totalistic and judicial practices in various Muslim countries. While Shari'a has been vigorously applied in family law, state law that has been mainly constructed by judges has been dominant in criminal and commercial law and has in practice reformed Shari'a to be more receptive to modern human rights. Even in family law habitual Shari'a-based practices such as polygamy and *talaq* (a man's right to unilaterally dissolve his marriage) have been significantly reformed and restrained. Coulson explains how, in order to mitigate possible severe crises of legitimacy, these legal reforms in various Muslim states, such as Egypt, Iran and Tunisia, have rhetorically been constructed through Shari'a as if guided by divine Muslim dicta.

Other aspects of Islamic law are excavated by Mahdi Zahraa in Chapter 7. His perspective focuses on the internal logic of Islamic law. Two major dimensions in Islamic law are the methodology of developing the law (*usul al-fiqh*) and the set of practical solutions to daily problems to be offered in the realm of Islamic law (*al-masa'el wa al-furu'*). However, within that seemingly ordered paradigm, meaningful struggles over hermeneutics have prevailed, while the common denominator is obedience to the basic fundamentals of the Shari'a. Hence, Mahdi claims, Islamic law can be adaptable to various contexts through diverse hermeneutics as long as the interpretations are based on common Islamic methodology and rules of interpretations.

Religions as Traditions of Law

Religion does not merely constitute a major source of modern human rights; it also constitutes a certain ontology in modern nationalism and law. Mainly since the nineteenth century, nationalism has utilized religion for its political purposes. Through legal categorizations nation-states have framed religious myths to consolidate a national ethos. Based on the fact that they are sociopolitical forces that comprise and reflect strong human desires and expectations, religion and nationality were intertwined to consolidate a political mechanism

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that mobilizes people with different interests towards what may be perceived as a common public goal (Migdal, 1988, 2004).

The constitutive interactions between religion and nationality that empower each other in modern legality have contradicted not a few sociopolitical generalizations. Emile Durkheim conceptualized that modern societies would necessarily undergo rigorous secularization (Pickering, 1984). He was therefore concerned about what would happen to modern societies without the effects of religion as a crucial and functional consolidating social force. Falsifying Durkheim religion is a vivid tradition and a national civil force in modern political regimes in many regions around the globe. Hence, various nation-states have employed different modes of public strategies to manage the challenges of religion as a massive sociopolitical force at both elite and grassroots levels.

One such legalistic political strategy excluded religion from being a publicly organized political force. It was integrated into the state's invasive endeavours to construct a fundamentally secular statehood and national collectivity that is systematically socialized to be unattached to (past) religious attachments. Thus, national projects of the state's de-religiosity, at various levels of intensity and in various political settings, were prominent in Turkey during the 1920s and 1960s, and in some authoritarian/totalitarian regimes like the Soviet Union-led communist regimes after the 1920s and then after 1945 until the 1980s, as well as in China after 1949. These different political–legal efforts often resulted in resistance and religious dissent among minorities (for example, inTurkey), the Church (for example, in Poland), and in various localities (for example, in China).

The constitutional institutional privatization of religion has been a second political legalistic strategy. This has been driven by a liberal vision of freedom of religion, as in the archetypical examples of France and the USA since the eighteenth century. Either through a legal ideology of secular republicanism (France) or state neutrality (the USA), that strategy has professed formal prohibition on the state's direct endorsement of any specific religious institution. In practice, however, the institutional privatization of religion has prevented religious non-ruling communities from attaining governmental direct support for equality. It has further resulted in national attempts to subdue, in practice, the religious collective demands, habits and needs of religious minorities, especially non-liberal religious communities (Barzilai, 2003; Shachar, 2001).

Alongside liberal endeavours to secularize the state as in France, or to release it from concrete institutional religious formal commitments, as in the USA, another legalistic political strategy has formally recognized the religious communalism of minorities, while state law has prominently propelled its own religious identity. Such a strategy of co-opting dominant religion in state law and legal ideology, and yet recognizing and even constructing religious non-ruling communities, has been used by states for circumventing other collective identities of the very same non-ruling communities. Thus, Israeli law has somewhat followed the *Millet* (community) system that had characterized the Ottoman Empire. Accordingly, Israeli Arab-Palestinians were constructed and recognized in state law as religious minorities (Muslims, Christians, Bedouins, Druze), and then were denied collective national rights as Palestinians.

A somewhat similar fourth political legal strategy has been employed by states that have aspired to be maintained as secular and yet uphold their religious communalism. India is an important example: after hectic debates in India's political forums at the end of the 1940s, the state was framed as secular, although religious communities have been bestowed with

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some group rights. A less professed secularism of the state, accompanied by constitutional protections for minorities, has been a foundational arrangement in the German *Grundgesetz* (Basic Law) as well.

The fifth political legalistic strategy is generated in states that have co-opted one religion as a formal dominant social force that is integrated into the state, while preserving the worship rights of others. England, Ireland, Italy, Portugal, Spain and Argentina are some examples of states that have granted one specific religion a constitutional superiority while allowing others to preserve their right to cultivate their different religious practices.

Despite various political legalistic strategies of modern nationalism, religions have prevailed as vibrant traditions. Part II of this volume deals with several religious traditions that have been articulated and practised amid the shadows of state law.

