Law and Religion

JURISPRUDENCE AND THEOLOGY

THE AUSTRALIAN SCHOOL

Edited by
Jonathan Crowe, Constance Youngwon Lee
and Joshua Neoh

ROUTLEDGE

Jurisprudence and Theology

In recent years, a distinctive approach to law and religion scholarship has developed in Australia, characterised by direct engagement with theology in addressing legal and jurisprudential questions. This collection consolidates and develops this approach under the label of the 'Australian School' of law and religion. The volume brings together leading experts to reflect upon the intersections between jurisprudence and theology and explore jurisprudential and legal questions from various theological standpoints. It presents a contribution to the continual reassessment of the nature and origins of shared norms through the convergent spaces between law and theology, prompting a deeper understanding of the foundations of our common humanity. It also models a way of doing law and religion scholarship that diverges from the dominant focus on the sociological interactions between law and religion in the context of cultural diversity and secular governance. The consistent theme of the collection is that jurisprudence and theology are inextricably intertwined, despite the traditional disciplinary divide between the two literatures. The book addresses both horizontal and vertical perspectives on this issue—horizontal, in the sense of engaging in comparative studies of diverse legal and religious paradigms, and vertical, in the sense of exploring the relationship between legal norms and transcendent sources of value. The book will be of interest to academics and researchers working in the areas of law and religion, jurisprudence, political theory, comparative law, the history of ideas and theology.

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The practice of religion by individuals and groups, the rise of religious diversity, and the fear of religious extremism, raise profound questions for the interaction between law and religion in society. The regulatory systems involved, the religion laws of secular government (national and international) and the religious laws of faith communities, are valuable tools for our understanding of the dynamics of mutual accommodation and the analysis and resolution of issues in such areas as: religious freedom; discrimination; the autonomy of religious organisations; doctrine, worship and religious symbols; the property and finances of religion; religion, education and public institutions; and religion, marriage and children. In this series, scholars at the forefront of law and religion contribute to the debates in this area. The books in the series are analytical with a key target audience of scholars and practitioners, including lawyers, religious leaders, and others with an interest in this rapidly developing discipline.
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Jurisprudence and Theology

The Australian School

Edited by Jonathan Crowe, Constance Youngwon Lee and Joshua Neoh

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This book began with friendship. A group of us have been meeting annually in Australia since 2019 to talk about theology and jurisprudence. The travelling band has met at the University of Notre Dame Australia (2019), University of Sydney (2022), University of Adelaide (2023), University of Southern Queensland (2024), Queensland University of Technology (2025) and Australian National University (2026). Birds have nests, foxes have holes, and thankfully, we have hosts. These gatherings provide solidarity to our solitary work.

This book is dedicated to Bertie and Clemmie, who were both born while their parents were editing the volume, and who bear testament to the transcendent.


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1 Jurisprudence and Theology

The Australian School

Jonathan Crowe, Constance Youngwon Lee and Joshua Neoh

This book explores the complex and multifaceted intersections between jurisprudence and theology. The adoption of an expressly theological approach to jurisprudential and legal questions is characteristic of what has come to be known as the Australian School of law and religion studies. The contributors to this collection include both established and emerging Australian scholars whose work embodies the approach of this school. In this introductory chapter, we begin by discussing the promise and pitfalls of connecting the fields of jurisprudence and theology. We then consider more directly the origins and characteristics of the Australian School. The chapter concludes with a road map for the reader in the form of an overview of the contributions to this volume.

Jurisprudence and Theology

The study of law and religion is both very old and very young. In one sense, it is as old as the hills. As old as Mount Sinai, to be precise. The Book of Exodus claims that the law was given to Moses by God himself on Mount Sinai. Paul's Letters would later challenge the form and content of this law, and consequently, the question of law and religion would come to dominate much of early Christian theology. Just as much of early Christian theology was about law and religion, so much of medieval jurisprudence too was about law and religion. Thomistic jurisprudence begins with eternal law and ends with divine law. In between them are natural law and human law. All this was swept aside in the march of secularism, when legal positivism replaced natural law as the dominant mode of legal thought. Contemporary law and religion scholarship could thus be thought of as an effort to recover this older tradition of thought, which locates the legal world within a larger theological worldview. We are only beginning to recover what we have lost. In this sense, the study of law and religion is still very young. What is young is the study of law and religion in a secular age.

