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SYMPOSIUM

LAW, RELIGION, AND HUMAN RIGHTS IN GLOBAL PERSPECTIVE

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"Our age is *not* an age of secularization," according to the prominent sociologist Peter Berger, but "it is an age of exuberant religiosity."[1] Religion has not faded away with the emerging global culture but has remained a vital and potent force around the globe. Berger's empirical studies have verified that "[m]ost of the world today is as religious as it ever was, and in some places is more religious than ever."[2] If this is so, why have the conventional understandings of the nature of law and human rights looked at religion as a problem for the law rather than a source of insight about or legitimation of the law? Berger points out two exceptions to the exuberant religiosity of our age that may explain this current state of affairs. He claims that a "cross-national cultural elite" including Western academics (sociological exception) and the region of western and central Europe (geographical exception) are both exceptions to these general trends.[3] In other words, Western academics, who are the group most responsible for constructing contemporary conceptions of law and human rights, tend to ignore or reject the importance of religion in their own lives. Given this fact, it should not be surprising that Western academics have likewise frequently ignored or rejected the academic importance of religion.

To correct for this academic blindness, the essays and articles in this Symposium highlight the importance of religion for properly understanding the nature of law, feminism, globalization, human rights, international legal history, and judicial decision making. These essays and articles also challenge the academy to accept a more sophisticated understanding of religion and to understand its importance for all academic inquiry. In this respect, the renowned theologian David Tracy has pointed out that "religions are exercises in resistance. Whether seen as Utopian visions or believed in as revelations of Ultimate Reality, the religions reveal various possibilities for human freedom that are not intended for that curious distancing act that has become second nature to our aesthetic [academic] sensibilities."[4] He further claims that religious questions are "limit questions" which "must be logically odd questions, since they are questions about the most fundamental presuppositions, the most basic beliefs, of all our knowing, willing, and acting."[5] Tracy's notion of religion as a form of resistence provides a paradigm for understanding the six essays and articles in this Symposium.

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1. Peter L. Berger, *Globalization and Religion*, 4 The Hedgehog Rev. 7, 10 (2002) (emphasis in original) (issue devoted to Religion and Globalization).
2. *Id.*
3. *Id.*
4. DAVID TRACY, PLURALITY AND AMBIGUITY: HERMENEUTICS, RELIGION, HOPE 84 (1987).
5. *Id.* at 87.

Like religion itself, each contribution is a form of religious resistence against the status quo images and understandings of law and human rights. In addition, his notion of religion as dealing with "limit questions" further explains why these articles and essays complicate rather than simplify our understanding of the relationship between law, religion, and human rights. Seeking a deeper understanding of the law and human rights means that the story becomes more complex rather than more simple.

Although all the essays and articles recognize the importance of religion, they do so in different ways that can be classified into two distinctive groups. The first group of essays and articles by Winnifred Fallers Sullivan, Cheryl B. Preston, and Emily Albrink Hartigan challenges the status quo but does so by emphasizing the particularity of religion and the contextual nature of law. Universal understandings of law, religion, and globalization are challenged in order to make room for more nuanced understandings of these phenomenon or epiphenomenon. They all deconstruct or decenter our current understandings of law, religion, feminism, and globalization. By contrast, the second group of essays and articles by Mark Weston Janis, Franklin I. Gamwell, and myself challenges the status quo by attempting to revise the current universal claims about law, human rights, and judicial decision making so that religion is properly taken into account. They advocate a new universal understanding of international law, human rights, and judicial decision making that recognizes the centrality of religion.

One of the unexpected and interesting facts about these two groups of essays and articles is that they breakdown along gender lines. The first group are all written by women, and the second group are all written by men. Although there was an expectation that each author would contribute something unique to the Symposium, no one planned this breakdown along gender lines. This breakdown mirrors the common assertion that women are more often drawn to particularity and narrative while men are drawn to universality and abstraction.[6] I do not point this out, however, as further evidence of this hypothesis but to note that it raises the question as to whether our concepts and conceptions of religion, law, and human rights are gender specific as well as Western. I leave for the reader the resolution of this difficult question, and in the following, I briefly summarize each essay and article to provide an overview of their provocative challenges to the status quo.