In Chapter 8 Robert Cover discusses obligations and social order in Judaism. Cover argues for the effects of the state on religious traditions of law. Accordingly, he contrasts the Western legal tradition, with its emphasis on rights, with the Jewish legal tradition that stresses obligations. The latter was developed over the last two millennia among Jews living as minority groups with no state and sovereignty to rely upon. Consequently, whereas Western legal tradition underscored rights as a source of mythologizing the nation-state, the Jewish tradition emphasized obligations (*Mitzvoth*) as a means of inciting Jewish communalism in the absence of a Jewish nation-state. While the Western nation-state in practice allowed for the evolution of rights in order to incite the collective good, in Judaism, as explained by Maimonides, obligations were clearly intended to uphold the communal Jewish good.

Judaism, Christianity and Islam have reflected only one fragment, however significant, of the relationships between states and religious traditions of law. Luke T. Lee and Whalen W. Lai (Chapter 9) focus on Confucian and Buddhist legal traditions in China. They elucidate how ethical rules of Confucianism (*li*) have interplayed with rigid legalism and its demands for obedience (*fa*). The Confucian tradition has preferred to thwart crime by relying on feelings of shame instead of relying on punishment, which may aggravate crime. While the state imposes punishment, Confucianism emphasizes such virtues as self-respect and conscience. In addition, Lee and Lai explain the characteristics of Buddhism and its effects on Chinese law. Buddhism has challenged the state, asserting an alternative communalism and an emphasis on mutual responsibility and self-regulating individuals. Although Buddhism has stood in opposition to state law in China because it expects its believers to disengage from statehood and be devoted to the Buddhist community, interactions between modern China and Buddhism have not necessarily generated conflicts. The state has recognized a certain autonomy of the Buddhist community, and the latter has never directly resisted the state. The unexpected result is a very multidimensional modern Chinese law, which conventionally may be perceived as secular but nonetheless embodies strong effects of religions as traditions of law.

Hinduism also testifies to multifaceted interactions between state power and religions as traditions of law. Ludo Rocher explains in his essay (Chapter 10) that Western notions of law pressured Hinduism only towards the end of the eighteenth century. Historically, obedience in Hinduism is embedded not in mere formal rigid law but in *dharma* – that is, the need of every human being to live in a transposable sense of balance with his or her environment. Law in its more stringent logic of ordered hierarchical set of regulations is part of *dharma*; however, law should not control *dharma* but, rather, be guided through it. Hence, Rocher's essay deconstructs any categorizations of religion and law as mutually separate. Rocher shows

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how any enforcement of Western law through English imperialism in India has been subjected to *dharma* and to intrinsic interactions of law and religion. However, principally since the beginning of the twentieth century, Hindu law and the hermeneutics of *dharma* have been more attentive to governmental purposes and have enabled the state to rule through national codification and a greater emphasis on administrative and criminal law.

Multicultural intercommunal probes into the infinite space of law and religion unveil aspirations for more direct dialogue between secularism and religiosity within the shadows of state law. In Chapter 11 Rebecca R. French deconstructs some problematic Western legalistic separations and epistemological dislocation of religion, law and politics. She invites us to talk to Buddhist Tibetans and be immersed in the Buddhist's perspective that these separations and dislocation do not exist in practice. In the Buddhist community, life is intrinsically religious and the law should maintain complete and comprehensive faith in Buddha. Secular law, as a dynamic and interchangeable subordinated category, can be relevant only when it concerns specific issues of administration. The divide between religious Buddhist law that dominates all daily practices and administrative issues which may be guided by secular law falls within the structure of the Buddhist natural religious law. Contrary to modern liberalism, there are no separate categories of religion and secularism. Rather, law in all its multiplicity is always governed by the principles of Buddhism. Thus, a state should be governed by a religious leader, such as the Dalai Lama, but may nevertheless be regarded as a constitutional democracy.

Religious law need not necessarily displace secular law. In Chapter 12 John Bowen explores how Islamic law in Indonesia is interlinked with secular law through judicial hermeneutics (see also Lev, 1972, 2000). Muslim law is being practised among different localities and is part of state law, especially when it concerns personal and family matters. Hence, religious law has survived in between local pressures and the colonial European influence over Indonesia (Lev, 1972, 2000).

The maintenance of non-liberal religious legal traditions in modernity should also be examined in light of modern technology, such as the Internet, which may hold secular symbols. In Chapter 13 Karine Barzilai-Nahon and Gad Barzilai present a theoretical framework for understanding interactions between religious fundamentalist communities and the Internet, through four dimensions of tensions and challenges: hierarchy, patriarchy, discipline and seclusion. They develop the concept of *cultured technology*, and analyse how religious communities reshape technology and construct it within their culture, while allowing it to engender certain changes in their customary life and law. The study examines cultured technology among ultra-Orthodox Jewish communities in Israel and is based on an original dataset of 686,192 users and 60,346 virtual communities. While formal law in these communities remains suspicious of modern technology, in practice the community elite allows the community to adapt and culturally construct it for communal socioeconomic needs. Hence, between state law that embraces liberalism and the Internet with its secular manifestations ultra-Orthodoxy upholds its legal tradition with practical adaptations.