It was once commonplace to see theology and jurisprudence as intertwined. Today, however, explicitly theological work on jurisprudence is relatively uncommon and marginalised. Even contemporary natural law theorists, whose

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work continues to owe much to Thomas Aquinas,[1] often eschew express references to theological questions in their jurisprudential works or relegate these to an afterthought. John Finnis, the most influential contemporary natural law theorist, for example, does not introduce theological questions into his major work, *Natural Law and Natural Rights*, until the concluding chapter.[2] Mark C Murphy, who has a strong claim to be the next most important contemporary natural law author after Finnis, leaves theology out of *Natural Law in Jurisprudence and Politics* entirely[3]—although his important work in philosophy of religion is often expressly theological.[4] And Jonathan Crowe, one of the present authors, is guilty of this too—theology appears in his *Natural Law and the Nature of Law* in only the introduction and conclusion.[5]

Why has theology, once so central to philosophy of law, become marginalised? The story no doubt has something to do with the rise of contemporary analytical philosophy, with its emphasis on logic and reason, and tendency to look to the sciences for methodological cues. Contemporary jurisprudence, insofar as it has adopted the methods of analytical philosophy, has acquired the same tendencies. This manifests itself in a suspicion towards appeals to God or other theological concepts, which appear metaphysically extravagant from an analytical standpoint. Just as theistic philosophy of religion holds a somewhat marginal position within contemporary philosophy, theistic jurisprudence lies at the margins of contemporary philosophy of law. This, in turn, explains the reluctance of jurisprudential thinkers—even those working in the natural law tradition—to foreground theological issues. They would like, understandably, for their work to garner mainstream attention, rather than being relegated to the margins. And this strategy has, to some extent, been successful. For instance, although Finnis's neglect of theology has been criticised by other natural law authors,[6] it arguably succeeded in sparking a widespread resurgence of interest in natural law among philosophers of law, not to mention law students and lawyers.

There are philosophical as well as sociological reasons why jurisprudential thinkers may choose not to emphasise theological themes. Contemporary jurisprudence, like contemporary political philosophy, has been heavily influenced

1 See, for example, John Finnis, *Natural Law and Natural Rights* (Oxford University Press, 2nd ed, 2011) vi; Mark C Murphy, *Natural Law in Jurisprudence and Politics* (Cambridge University Press, 2006) 1.

2 Finnis (n 1) ch 13.

3 Murphy (n 1).

4 See, for example, Mark C Murphy, *Divine Holiness and Divine Action* (Oxford University Press, 2021); Mark C Murphy, *God's Own Ethics: Norms of Divine Agency and the Argument From Evil* (Oxford University Press, 2017); Mark C Murphy, *God and Moral Law: On the Theistic Explanation of Morality* (Oxford University Press, 2011).

5 Jonathan Crowe, *Natural Law and the Nature of Law* (Cambridge University Press, 2019).

6 See, for example, Russell Hittinger, *A Critique of the New Natural Law Theory* (Notre Dame University Press, 1987); Jean Porter, *Nature as Reason: A Thomistic Theory of the Natural Law* (Eerdmans, 2005).

by the ideas of John Rawls.[7] Rawls popularised the notion that political discourse should aim for an 'overlapping consensus' by avoiding any commitment to 'comprehensive doctrines' with which not everyone can potentially agree.[8] Theological discourse, the thought goes, is inherently exclusionary, insofar as non-theists cannot engage with it. By introducing theology into jurisprudence, we may appear to give up on the possibility of speaking to the community at large. This is a sacrifice that Rawlsians—and not only Rawlsians—are reluctant to make. These concerns about the apparently exclusionary nature of theological discussions also play into contemporary anxieties about systemic forms of social discrimination. Christian theology, in particular, provokes fears for some about privileging a historically Western form of discourse and marginalising alternative religious and cultural worldviews.