I. THE PARTICULARITY OF RELIGION, HUMAN RIGHTS, AND THE LAW

Winnifred Fallers Sullivan's essay entitled *Religious Freedom and the Rule of Law: Exporting Modernity in a Postmodern World?*[7] provides a good introduction to the complexity of the issues involved in understanding the phenome-

6. *See, e.g.*, Deborah L. Rhode, *Feminist Critical Theories, in* FEMINIST LEGAL THEORY 333, 344 (Katharine T. Bartlett & Rosanne Kennedy eds., 1991) (arguing that "[m]any feminist legal critics are also drawn to narrative styles that express the personal consequences of institutionalized injustice" and "usually situate their works in the lived experience of pornography or sexual harassment rather than, for example in the deep structure of Blackstone's Commentaries or the fundamental contradictions in Western political thought").

7. Winnifred Fallers Sullivan, *Religious Freedom and the Rule of Law: Exporting Modernity in a Postmodern World?*, 22 Miss. C. L. Rev. 173 (2003).

non or epiphenomenon of religion and its relationship to law. To uncover this complexity, she relies on scholars from a multiplicity of disciplines including anthropology, history of religions, political theory, law, religious history, and sociology. From the beginning, she notes that there is little academic agreement about the definition of religion and tries to get a purchase on the concept "from the perspective of law."[8] She argues that "'religion' cannot be understood apart from an understanding of the cluster of ideas around the invention and regulation of modern religion, including religious freedom, disestablishment, and the separation of church and state, ideas that are largely indebted, on the religious side, to liberal protestant theological reflection and culture."[9] The concept of religion emerging from early modern Europe and the Protestant Reformation is a modern protestant understanding of religion as "private, voluntary, individual, and believed."[10] This analysis leads to a problematic tension: "in Western democracies religious freedom and the rule of law are modernist constructs," while "'post-modern' religion" is often illiberal and refuses "to occupy the legal space set apart from it by protestant theology and modern law."[11] Given the historical shift from modernity to post-modernity, Sullivan cautions against relying on outdated modernist notions of religion and law to support advancing religious freedom. Rather, she calls for "a reexamination of rationales for laws privileging religion and the bargain made by the Protestant churches, a bargain that Sidney Mead called 'the Trojan horse in the comfortable citadel of [American] denominationalism.'"[12]

Cheryl Preston's article, *Women in Traditional Religions: Refusing to Let Patriarchy (or Feminism) Separate Us from the Source of Our Liberation*,[13] further challenges contemporary feminists to reevaluate their often reductionistic dismissal of traditional religions as a source of liberation for women. As a committed member of the Church of Jesus Christ of Latter-day Saints, Preston rejects "the usual secular, liberal epistemologies that deny faith within an organized structure" that are usually employed by feminists in their critique of organized religions as patriarchal.[14] For example, she points to the controversy over the *burqa* worn by traditional Muslim women as the "feminist ensign of our age."[15] She notes that feminists tend to "reduce Third World women to the category of victim" and fail to see how their imperialistic views help "camouflage the violence and brutality of colonialism."[16] In response, Preston does not suggest gender issues or the abuse of power in the name of religion should be ignored. However, she thinks that gender issues can be addressed within traditional religions so that faith in a traditional religion can be reconciled with feminism and feminism can be reconciled with organized religious faith. This prevents an

8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.* at 177, 175-76.
12. *Id.* at 183.
13. Cheryl B. Preston, *Women in Traditional Religions: Refusing to Let Patriarchy (or Feminism) Separate Us from the Source of Our Liberation*, 22 Miss. C. L. Rev. 185 (2003).
14. *Id.* at 186.
15. *Id.* at 185.
16. *Id.* at 195, 194.

either/or choice requiring women to choose between their traditional religion (which women tend to support more than men) and their liberation from patriarchy. Faced with such a choice, Preston argues that many women will choose their religious commitments over their commitment to feminism. Alternatively, she advocates that balancing these commitments requires women within traditional religions to make their own assessment of their oppression and liberation. With this approach, "religion and feminism work together in a woman's life to help her reach her full potential."[17]