Religions and Human Rights: Conflicts

Part III focuses on conflicts between liberalism as culture, political and legal ideology and political power, on the one hand, and religion and communalism, on the other hand. The challenge for liberal jurisprudence has been to reconcile the state's veiled religious identities

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with its asserted egalitarian commitments to freedom of, and from, religion. Liberalism has responded to that challenge by means of two arguments. First, individual rights precede any other concrete and distinct definition of the 'common good'. Second, the state is neutral and can provide impartial procedural justice (Rawls, 1973, 1993; Barry, 1995). Accordingly, it is constructed as if the state's religious identities do not exist and cannot obstruct the preference given to individuals' freedoms over any republican, religious, good. These two fundamental liberal claims are problematical. First, nation-states do have a certain religious republican good. Hence, giving absolute and exclusive preference to individual rights, invariably under all possible contexts, would repress non-ruling religious communities (Barzilai, 2003), which have a different, but not indispensably contradictory, ontological conception of the 'good' (MacIntyre, 1984, 1988; Sandel, 1982, 1996).

Second, if individual rights are being exclusively underscored, any liberal de-ontological justice might regretfully be disengaged from complex human experiences. Members of non-ruling religious communities may not benefit and may even be damaged from the liberal discourse unless they are being stripped of their embedded identities. These types of conflict between liberalism, religion and non-ruling religious communities are the topics of Part III.

The frenzied contention over female circumcision as a prevalent custom in some Muslim communities – primarily in Africa – has been an ostensible example of a confrontation between non-liberal religious practices and human rights. Jessica A. Platt returning from a research journey in Africa argues, in Chapter 14, for the prerequisite of cultural relativism when seriously debating the practice of circumcision. She claims that there are possibilities for education and clinical medicine to mitigate between this religious custom and the international community's imperative to preserve human rights.

Platt analyses important efforts made by international law and some domestic legislation, driven by liberal aspirations and intended to prohibit women's circumcision since 1948. However, international law also empowers freedom of religion. Hence, the essay raises two points of critical review of the conflict between liberalism and non-liberal religions. First, the legal prohibitions have infringed upon non-liberal communities' freedom of religion. Second, the legalistic prohibitions have not eradicated the problem, but have instead resulted in more circumcision being performed clandestinely, evading state supervision. Consequently, the legislation has increased the likelihood of health risks and even death among young girls undergoing this practice. Platt offers an alternative solution – a balance between human rights and the religious custom of circumcision through allowing only spiritual or very light types of circumcision under clinical supervision. Instead of intrusive criminalization of a religious custom, however problematic, she calls for women to be educated and informed about the severe damage that circumcision inflicts upon them. Criminalization in law should be very specific and only enforced upon severe violent types of circumcision that endanger the sexuality or health of the female and her children, while allowing for spiritual and light undamaging types of circumcision that reflect religious freedom.

In the face of mounting discussions in the West concerning the rights of Muslim women, Nayer Honarvar (Chapter 15) explores women rights in Islamic societies based on a genealogical analysis of Shari'a formal law. She delineates a severe conflict between the formal Shari'a law and human rights. Comparing Muslim women's socioeconomic legal status with that of Arabian and Persian women before Islam, women's conditions deteriorated after the seventh century AD, once Shari'a law was imposed. Islam is a male-dominated setting,

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Honarvar argues. Thus, in marriage, divorce and inheritance, Muslim law clearly tends to favour men. Men are entitled to polygamy, whereas women are forbidden to have more than one husband, for example.

Motherhood is highly esteemed in Islam, but once the marriage is dissolved the woman loses most of her custodial rights over her children. Honarvar argues that Islam has severely discriminated against women in education and economics as well. Although Islam has now improved women's legal status in inheritance, making them legal heirs of their husbands, women are still severely discriminated against in their inheritance rights compared with men. Hence the challenge remains as to whether international and national politics in Muslim societies, especially in Muslim political regimes, will significantly reform crucial facets in Muslim religious traditions of law.

Women's status in non-liberal communities may be reformed through globalization. In Chapter 16 Sally E. Merry examines Hawaiian women's struggles against violence. Her essay is a story of religion as a sociolegal force that mitigates abuse of females' rights. Merry tests three paradigms that are intended to rejuvenate the self in her struggles against violence – the rights, the community and the religious paradigms as approaches that are exercised by women in the context of globalization. Religion is practised as an alternative to a feminist rights-based approach. Through the Church the main values that are discussed among women are spirituality, communication, anger and forgiveness. Yet, and critically observed, religious healing is based on submission of women to men and male responsibility to hamper the dissolution of marriage. The underlying logic is trust in God, the sanctity of marriage and forgiveness. Religion approaches battered women in between the shadows of the law, since it assisted in saving battered women without criminalizing the actions of their husbands. However, the religious approach has marginalized feminist arguments against patriarchy and has therefore strengthened the male-dominated community.

As we see, religion in its multiplicity of forms and multidimensional facets may come into direct – even expressive – conflict with human rights. Nonetheless, religion itself embodies a space of human rights through which it may constitute a normative setting to raise dissent against the state. Thus, the principle of 'freedom of religion' may support even conscientious objection to military service, based on a broad abstraction of religion as conscience. In fact, 'religion' has broadly been constructed for exemption purposes from state law in such matters as military conscription, education and the labour market (Sturm, 1983).

Time and again, however, religious hermeneutics may be repressed by state legal ideology and state agents. As Robert Cover expounds in Chapter 17, state law has been violent towards non-ruling religious hermeneutics because it has eliminated these hermeneutics as viable sources of meaning, law-making and policy-making. The ruling elite – judges and justices included – have conceived those alternative religious meanings as sources of destabilizing the state. This does not mean that the state – as defined through its elite and institutions – is secular. The state itself conveys its own religious preferences, while it simultaneously acts coercively towards its non-ruling religious communities (cf. also Barzilai, 2003; Shachar, 2001).