Rawls, of course, is not the only game in town where political philosophy is concerned. Others, such as Alasdair MacIntyre, have powerfully argued that comprehensive doctrines are in fact a necessary part of political discourse.[9] These narratives give us something in common to talk about, uniting us, at least potentially, around a genuinely shared conception of rationality and the good. The Rawlsian concept of overlapping consensus, by contrast, threatens to splinter the political community into a collection of disparate groups or individuals who are only ever peripherally engaged with each other (that is, at the point of overlap) and therefore lack the resources to reason through their disputes about what justice requires. And one rich source of narratives that might, at least potentially, unite us concerns our relationship with life, the universe and everything. By speaking theologically, we invoke themes of near universal concern throughout human history. Christian theology—or, indeed, Muslim, Hindu, Buddhist, Daoist or Confucian thought—is, on this view, an entrée into these basic questions about the shared human condition. By engaging in theological discourse, we open at least the possibility of something more than a community of overlapping interests. We lay the groundwork for a meaningful story about the origins and purpose of human life—a story we can all partake in, even if we approach it from different standpoints.

Max Weber famously argued that the history of law begins with revelation and ends with professionalisation.[10] Law is initially something revealed to us by prophets but ends up as something administered by professional jurists—trained in law schools, not seminaries. However, key jurisprudential concepts, such as authority and sovereignty, retain the vestiges of their

7 For critical discussion of this trend, see Jonathan Crowe, 'The Idea of Small Justice' (2021) 34 *Ratio Juris* 224.

8 John Rawls, 'The Idea of an Overlapping Consensus' (1987) 7 *Oxford Journal of Legal Studies* 1, 4–5.

9 See, for example, Alasdair MacIntyre, *Whose Justice? Which Rationality?* (University of Notre Dame Press, 1988) 3–7.

10 See, for example, Max Weber, *Economy and Society: A New Translation*, tr Keith Tribe (Harvard University Press, 2019) 386.

theological origins; they 'prowl about in our lives', as Weber put it, like 'the ghost of dead religious beliefs'.[11] Attempts to make sense of these ideas from a purely secular standpoint are often disappointing, as evidenced by the difficulty contemporary legal philosophers have faced in explaining the authority of law.[12] Connecting theology with jurisprudence helps us to understand where core jurisprudential ideas come from. It also offers intellectual resources that, when embedded in social narratives, arguably offer greater promise than purely secular notions in restoring faith in law's claim to promote a genuinely common good. Law without justice, Augustine argued long ago, is no different to the rules of a robber gang.[13] If law is only a power game, then we might have reasons to play the game, but we owe law no higher form of allegiance. However, if law connects us with a higher source of value, then we have reason to respect and obey it. Theology offers one possible route to understanding what that higher source of value might be.

The Australian School

The so-called Australian School takes up the possibility of a human narrative grounded in theological concepts and applies it expressly to legal and jurisprudential issues. Why have the Antipodes, far flung from many other centres of jurisprudential thought, yielded fertile ground for this perspective? The answer lies at least partly in the advantages of distance. Australian law and religion scholars, while having ready access to work from US and European authors, are not steeped in the specific legal and cultural contexts of those jurisdictions. They are, as a result, relatively free of some of the preoccupations that characterise US law and religion scholarship in particular.

When secular constitutions came to be written in the modern era, they often contained articles providing for the free exercise of religion, together with restrictions on the establishment of religion. In the US Constitution, we find both the free exercise clause and the non-establishment clause in the First Amendment: 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.' The Australian Constitution likewise stipulates that

> the Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth. (s 116)

11 Max Weber, *The Protestant Ethic and the Spirit of Capitalism*, tr Talcott Parsons (Routledge, 1992) 124.

12 For an overview, see Crowe (n 5) ch 10.

13 Augustine, *City of God*, tr Henry Bettenson (Penguin, 2003) 139 [bk IV, ch 5].

With provisions like these, the study of law and religion became quickly ensconced within constitutional law. When the study of law and religion re-emerged in the legal academy, it was understandable that these constitutional provisions were its first port of call.

Because the First Amendment looms so large over American law, it has predictably consumed much of the intellectual energy of law and religion scholars in the United States. They became stuck at this first port of call. Across the Pacific, in the Australian continent, s 116 was similarly the first port of call for law and religion scholars. But we soon moved past it. The reason was simple. There is nothing much to say about s 116. In its interpretation of s 116, the High Court of Australia has effectively defanged the section and turned it into a toothless tiger.[14] No law has ever been struck down in Australia based on s 116. The High Court has interpreted the section to be a restriction on legislative power, not a conferral of individual rights. The non-establishment clause has been interpreted to prohibit only a direct and purposeful declaration of one religion as a national institution,[15] while the free exercise clause has been interpreted to prohibit only laws whose purpose is to restrict the exercise of religion, but not laws for an unrelated purpose which incidentally restrict the exercise of religion.[16]