Similarly, Emily Albrink Hartigan's article, *Globalization in a Fallen World: Redeeming Dust,*[18] resists the conventional understandings of globalization and the methods used to explore this phenomenon. She challenges "the discursive, 'rational' discourse of the late twentieth century university and political-cultural commentary in the United States of America and Great Britain," which she identifies as the "primary paradigm used in academic globalization discussion."[19] By contrast, her article's "most authentic manner of expression and process is not linear and purportedly syllogistic, but narrative and parabolic."[20] By relying on the spiritual aspects of Jacques Derrida, Ivone Gebara, William Stringfellow, David Tracy, and feminist spirituality, this method attempts to decenter our current legal consciousness to allow the religion-beyond-religion and the God-beyond-God to participate in shaping an emergent legal consciousness and understanding of globalization. In other words, although I would not pretend to capture or compress the movement of her essay, her essay focuses on the prophecy and hope that can be realized from an embodied knowledge of the Spirit's redemptive presence-and-absence. For example, she points to the possibilities of redemption that could arise from a "new merchant law." Merchant law results from gathering the customs under which merchants trade goods and has been compared to the way in which merchants' boots use to gather dust in their travels on the unpaved roads of Europe and England. Hartigan notes that in certain trading arrangements between France and the United States, "we find that trading partners such as France who have values with substantive content can in effect change our Constitution. One form of globalization-regulation, then, may be the conscientious actions of other nation-states."[21] Hartigan ends her essay stating: "I persist in my hope that from the strongest particularity we can muster, weaving in and out of the texts we share and adding threads of new and strange texts and stories, we will end up with something unexpected, unthematic, and beautiful."[22]

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17. *Id.* at 214.
18. Emily Albrink Hartigan, *Globalization in a Fallen World: Redeeming Dust*, 22 Miss. C. L. Rev. 215 (2003).
19. *Id.*
20. *Id.*
21. *Id.* at 228-29.
22. *Id.* at 232.

II. THE UNIVERSALITY OF RELIGION, HUMAN RIGHTS, AND THE LAW

In contrast to the critiques of universality by Sullivan, Preston, and Hartigan, the last three articles by Janis, Gamwell, and myself argue for a new universal understanding of international law, human rights, and judicial decision making that recognizes the centrality of religion. Rather than calling into question the merits of universal international legal norms, Mark Weston Janis's essay entitled *A Sampler of Religious Experiences in International Law*[23] begins to rewrite the history of international law to take into account the important contributions of religion to international law. He argues that "[r]eligious principles, religious problems, and religious enthusiasts have all played profound, if sometimes little appreciated roles in the development of international law."[24] Janis first identifies and defuses "three suspicions international lawyers have of religion"[25] that have contributed to this failure to appreciate the role of religion. The first suspicion arises from the failed attempt by those like Oppenheim to turn law into a science under the influence of legal positivism. A second suspicion of religion derives from the "fear of excluding or alienating those whose values and religious beliefs are quite different from" those of the Western perspective.[26] The third and last suspicion stems from the concern that religion has historically lead to division and warfare as evidenced by the thirty years war in Germany and that international law has a limited capacity to bridge these religious differences with treaties like the Treaty of Westphalia in 1648.[27] After overcoming these suspicions, Janis outlines two important contributions of religion to international law. The first contribution derives from "the sometimes beneficial influence of religious enthusiasms on the development of international law" including great figures such as Francisco Suarez, Francisco de Vitoria, Hugo Grotius, David Low Dodge, Noah Worcester, William Ladd, Elihu Burritt, and Woodrow Wilson.[28] In addition, religion made an important contribution to international law by providing "universalistic norms . . . protect[ing] religious diversity."[29] In closing, Janis even notes some parallels between religion and international law including "the aspiration of both to teach and affirm a universalistic message" and an "evangelistic core."[30]

Franklin Gamwell's article entitled *The Purpose of Human Rights*[31] argues for an even deeper relationship between religion and human rights by challenging the modern consensus among political philosophers such as Jürgen Habermas, Alan Gewirth, Brian Barry, and John Rawls "that a principle or principles of human rights must be independent of any comprehensive telos to which all human activity ought to be directed."[32] The novelty of Gamwell's challenge to the modern consensus is not his agreement with the pre-modern claim that all

23. Mark Weston Janis, *A Sampler of Religious Experiences in International Law*, 22 Miss. C. L. Rev. 233 (2003).
24. *Id.*
25. *Id.*
26. *Id.* at 234.
27. *Id.* at 234-35.
28. *Id.* at 235-36.
29. *Id.* at 236.
30. *Id.* at 238.
31. Franklin I. Gamwell, *The Purpose of Human Rights*, 22 Miss. C. L. Rev. 239 (2003)
32. *Id.*

human life (including politics) is properly directed to an all-inclusive divine purpose or comprehensive telos but his rejection of authority as the grounding for comprehensive teleology. Gamwell considers modernity's "commitment to the autonomy of reason" "non-negotiable" so that claims about God, morality, and politics must be rationally redeemed.[33] The mistake of modern thought has been to dismiss comprehensive teleology by merely assuming that it cannot be rationally redeemed. Thus, Gamwell's position that human rights depend on a rational comprehensive teleology constitutes a unique alternative to the medieval affirmation of a comprehensive teleology based on authority and the modern affirmation of a nonteleological account of human rights based on reason.