Cover has highlighted collisions between the *nomos* (that is, basic world-views and normative aspirations) of non-ruling religious communities that have challenged the state and the state's interest in subduing these *nomos* in order to maintain a 'unified' national narrative. Amid myths of a unitary state law, Cover proposes a pluralistic interplay of all religious ontological

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conceptions of the 'good' as part of law-making and legal interpretations, whilst being aware of the state's inability to activate an impartial justice. Challenging state law through the *nomos* of communities constitutes an alternative way of countering state violence.

Cover has perceptively conceptualized religion as a constitutive force of normative order, civil obedience and also as a source of oppression. Hence, in cases of serious conflicts between egalitarian principles, like equality, and the insularity of a religious community, Cover emphasizes the redemptive principle of egalitarianism that justifies limited state interference in the insularity of the community. However, he expects, as do other authors in this volume, a public policy of multiculturalism that respects the conflicts of hermeneutics, meanings and practices among and between the state and opposing religious communities.

The essays so far discussed in Part III show that possible severe encounters between human rights and acts of religious violence may exist. Certainly, a perspective that attributes a great deal of importance to religion in politics and law should neither justify violence in religious communities nor pretext it through underscoring secular violence as well. We have to ensure the human right of exit and the redemptive principle submitted by Robert Cover. The first principle claims that a potential victim deserves to leave her community and that she deserves a state's protection against violence (Barzilai, 2003). The second principle asserts that if a state's interference in a specific sphere of communal life is necessary to abolish discrimination, the interest in social redemption should overcome the principle of communal singularity and religious autonomy. Cover explains, however, that the internal religious order of non-ruling community should not be dissolved.

The last two essays explore why religious communities are not necessarily sources of conflict but, rather, sources of autonomy, liberty and international law. In Chapter 18 Austin Sarat and Roger Berkowitz are concerned with the legal claim for 'order' that has disabled any aspirations for multiculturalism. In order to show that law enables multiculturalism as long as its imagined order is not endangered, they compare two court rulings of the US Supreme Court, *Reynolds*[5] and *Yoder*[6] in which religious communities demanded recognition of their fundamentalist traditions and autonomy.

In *Reynolds* the Mormons' request to recognize polygamy was dismissed, since polygamous marriage was considered by the Court as a savage habit that reflects and incites a 'disordered' society. In *Yoder*, on the contrary, the justices did not consider state law as being under threat since the Amish were considered as a small and peripheral community. Hence, a multiplicity of religious, even fundamentalist, practices was considered as reconcilable with political order. Sarat and Berkowitz claim that *Yoder* has not been an unexpected legal result. Rather, it has articulated the liberal precept that state law is the superior regulating order, while communal religious practices may be considered as legally valid only when they do not endanger the state's perceived and self-generating order. Hence, modern law may be oblivious of the virtues of religious multiculturalism.

But does perpetuation of religious *nomos* allows construction of universal human rights? The last essay in the volume explains why respect for religious communities may be conducive to the growth of universalism. In Chapter 19 Shashi Tharoor criticizes the trendy articulation of human rights as exclusively relying on a Western concept of individualism and overtly

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5 *Reynolds* v. *United States*, 98 US (1878).

6 *Wisconsin* v. *Yoder*, 406 US (1971).

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or surreptitiously defying the important essence of non-Western communities. The essay suggests shifting the emphasis from intolerance towards religions to intolerance towards coercion. Thus, religious collectivities should be respected and defended, yet violent religious habits such as female mutilation and child marriages should be eradicated on account of their coercive nature. Tharoor's approach constructs universalism of human rights as a diversity of preserved traditions mutually reciprocating each other and jointly resisting coercion.

Religion is not a static phenomenon. It has become a source of dissent when, and to the extent that, it has been marginalized and discriminated against. In countries that have aimed to suppress religion, like Poland and Lithuania in Europe and Turkey in the Middle East, religion has incited some collective resistance to the state. Further, the Catholic Church in communist regimes, has used its power to oppose these regimes as was the case with the Catholic Church in East Germany. Similarly, Islamic movements in India and Israel have reacted to discrimination against, and marginalization of, their Muslim populations with rigorous collective and institutionalized dissent against the ruling elites – Hindu and Jewish, respectively. Sometimes, the religious dissent democratizes political settings as was the case in Poland and East Germany in the 1980s and 1990s.

Yet, religious dissent may become very violent either at the level of small groups or large social movements. In Israel, nationalistic Jewish fundamentalists have tended to severely criticize the state, which they perceived as too secular and too pro-Palestinian, especially since the conclusion of the Oslo Accords (1993–99). This led to the assassination of Prime Minister Yitzhak Rabin on 4 November 1995. Likewise, violent religious dissent to state law conveyed by citizens against their political regimes has repeated itself, *inter alia*, in Egypt, Iraq, Jordan, Lebanon, Russia, Sudan and the West Bank and the Gaza Strip, where Muslim groups and social movements have become major localities of dissent and violence against political regimes and their ruling elites.

Violent religious dissent is not accidental. Religious texts, either written or unwritten, have offered structured and sacred guidelines for an alternative order in all spheres of life. Our volume offers and invites a diversity of avenues to deconstruct religious texts as violent texts. Nevertheless, the global–local nexus may lead religious texts to be interpreted as being either violent or peaceful – much depends on the context.