This narrow way of interpreting s 116 has many negative consequences, but one positive offshoot of this legal development is that law and religion scholars in Australia are not stuck with working out what each new High Court case has to say about s 116, for these cases are few and far between. Faced with this doctrinal desert, law and religion scholars in Australia have to seek greener pastures elsewhere. Having said all that could be said about s 116 (there is only so much of the dead horse that one can beat), many of us then redirected our energies to broader questions of legal theory and theology. We are not as preoccupied with free exercise and non-establishment issues as our American cousins are, which frees up intellectual space for us to explore new lines of inquiry. In recent years, a distinctive approach to law and religion scholarship has developed in Australia, characterised by direct engagement with theology in addressing legal and jurisprudential questions. This volume consolidates and develops this approach under the label of the Australian School of law and religion.

The label of the Australian School, as with so much else in our internet age, began on the World Wide Web. This label can be traced to a blog post in

14 See generally Jonathan Crowe, *Australian Constitutional Law: Principles in Movement* (Oxford University Press, 2022) 214–7.

15 Paul Babie, Joshua Neoh, James Krumrey-Quinn and Chong Tsang, *Religion and Law in Australia* (Kluwer Law International, 3rd ed, 2022) §38, citing *Attorney-General (Vic); Ex rel Black v Commonwealth* ('*DOGS Case*') (1981) 146 CLR 559, 653 (Wilson J).

16 Ibid §39, citing *Kruger v Commonwealth* ('*Stolen Generations Case*') (1997) 190 CLR 1, 86 (Toohey J) 134 (Gaudron J) 161 (Gummow J).

2022 by an American scholar,[17] and since then, the term has been informally used in academic circles by Australian scholars,[18] but in a loose and ill-defined way. It often takes an outsider to see what is unique and distinctive about what we do, so it seems appropriate that this label was given to us by an American scholar. This volume embraces this label and seeks to define what we mean by the Australian School by demonstrating how it is done. The volume brings together the who's who of the Australian School to reflect upon the intersections between jurisprudence and theology. The editors and authors include many of the foremost Australian scholars on law and religion as well as a former justice of the High Court of Australia.

The bulk of global scholarship in law and religion today see law and religion as separate social institutions that interact with each other in complex ways. That is no doubt true. Law and religion are certainly social institutions, but they are institutions that each house a cluster of concepts and ideas. We may call the cluster of concepts housed by law 'jurisprudence', and the cluster of concepts housed by religion 'theology'. The Australian School shifts the focus from law and religion to jurisprudence and theology. The distinctiveness of this approach lies in its shift from doctrinal analysis to theoretical reflection. The Australian School sees jurisprudence and theology as existing in a dialogic relationship. While jurisprudence often claims to offer secular explanations of law, many legal theories are, unbeknownst to the theorists themselves, undergirded by theological concepts. The Australian School makes the implicit explicit.

As a historical matter, the bulk of the theological influences on the Western legal tradition are drawn from Christian theology. Outside the Western legal tradition, the theological influences are similarly rich and more varied. Jurisprudential viewpoints around the world have been shaped by a broad range of theological traditions. The tendency of jurisprudence to ground itself (at least implicitly) in some kind of theology is therefore not surprising, given its need for an ontological foundation for legal authority, along with the connections between legal institutions and social order. This volume includes consideration of Asian legal traditions with their own theological reflections and inflexions. Australia's geographical and cultural connections to the Asia-Pacific region make these kinds of cross-cultural comparisons a noteworthy feature of the Australian School.

17 Marc DeGirolami, 'The Australia School', *Mirror of Justice* (27 March 2022) <https://mirrorofjustice.blogs.com/mirrorofjustice/2022/03/the-australia-school.html>.

18 See, for example, Joel Harrison, 'The Australia School and Politico-Theological Inquiry', *Mirror of Justice* (29 March 2022) <https://lawandreligionforum.org/2022/03/29/the-australia-school-and-politico-theological-inquiry-joel-harrison-responds/>; Jeremy Patrick and Joshua Neoh, 'Theology and Jurisprudence', *Law and Religion Down Under* (August 2023) <https://open.spotify.com/episode/71psGMH9wAr0PdJgEXhHMI>; Sally Crosswell, 'UniSQ Symposium Attracts Deep Thinkers', *Proctor* (22 February 2024) <https://www.qlsproctor.com.au/2024/02/unisq-symposium-attracts-deep-thinkers/>.