To support his teleological conception of human rights, Gamwell argues "that the meta-ethical character of every claim to moral validity includes [the principle of communicative respect] by which a universal community of rights is constituted."[34] The principle of communicative respect provides that individuals are "morally bound to treat each other as *potential participants in moral discourse*," and thus it "prescribes a democratic political association."[35] Gamwell maintains that a democratic political association requires that the rights in the constitution be formative (neutral to disagreement about the substantive content of rights) rather than substantive so that moral and political decisions are subject to contestation and dissent. These rights institute a full and free debate concerning the question of which conception of the good human association should inform the substantive rights prescribed by law. In order to secure this debate, the constitution should include formative rights protecting the prerequisites for discourse (private liberties such as the rights to life, liberty and property) and "the right of all individuals or citizens to be participants in the democratic discourse" (public liberties such as due process, equal protection, freedom of speech, and religious freedom).[36] Despite the formative nature of the constitution, Gamwell contends that the formative principle of communicative respect implies a comprehensive purpose. This comprehensive purpose justifies the principle of communicative respect and provides the basis for the substantive principles of justice that are required to resolve moral and political decisions. Gamwell concludes that "[t]he comprehensive purpose exiled from modern moral and political thought is reasserted as the purpose of human rights. They are secured morally and politically by the telos of our maximal common humanity and, through it, the maximal divine good."[37]

Finally, my article entitled *Reenchanting International Law* challenges the conventional account of international law as relating to "a movement beyond 'the inadequacies of religion' (*i.e.*, religion produces war not peace) to a rational notion of law to govern the relations among the evolving nation-states."[38] For example, I demonstrate that John Rawls's attempt to support a determinant set of

33. FRANKLIN I. GAMWELL, DEMOCRACY ON PURPOSE: JUSTICE AND THE REALITY OF GOD 4 (2000).
34. Gamwell, *supra* note 31, at 246.
35. *Id.* at 248, 252.
36. *Id.* at 252.
37. *Id.* at 261.
38. Mark C. Modak-Truran, *Reenchanting International Law*, 22 Miss. C. L. Rev. 263, 264 (2003).

international legal norms independent of comprehensive doctrines (a "political, not metaphysical" Law of Peoples) is incoherent because it depends on a comprehensive doctrine. To the contrary, I argue that international law needs religion because it is indeterminate. By focusing on hypothetical judicial decision making in hard cases where the law is indeterminate, I show that the interpretation and application of international law requires judges to rely on comprehensive or religious convictions about authentic human existence for fully justifying the extra-legal norms they rely on to decide hard cases. On the other hand, I contend that a proper understanding of religious pluralism requires that the text of international law should remain indeterminate. International law should not adopt the full justification of legal norms based on comprehensive convictions, but it should only include noncomprehensive legal and extra-legal norms. This leaves the official text of international law (judicial opinions, treaties, etc.) indeterminate so that a plurality of comprehensive or religious convictions may justify international law. "Religious convictions are thus the *silent prologue* to any full justification of hard cases. The demands of full justification in hard cases reintroduces religious convictions into the justification of international law and thereby *reenchants* international law."[39]

CONCLUSION

In conclusion, the essays and articles in this Symposium challenge the conventional understandings of the nature of law, religion, feminism, globalization, human rights, international legal history, and judicial decision making. These challenges all center or derive from the attempt to provide a more sophisticated account of the importance religion for understanding law and human rights and to take religion seriously as a powerful normative force around the globe. These essays and articles also aid in transforming our understandings of law and human rights to take into account Berger's claim that "modernity fosters pluralism" rather than secularization.[40] Berger emphasizes that "[t]his does not mean (as secularization theory maintained) that people *give up* beliefs or values, but rather that these are now *chosen* rather than taken for granted. Put differently, pluralism does not necessarily change *what* people believe, but *how* they believe."[41] This Symposium helps make a first step in eliminating the long-standing and deeply-ingrained myth of secularism that informs conventional conceptions of law and human rights. Demythologizing our conventional secular conceptions of law and human rights to recognize the importance of religion and its pluralistic forms will thus be a long process that has only just begun.

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39. *Id.* at 267.
40. Berger, *supra* note 1, at 11.
41. *Id.*