The Challenge of 'Globalization'

As this volume demonstrates, religions are as vivid as ever. Religious fundamentalist movements in Christianity, Islam and Judaism have largely been generated in resistance to modernity and to its exclusive secular conception of historicity and legality. Often, this interaction of confronting modernity would not lead to violence. Nonetheless, under other conditions, collisions between neo-liberal globalization and religious fundamentalism may result in violence as was horribly proven on 11 September 2001 with Al-Qaeda's attack on the World Trade Center and the Pentagon. Religions may include subcultures of violence against 'external enemies', such as state law and state legal institutions that symbolize secular depravity. Hence, religious terrorism has been manifested in Western and non-Western political regimes, including Afghanistan, Algeria, Argentina, Egypt, England, France, India, Iraq, Israel, Japan, Jordan, Kenya, Lebanon, North Ireland, Philippines, Russia, Saudi Arabia, Spain, Syria, Turkey and the USA (cf. Pape, 2005).

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Why do religions sometimes spur terrorism as a possible hermeneutic against state law in the midst of neo-liberal globalization? It is an intriguing question since, as this volume demonstrates, religious fundamentalism is not necessarily violent. Yet, religious texts often ingrain a binary theological distinction between eternal redemptive good and irreducible evil. The cosmic struggle, including a possible violent clash between 'good' and 'evil' is historically transcendental and should end in apocalyptic warfare (Juergensmeyer, 2000). Once believers are persuaded that they are under attack from secularism, they may use religious texts as manifesto of the battle against perceived heretic aggressors. Furthermore, neo-liberal globalization has expanded exhibitionist secularism, and in turn spurred a degree of siege mentality among religious fundamentalist non-ruling communities. They have protested against pornography, artificial abortions, free sex and even personal computers connected to the Internet as prominent manifestations of liberal secularism.

Social class and social deprivation also play crucial roles (Hirschl, 2004). The more a non-ruling community perceives itself as socially discriminated against, the more it inclines to draw on religion as a source of violent resistance against hegemonic legal ideology in the domestic and international sphere. Islam, for example, may have moderate hermeneutics towards non-Muslims or, conversely, it may generate very violent hermeneutics; it depends significantly on the leadership and elite that make use of religion in a specific context. Therefore, under conditions of poverty and feelings of deprivation, hostile leadership may turn to faith in transcendental, divine and cosmic justice in order to legitimate even a terrible violence as a means of revolutionizing the praxis and imposing religious law on earth. While the junction of religion and technology often serves religions in their educational purposes, the use of modern technology may also instigate ruthless violent events.

More generally, however, as essays in this volume convey, religion is not analogous to violence. First, the practice of religion exceeds that of violence since it is more compound and complex phenomenon that habitually reflects the deepest of human desires. Second, the sources of violence are not necessarily religious and, as history tells us, they may certainly be secular as well. The challenge of globalization is to reconcile religiosity, religion and religious fundamentalism with international human rights.

In a local–global religious context of communities, two processes may unfold. First, as this volume shows, religion may be generated as transnational and construct cross-national, even supranational, identities and practices that are being expanded through information technologies, such as international media and the Internet (Santos, 1995; also Barzilai-Nahon and Barzilai, Chapter 13). Hence, liberalism is becoming a major and dialectical source of advancing religious values, norms and practices. Second, this volume also argues that religious communities may construct practices that are affected by liberalism. Thus, religious women affected by a liberal climate may wish to gain more equality within their non-liberal community without secularizing it. In such circumstances they would raise religious arguments for gender equality based on both human dignity and preservation of the communal culture.

Last: Is 11 September 2001 a Final Word?

Especially since the terrorist attacks of 11 September 2001, we should not be misled by liberal expectations of separating the state from religion, nor should we be captives of illusions concerning an all-encompassing globalization of secular values and an inevitable cultural

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war between them and religious fundamentalism. The centrality of religion in modernity will continue to prevail as a major challenge that exceeds issues of violence and terrorism. The various essays in this volume show and argue for the interplay between religion as a comprehensive and dynamic transnational phenomenon and modernity that is both resisted by, constituted and generated through religion. Law is a major field in which these dialectical interactions have been transhistorically constituted.

Can we reconcile between legal texts of religions, even those that are practised by non-liberal religious communities and the aspiration for a universal code of human rights? This is a challenge for law and society scholars that the essays in this volume pose. The abstraction of basic human rights from the diversity of religions should and can be a component in the aspiration for a universal minimal legal code. That code should admit cultural relativity and the need to sanctify the plurality of religions in law. It should also acknowledge the importance of political spaces in which different religious communities may be included as legitimate components in traditions of legality. This volume proves that religions should be subjected to a careful deconstruction process through which we should better understand religion as a field of power, faith, legality and hermeneutics, which cannot escape diverse contextualization in different localities.

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Proof Copy

Name Index

Aakhus, M.A. 302
Abdul-Rauf, Muhammed 358
Abelard, Peter 112
Abu Hurayrah 169
Ackerman, Bruce 264
Adams, Arlin M. 260, 262, 265
Adamu, Uba Abadalla 305, 306
Al-'Amidi, Sayf Al-din 187
Al-Bouti, M. Sa'ieed Ramadan 184, 187
Al-Ghazali, Abi Hamid M.I.M. 187
Ali, Hasan 291, 292
Ali ibn Abu Talib 351
Al-Shafi'ie, Muhammad bin Idrees 177, 187
Al-Shatibi, Abi Ishaq 187, 188
Al-Zarqa', Mustafa Ahmad 187
An-Na'im, Abdullahi Ahmed 171
Alexander III, Pope 115
Allen, Woody 57
Ambrosetti, Giovanni 95–106
Amin, Idi 36
Ammicht-Quinn, Regina 3
Anderson, Benedict R. 265
Annan, Kofi 520, 521
Anselm of Canterbury, St 78, 79, 82
Apastamba 234
Appleby, S.R. 302
Aquinas, St Thomas 96, 97
Arifin, Tenghu Daud 289–90
Asad, Talal xiv, 263
Augustine, St xiv, 22, 96, 104
Austin, John 205