The distinct strength of the Australian School is its willingness to look beyond parochial legal issues and explore wider questions that exist at the intersection of jurisprudence and theology. The approach may be Australian, but the subjectmatters—jurisprudence and theology—are universal and trans-jurisdictional. Naming our approach the Australian School is meant to distinguish it from other approaches, but it is certainly not to limit its appeal and reach, for the jurisprudential and theological ideas that the volume explores are both timeless and timely across jurisdictions. Indeed, theological concepts, as noted previously, have the potential to engage shared human concerns about the meaning and purpose of life in a way that doctrinal legal questions or parochial political disputes cannot hope to do. The chapters in this volume emerge from a single country, but they speak to the world.

The Plan of the Book

The structure of this book reflects four key themes characteristic of the Australian School. These are an expressly theological engagement with the natural law tradition; a focus on the theological underpinnings of constitutional concepts such as the rule of law, federalism and religious liberty; a concerted effort to connect classical figures in theological traditions with contemporary jurisprudential debates and issues; and an emerging emphasis on the intersections between Christian approaches to jurisprudence and other theological traditions (particularly traditions from across the Asia-Pacific region, for the reasons noted earlier). The book devotes a section to each of these themes before concluding with a final chapter discussing the future of the Australian School.

Part I: Natural Law and Theology

The first part of this book considers the significance of natural law ideas for the normative foundations of Western institutional systems. Unlike the leading jurisprudential contributions to natural law theory mentioned previously in this chapter, it does so from an explicitly theological perspective. In her chapter, Anna Taitslin argues that theological doctrines have influenced not only natural law conceptions of legal obligation but legal positivist understandings as well. Natural law as propounded by Thomist scholars is premised on rational metaphysical grounds. By contrast, Taitslin notes that the voluntarists viewed natural law in terms of the divine will, or the commandments. This voluntarist vision of the law, as the command by a sovereign, was adopted by legal positivists. The influential legal positivist H L A Hart famously challenged John Austin's narrow definition of law as commands obeyed for fear of punishment, but Taitslin argues that Hart's view nonetheless displays features of the intellectualist and voluntarist debate. In this way, even nuanced versions of legal positivism show the continuing influence of theological doctrines.

Benjamin B Saunders's chapter examines the applicability of natural law norms, with particular reference to procedural fairness, to church law and decision-making. He offers an illuminating overview of the Reformed position that a distinct form of government exists within the church, which is separate from that of the civil government. This view also holds that Scripture sets out the main principles by which the church should be governed but leaves the detail of many aspects of church life as a matter of wisdom or positive law. In practice, for many Protestant churches, this means that there is nothing in between the poles of scriptural command and human-positive law. This can lead to arbitrariness, or a positivistic view of church law which can lead to injustice when applied rigidly. This illuminating chapter considers the extent to which natural law principles could be applied within the church to inform church government. One complicating factor is that, under the Reformed view, church power is very different from civil power, being declaratory and ministerial rather than coercive. Can a genuinely Reformed account be developed whereby church government can draw from natural law but also respect the distinct nature of church government?

The next chapter, by Jonathan Crowe, closely examines the contributions of Thomas Aquinas to natural law theory in light of its influence on secular conceptions of law. Indeed, Aquinas's distinction between four kinds of law—eternal, divine, natural and human—has become a staple of Western jurisprudence. This chapter explicates the distinction between these categories of law, beginning with and building upon Aquinas's analysis. In so doing, it emphasises the essential role of theological doctrines in fully grasping the relationships between the categories. Aquinas's exposition of the four kinds of law assumes a distinction between divine and human perspectives on law, as well as a specific conception of the sources and limits of the human capacity for reliable legal knowledge, and God's role in making this knowledge possible. Crowe makes a compelling case for the enduring salience of theological dimensions of Aquinas's understanding of law, arguing that though obscured in more recent jurisprudential discussions, they remain essential for grasping some of the subtle and enduring insights in his taxonomy.

Part II: Constitutionalism and Theology

The second part of this book examines a range of theological ideas which arguably influence and underpin constitutional theory. The opening chapter in this part is by Patrick A Keane AC KC, a former justice of the High Court of Australia with a long-standing interest in this area. Keane's chapter argues that the constitutional arrangements of the liberal democracies of Australia and the United States embody an understanding of the relationship between private individuals, on the one hand, and the community and its public institutions, on the other, that is distinctively Christian in its inspiration. The civic life of these democracies continues to be conducted within and shaped by this framework, even while participation in formal religious observance is on

the decline. The constitutions of liberal democracies can therefore be said to embody 'Christian values'—albeit in a different sense to the way that term is sometimes used by political candidates within those systems.

Renato Costa's chapter considers the work of Abraham Kuyper's famous formulation and implementation of a unique pluralistic societal framework known as *sphere sovereignty*. This concept envisions active participation of individuals within non-hierarchical public and private associations. Sphere sovereignty is rooted in a Calvinist understanding of God's sovereign authority over all individuals and human associations. Ultimately, since all authority flows directly from God, this theory asserts equal standing for the state, businesses, families, religious bodies, sports clubs and other associations within a given territory. Each association is sovereign in its own sphere. Kuyper contends that this environment of cooperation and social flourishing should be governed by a constitution. In his view, constitutions serve to uphold the integrity of the public domain while establishing the internal laws and limitations of the state, thereby safeguarding the liberty of other spheres to fulfil their distinct purposes. Costa makes the insightful observation that Kuyper's detailed account of *sphere sovereignty* concludes that constitutions beget an 'invincible bulwark', the guarantee of citizens' rights over their own purses against a totalitarian state.

Along a similar vein of examining theological influences on views of constitutionalism, A Keith Thompson considers the different views of religious tolerance and coercion in the work of John Locke, Augustine and Joseph Smith, the founder of the Church of Jesus Christ of Latter-day Saints. Thompson begins by considering Locke's undeniable intellectual influence on the framers of the US Constitution. Though Locke himself never visited America, his insights about religious tolerance were the product of his reflection upon the intolerance that he witnessed in his life. Thompson then explores the development of Augustine's thought on religious tolerance and coercion, culminating in his harsh suppression of the Donatists. He contrasts this with Smith's views as formed in the context of persecution and suppression of the Latter-day Saints. Thompson argues that Smith sets a high standard for religious toleration that holds lessons for contemporary approaches to religious liberty.

The chapter by Justin McGovern, Joseph Suttie and Madeleine Suttie contends that prior to any consideration of legal reasoning, there are assumptions as to the philosophical and theological worldviews that inform concepts of truth and reason. In doing so, they consider the Thomistic natural law tradition which defines *prudentia* as the coherence of right means in relation to ends. The renowned philosopher Josef Pieper in his foundational work *The Four Cardinal Virtues* considers the teleological relationship between prudence and the transcendentals. Pieper concludes that prudence derives from reason applied to a consideration of means, which is necessarily linked to one's conception of the good. Pieper identifies that the conception of the good is itself intrinsically linked to the knowability and coherence of the truth. Pieper wrote in the immediate post-war German reconstruction, where the scale

of conflict raised fundamental questions as to the basis for legal and social authority. Dismissing the utopian legal concepts of the new Soviet man on the one hand and the consumerist *Homo economicus* on the other, Pieper advances a philosophy of prudence that is highly relevant in today's post-structuralist legal uncertainty. The authors thus consider Pieper's theory of *prudentia* as a potential basis for reconsidering the role of natural reason in contemporary legal philosophy in contrast to legal positivism and critical legal theory.

Part III: Old Views, New Viewpoints

The third part of the book reconsiders seemingly settled discussions from a fresh perspective. By doing so, these chapters breathe new life into old themes, including into the old annals of analytic jurisprudence. Joshua Neoh and Jonathan Tjandra offer a refreshing response to John Gardner's portrayal of law as a 'leap of faith' based on Hans Kelsen's famous idea of the Grundnorm. In *Law as a Leap of Faith*, Gardner links the Kelsenian concept of law with the Kierkegaardian idea of a leap of faith. Gardner equates Kierkegaard's God with Kelsen's Grundnorm, and Kierkegaard's Religious Person with Kelsen's Legal Person. Neoh and Tjandra disagree with what Gardner has done to Kierkegaard. In their chapter, they show that Gardner's argument conceals a central difference between Kierkegaard and Kelsen. Kierkegaard's God suspends the normative domain, whereas Kelsen's Grundnorm constitutes the normative domain. The authors suggest that to see the difference between Kierkegaard and Kelsen's normative accounts, one cannot avoid Carl Schmitt's views on this subject.