Bachrach, P. 303
Bailyn, Bernard 260
Ball, M. 57–61 *passim*, 62, 64, 69
Banning, Lance 260
Baratz, M.S. 303
Barks, Coleman 62
Barry, B. xx
Barth, Karl 59, 60, 428–9
Barzilai, Gad xii, xvii, xix–xxii, xxiv, 301–16
Barzilai-Nahon, Karine xix, xxiv, 301–16
Bastani, S. 304
Baudhāyana 234
Becket, Thomas 111
Beeson, I. 305
Bellah, Robert N. 265
Benda-Beckmann, Keebet von 271
Bentham, Jeremy 197
Ben Zakkai, Rabbi Yohanan 81, 90
Berger, Peter L. 265
Berkowitz, Roger xiii, xiv, xxii, 485–516
Berman, Harold J. xv, xvi, 107–47
Bialik, H.N. 77, 88
Bimber, B. 304
Blackstone, Sir William 108, 109, 145
Blumhofer, Edith L. 390, 391, 399, 412
Blumoff, Theodore Y. 252
Boggs, Stephen T, 400, 401
Bograd, Michele 380
Bonhoeffer, Dietrich 60, 63, 64
Boorstin, Daniel J. 260
Bowen, John R. xix, 269–99
Boyarin, D. 305, 307, 312
Bracton Henry de 115
Braithwaite, John 404
Brandeis, Louis 463, 464
Brennan, Justice 485
Brhaspati 243
Bruce, S. xiii
Buddha 209, 211–12 *passim*, 214–16 *passim*, 217, 218, 219, 220, 256, 258
Bühler, G. 236
Bunt, G. 305, 306
Burger, Chief Justice xii, 480, 482, 497–504 *passim*
Burt, R. 305

Cahn, Itzhak 93
Calvin, John xvi, 128–31 *passim*, 135, 136, 139, 140, 143
Cammack, Mark 285
Caplan, K. 311
Carbonatto, Helene 404
Caro, Joseph 427
Carter, Les S. xii, 394, 397, 398

Proof Copy

Carter, Stephen 252, 265
Casanova, José 265
Castells, M. 302
Chandler, David B. 383, 384
Charles V, Emperor 125
Ch'i, Marquis of 206
Christ, Jesus 17, 18, 63, 64, 66, 68, 70, 98, 209, 211, 340, 344, 407, 408, 454
Chun, Malcolm N. 400, 401
Cicero 66
Claustres, Pierre 513–14 *passim*
Coke, Sir Edward 137, 140, 457, 473
Collier, Jane F. 372
Composta, D. 100
Comaroff, Jean 265
Comaroff, John 265
Comaskey, Brenda 404
Confucius 204, 206, 224
Connolly, William 504
Cordeiro, Wayne 391, 395
Cotta, S. 104
Coulson, Noel J. xvi, 149–59
Cover, Robert M. xviii, xxi, xxii, 193–202, 419–83, 514, 515
Cowan, D.E. 301, 302, 303
Cox, Harvey 390, 391, 395
Crabb, Larry 394
Crnkovich, Mary 404
Cromwell, Oliver 132, 135
Csordas, Thomas J. 396
Custer, George Armstrong 36

Dahan, M. 312
Dalai Lama, Fifth 256
Dalai Lama, Fourteenth 251, 255, 256, 257, 259, 260
Dalby, Gordon 394
Darrow, Clarence 33–4, 47
Davis, Albie 403, 404
Davis, J. 306
Davis, Jefferson 433
Dawson, John P. 127
Dawson, Lorne L. 301, 302, 303, 305, 306
Delany, P. 305
de Lubac, H. 105–6
DiMaggio, P. 302
Dobson, James 393
Douglas, Justice 503
Douglas, William O. 108
Douglass, Frederick 433, 452–3, 454
Dror, Y. 307, 311
Durkheim, Emile xvii, 303
Dworkin, Ronald 40–43 *passim*, 46, 47, 49, 264

Edwards, Paul 33–4
Ehrlich, Eugen 204, 205, 206
El-Or, T. 310
Eisgruber, Christopher L. 264
Eliade, Mircea 263
Ellen, Roy F. 271
Emmerich, Charles J. 260, 262, 265
Escarra, Jean 204, 221–2
Esther, Queen of Ahasuerus 69
Etzioni, Amitai 302
Eysenck, Hans J. 84

Fassò, G. 104
Field, Henry F. 380
Field, Martha H. 380
Finnis, John 37–40 *passim*
Fisher, D.J. 302
Fiss, Owen 458–9 *passim*
Fitzpatrick, Peter 496
Foot, Philippa 45
Foucault, Michel 372
Fowler, Robert B. 265
Frei, Hans W. 59
French, Rebecca R. xix, 251–68
Friedman, M. xv, 302, 307, 312
Friedmann, Daniel 71–93
Fyzee, Asaf A.A. 335, 365