In the next chapter, Reid Mortensen explores the theology and jurisprudence of Richard Hooker in his seminal work, *Of the Lawes of Ecclesiasticall Politie*. Hooker is the most significant theologian of the English Reformation and, in justifying the political initiative in religious reform, among the most magisterial of the Protestant theologians of the 16th century. The chapter gives an account of *The Lawes*' well-known debt to Thomas Aquinas's *Summa Theologica* in providing a structure for, what was in substance, a Reformed theology of church and state. Particular emphasis is given to Hooker's reliance on the work of the medieval and Tudor jurists Henri de Bracton, Sir William Stanford and, possibly, Sir John Fortescue. Together, this theology and jurisprudence justified a significant role for monarchy in the government of the church—albeit, as influenced by the English jurists, a monarchy limited by natural and positive law. It also led to Hooker's exceptional classification of the common law (and English equity) as a form of natural law. In bringing the English jurists into *The Lawes*' apology for the role of civil government in the English Church, Hooker not only proposed a conception of a unified visible church and the state but created a magisterial jurisprudence capable of supporting this vision.

Nicholas Aroney makes an important contribution to this theme in his chapter on the theological grounds of a philosophical jurisprudence. Aroney

considers the long-standing debate in jurisprudence where justice is seen as essential to law, such that an 'unjust law' is not really law. A nominalist might respond that the debate is merely semantic: it does not matter whether or not the word 'law' designates an enactment that is by definition just, provided we use the word consistently. Proponents of the thesis that 'true law is necessarily just' seem to be realists because they consider the word 'law' to designate something essentially just. Aroney observes that, when framed this way, the debate seems entirely philosophical: it turns on whether one adopts a nominalist or a realist metaphysics. In this context, the salient question to ask is: 'To what extent is there a theological dimension?' Thomas Hobbes, an important originator of modern legal positivism, developed the idea that law is an exercise of arbitrary power based on a late-medieval distinction between *potentia absoluta* and *potentia ordinata*. Applied first to the divine power, and later to the royal and papal power, this distinction ran counter to Augustine, who affirmed that divine power cannot be separated from divine justice, because God is one simple being whose justice *is* his power and whose power *is* his justice. This chapter explores the theological grounds of natural law theory by tracing the relationship between theology, anthropology and jurisprudence in the works of Thomas Aquinas, including the *Summa Theologica* and the *Summa Contra Gentiles*. In this way, Aroney gives a detailed overview of the connections between the Thomistic doctrines of the aseity and simplicity of God, the creaturehood and fallenness of humanity, and the nature and purpose of human law and political authority.

Part IV: Comparative Perspectives

The fourth part of the book engages with comparative analyses of the normative foundations of theological and jurisprudential theories. Constance Youngwon Lee considers the normative bases for paradigmatic models such as the 'conscionable person' as a fundamental guiding principle in moral theory. She begins by problematising the ongoing ubiquity and utility of such models in modern jurisprudential discourse notwithstanding their unmooring from substantive normative foundations. Considering this problem, she highlights the ongoing importance of articulating the substantive principles which underpin such models. With all this in mind, this chapter examines two seminal accounts of the conscionable person in Eastern and Western thought, namely, Confucian and Calvinian. In these analyses, Lee draws conceptual symmetries between the Confucian emphasis on moral cultivation and communal agency, as epitomised in the *junzi*—the 'exemplary person'—with John Calvin's notions of a flawed but responsible moral agent based on his theological doctrines of *Imago Dei, Total Human Depravity* and conscience. By comparing such seemingly disparate perspectives, Lee delves into the subtle nuances of conscionable personhood; arguing that it is by examining the conceptual bases of such paradigmatic figures through a comparative lens that we can begin to uncover some of the normative continuities that transcend cultural differences.

Oscar Kawamata follows with an illuminating chapter on the intersection of Buddhism and jurisprudence, considering the implications of a God-less theology through a comparative lens. At the outset, he frames his discussion by noting that, despite historical associations with the concept of a supreme creator God (or *theos*), in conventional use, the word 'theology' is becoming increasingly synonymous with the philosophy of religion. On this view, the term 'Buddhist theology'—as an appellation for Buddhist views on the nature of the cosmos—has increased in usage, notwithstanding the fact that all Buddhist schools emphatically reject the notion of a creator God. In this chapter, Kawamata gives a careful and detailed consideration of the relationship between Buddhist 'theology' and jurisprudence, paying particular attention to the implications of its God-less nature. As part of this exercise, Kawamata sheds light on this issue by considering the relationships between jurisprudence and more conventional theological concepts, looking particularly at Thomas Aquinas's accounts of the problem of evil, divine providence, and human nature as divinely created, before exploring how the Buddhist framework deals with similar topics without recourse to God.

Benny Tabalujan's chapter proposes to connect Western legal culture with Christianity. He begins with the astute observation that in law and religion studies, considerable scholarship asserts that Western legal tradition owes much to the influence of Christianity. However, he also notes that in spite of this assumed connection, relatively little has been written on the transmission mechanism through which this influence flows. Tabalujan suggests that 'legal culture' may be the missing link. This chapter begins by outlining key threads in the writings of Harold Berman on law and religion. Berman was a leading proponent of the claim that Christianity fundamentally influenced the development of the Western legal tradition, and his writings can be viewed as a key representative of this school of thought. The chapter goes on to unpack the concept of legal culture—often associated with the Stanford legal historian, Lawrence Friedman. Tabalujan then undertakes an examination of the extent to which Berman's major writings on law and religion refer to Friedman's work on legal culture. Finally, relying on the work of Berman and Friedman, this chapter mounts a preliminary case suggesting that Western legal culture is the mediating mechanism through which the Judeo-Christian faith influences the Western legal tradition and concludes by outlining some implications which flow from this assertion.

Part V: Future Directions

The fifth and final part of the book examines the prospects of law and religion scholarship in Australia—where we are now and where that will lead us. Joel Harrison and Lukas Opacic offer an illuminating assessment of the prospects of law and religion scholarship and advocacy in Australia. They focus particularly on recent scholarship on religious liberty and recent debates on the ends of education. Harrison and Opacic argue that conventional approaches to law

and religion in Australia are 'unreal' in two ways. First, they demonstrate a commitment to ethical individualism which casts political community as a space for the negotiation of individual preferences in the abstract, rather than a composition of real traditions and institutions committed to the pursuit of shared ends. Second, they are metaphysically unreal as they rely on a conception of freedom as a formal capacity to choose between options without regard to the good of those choices.

Within this 'unreal' approach, the goal of religious liberty protections, for example, is often understood narrowly, as ensuring a zone of autonomy within a context of pluralism and state neutrality. On this view, law and religion discourse is concerned with patrolling boundaries—it rests on an assumption that religious action is an intervention from a private domain into a public one. Harrison and Opacic wish to unsettle this view. They argue that the future of Australian law and religion lies in deliberating upon shared human ends, asking why it is that we associate together and what constitutes the good society. Religious liberty—and other matters of constitutional law and practice—are not bounded problems but matters that must be narrated, recognised or determined within a comprehensive vision. This entails understanding religion as a public good, meaning an end that is integral to forming a good society. Harrison and Opacic conclude that, practically speaking, law and religion discourse must always turn (and return) to theology.

Conclusion

As can be seen from the range of topics in the chapters surveyed, contributors to the Australian School may not all be singing from the same song sheet. However, what makes us a symphony and not a cacophony is our broad agreement that contemporary law and politics need to move beyond a focus on conflict over scarce resources and orient towards a genuinely shared conception of the human good. The kinds of theologically informed jurisprudential reflections found throughout this book are an attempt to broaden the horizons of law and politics beyond narrowly conceived rights and interests to questions of what makes us truly human. By placing jurisprudence within the context of enquiries about the origins and purpose of life and existence in general, the jurisprudence and theology movement exemplified by the Australian School seeks a better understanding of the nature and goals of human beings and our societies. In so doing, it sheds light on the forces guiding the historical development and normative purpose of law—an essential component of any complete jurisprudential enquiry. This is the Australian School manifesto.