Gaita, Raimond 31, 36
Garrison, William Lloyd 450
Gautama, Siddhartha 234, 242, 243 *see also* Buddha
Gedicks, Frederick M. 252
Geertz, Clifford 271, 283
Gellner, Ernst 264
Gilligan, Carol 394
Giovanni Ambrosetti xv
Glanvill, Ranulf de 115
Goitein, Hugh 77, 80
Goldsworthy, Jeffrey 39
Goulding, A. 304
Greenawalt, Kent 252, 262–3, 265
Greene, Graham 19
Gregory VII, Pope 110
Gregory IX, Pope 115
Gratian 113, 115

Proof Copy

Greley, Andrew M. 265
Grisez, Germain 40
Grotius, Hugo 58, 96, 100
Gushri Khan 256, 260
Gurmann, A. 302
Gutmanis, Jane 401

Hadden, J.K. 301
Hampden, John 137
Hampton, K. 304
Handy, E.S. 412
Hanna, Cheryl 380, 381
Han Fei-tze 205, 222
Hartigan, Emily 252
Hasan, Judge 288–9, 293
Hasan ibn ʿali ibn Abi Talib 351
Hassall, Ian 404
Hastings, Warren 248
Healy, Kerry 381
Heller, H. 308
Hennebry, J. 306
Henry II, King 115
Hertzke, Allen D. 264
Heschel, Abraham 33
Hetzel, Sue 404
Hicks, Edward 62, 65
Hirschl, R. xxiv
Hitler, Adolf 36
Hobbes, Thomas 100, 194
Hoebel, E. Adamson xiii
Hoffman, D. 304
Hojsgaard, M. 301, 303
Honarvar, Nayer xx, 335–67
Hooker, Richard 132, 140
Hoover, S.M. 306
Hostetler, A.J. 305
Howe, Mark D. 260, 433–4
Hsiao Ho 205
Hsien-feng, Emperor 208
Hsüang, Duke of 206
Hudson, Jackie 392, 395
Hudson, Joe 404
Huguccio of Pisa 15
Hui-yüan 218
Humai, Queen of Persia 344
Hus, John 123
Hutchinson, W. 261
Hyde, Lewis 60

Iraj Mirza 357
Isa, Maria 486, 487
Isa, Tina 486–8 *passim*
Isa, Zein 486, 487
Ito, Karen L. 402

Jackson, Justice 457
James I, King 473
James II, King 131
Jasperson, J. 303
Jay, John 486, 488, 489, 506
Jefferson, Thomas 141, 260, 434, 499
Jemilah, Aman 280
John Paul II, Pope 29
Jones, William 248
Jose ben Halafta, Rabbi 456
Joseph, Rabbi Akiba Ben 195
Judah HaNesi, Rabbi 195
Juergensmeyer, J. xxiv
Justinian, Emperor 111, 112, 113

Kahn, Paul 510–11
Kammen, Michael 506
Kant, Immanuel 40, 96
Karst, Kenneth 488
Kasim, Judge 292, 293, 294
Katz, E. 307
Katz, J.E. 302
Kautilya 235
Khadijeh al-Kubra 362
Khostrow Parvis, King of Persia 344
Kiekegaard, Søren 64
Kling, R. 302

Ladd, Everett C. 262, 265
Lai, Whalen W. xviii, 203–25
Landow, G. 305
Lang, Master 219
Langdell, Christopher C. 58, 59
Lao-tzu 209
LaPrairie, Carole 404
Larsen, E. 303, 306
Las Casas, Bartoleme de 499
Latimer, George 450
Laud, Archbishop 137
Lawrence, B. 301
Lebah, Inen 289
Leclercq, J. 97
Lee, G. 306
Lee, Luke T. xviii, 203–25
Leff, Art 36

Proof Copy

Le Gogg, Jacques 263
Legaz y Lacambra, L. 100
Lehmann, Paul xv, 57–70
Leo XIII, Pope 100
Leopold II, King of Belgium 4
Leopold, Nathan F. 34
Lev, Daniel S. xix, 273, 274, 297
Levi-Strauss, Claude 44
Li Hung-chang 208
Liebman, C.S. 302, 307
Lilburne, John 127
Lincoln, Abraham 433, 474
Locke, John 100, 133, 135, 136, 194, 493
Loeb, Richard A. 34
Longclaws, Lyle 404
Lorde, Audre 485
Lukes, S. 303
Luther, Martin xvi, 117–25 *passim*, 126, 127, 129, 130

Ma, Nalani T. 402
McClure, Kristie 493
McConnell, Michael 252
McGillivray, Anne 404
Machiavelli, Nicolò 121
MacIntyre, A. xx
Madison, James 253, 260, 261
Mahdi Zahraa 161–89
Mahmood, Judge 347–8
Maimonides 81, 197, 198, 200
Maitland, Frederic W. 115
Malo, David 412
Manu 230, 236, 238, 239, 240–41, 244, 245, 248
Mao Zedong 5, 222
Marty, Martin E. 262, 265, 302
May, Henry J. 260
Mencius 207
Merry, Sally E. xiii, xxi, 369–418
Messick, Brinkley 277
Meyer, Manu A. 401, 403, 404, 408
Migdal, S.J. xvii
Miller, Peter 375
Miller, Wallace 498
Miller, William J. 260
Milsz, Czeslaw 54–5
Milton, John 66
Minirth, Frank 394, 397, 398
Mor, G. 312
Mohammed, Prophet 150, 336, 337, 340, 341, 346, 347, 348, 351, 356, 360, 362
Moses of Mendelssohn 485
Mukhlis, Tenghu 278
Müller, Max 235
Murphy, Jeffrie 35
Murrin, John M. 260

Nagel, Thomas 34
Napeahi, Abby 406
Nietzsche, Friedrich 3, 9, 30, 31, 36, 45, 56
Noo Al-Din Al-Shahid 166
Nussbaum, Martha 40, 43, 45, 46, 47, 49

Ogle, E. 303
Ono, H. 304
Orwin, Clifford 4

Paglinawan, Lynette K. 401, 405
Palama, Dassar 402
Pape, A.R. xxiv
Pascal, Blaise 64
Paymar, Michael 380, 381
Pe'a, Howard 406
Pence, Ellen 380, 381
Penn, William 62, 65
Perlmutter, D. 306
Perry, Michael J. xv, 3–56, 252, 265
Pfeffer, Jeffrey 303
Phillips, Wendell 450, 452
Pickering, W.S.F. xvii, 303
Piovani, P. 97
Pius XII, Pope 100–101
Plato 59
Platt, Jessica A. xx, 319–30
Pol Pot 36
Porang, Abubakar 280–82 *passim*, 293
Posner, Richard A. 34
Pospisil, L.
Pourandokht, Queen of Persia 244
Ptacek, James 380
Pukui, Kwena 405
Pukui, Mary K. 400–401 *passim*, 402, 403, 404, 405, 406, 407, 412
Putnam, Hilary 12

Rabin, Yitzhak xxiii
Rachal, W. 261
Rafaeli, S. 303
Rakove, Jack N. 260
Ramos, D. 304
Rawls, John xx, 67, 252, 263

Proof Copy

Reagan, Ronald 64
Rebibo, Y. 309
Reichley, A. James 265
Renteln, Alison 488
Reynolds, George 491–7 *passim*
Roberts, S. 404
Robertson, R. 304
Rocher, Ludo xviii, xix, 227–49
Rodriguez, Noelie M. 382
Rommen, H. 100
Rorty, Richard 3, 44–5 *passim*, 50–53 *passim*, 62
Rose, Nikolas 375, 414
Rosen, Lawrence 277
Rosenblum, J. 307
Rousseau, Jean-Jacques 96, 141, 194
Rozen, L. 306

Salah Al-Din Al-Ayyoubi 166
Sandel, Michael J. xx, 262, 265
Sandoz, Ellis 260
Santos, D.S.B. xiii, xxiv
Sarat, Austin xiii, xiv, xxii, 485–516
Schacht, J. 158
Schechter, E. 307
Schechter, Susan 380, 385
Schleiermacher, Friedrich 59
Schlesinger, Arthur 486, 488, 489
Schneider, Elizabeth 380
Schwarts, Oswald 363
Schwarzenberg, Baron von 127
Sen, Amartya 520, 521
Ser, S. 307
Serikulah 278
Shachar, A. xvii, xxi
Shook, E. Victoria 403
Shu Sun Tung 205
Siddiqi, M.M. 345, 363–4
Simeon ben Gamaliel, Rabbi 427, 475
Simeon the Just 426, 427
Smalley, Gary 394
Smith, Joseph 467
Smith, Steven D. 252, 260–61, 262, 265
Smith, W. Robertson 345
Sohm, Rudolph 122
Souter, Justice xii
Spacey, R. 304
Spigelman, S-I. 303, 305
Stalin, Josef 5, 36
Sternberg, Meir 88
Sturm, D. xxi
Sudweeks, F. 303
Suharto, Hajii Mohammad 274
Sullivan, Winnifred F. 264, 265

Talley, Jim 394
Tambiah, Stanley J. 263
Taney, Roger 451, 452, 473
Tawney, R.H. 35
Taylor, Charles 260, 265
Teitel, Ruth 252
Tharoor, Shashi xxii, xxiii, 517–22
Thoreau, Henry D. 502, 503
Tinder, Glenn 31–2
Tocqueville, Alexis de 68–9 *passim*, 495, 505
Todorov, Tzvetan 490, 499, 500–501, 512–13
Tolstoy, Leo 25
Tonn, B.E. 303
Toeltsch, E. 99, 100
Trent, John 394
Tushnet, Mark 492
Tutu, Desmond 32
Twersky, Isadore 198
Twining, W.L. xiii
Tyabji, F.B. 360

Udall, Walter 137
Umar ibn Abdul Aziz 166
Unger, Roberto 510
Usman 278

Vasistha 232, 234, 235, 237
Villey, Michael 103

Waite, Chief Justice 491, 492–7 *passim*, 499, 501, 502, 503, 504
Walker, David M. 180
Warburg, M. 301, 303
Weber, Max xiii, 303
Weinberg, Steven 34, 47
Weiss, Johannes 58
Wellhausen, Julius 58
Wellman, B. 302, 304, 305
Wiecek, William 451, 453
Wigmore, C. 206
Williams, Bernard 9, 26, 50, 56
Williams, Roger 260, 434
Wills, D. 305
Wolff, Christian 100
Wright, H. Norman 394
Wright, L.M. 302

Proof Copy

Wundersitz, Joy 404
Wuthnow, Robert 262, 265
Wyclif, John 123

Yājñavalkya 237, 244, 245
Yazid ibn Al-Walid 166
Yeh Ming-ch'en 208
Yllo, Kersti 380
Yoder, Jonas 498
Yorkey, Mike 393, 394
Yossef, Ovadia 311, 312
Yu, Mary K. 383, 384
Yutzy, Adin 498

Zahraa, Mahdi xvi
Zavodny, M. 304

Proof Copy