

BOOK REVIEW SYMPOSIUM ON SOVEREIGNTY AND THE SACRED

THE PROFANE/SACRED OECONOMY OF LAW AND RELIGION

Sovereignty and the Sacred: Secularism and the Political Economy of Religion. By Robert A. Yelle.
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It is a curious coincidence that these reflections will be published on the eve of the fortieth anniversary of the *Journal of Law and Religion*. Forty carries biblical significance as the number of testing, of tribulation, of sacrifice and the hope of redemption, of being made anew. A similar sentiment is central to the genre of law and religion scholarship, including the literary tradition within this journal and Robert Yelle's work: an anxiety that the Western social order is suffering a protracted existential crisis that requires a renewed inquiry into our religious natures and a commitment to values derived from the entanglement between law and religion. My aim here is to reflect together on this sensibility and the questions it raises, in terms of both the immediate text and the broader law and religion tradition.

In *Sovereignty and the Sacred: Secularism and the Political Economy of Religion*, Yelle portrays our individual and social experiences caught in an oscillation between diametrically opposed poles that capture a range of phenomena and impulses fundamental to human nature across time and place (184–85). On one end, there is the calling to remake the world anew (the following words are all expressions drawn from the text): anarchic, antinomian, charisma, a primal chaos, spontaneous, untamed, wild, rupture, violence, the exception, the miracle, topsy-turvy, the realm of the fiat executor, the sacred, the sovereign, unstable, amorphous, and protean. On the other end, the need to ensure stability: bureaucratic legality, institutionalized authority, market logic, positivism, calculability, modernism, bourgeois capitalism, pragmatic, disenchantment, secularization, intentioned rationality, an entrenched “schemata of feeling, thinking and acting” through a regimented “network of symbols, myths and rituals” (15). To flourish, individuals and society must navigate this dual nature, these primal jurisdictions “of Jerusalem and Athens” (67), which ultimately boils down to a question of ethical management of value choices, of seeking to court the spontaneous, untamed wild potential of human existence in a way that is productive and just, that brings it under control without suppressing its vitality (69). The rule of law is pregnant with hierarchies of these commitments, and these value schemes resist any simple objective or rational justification. If there are many ways that the world can be made (and remade), then the origins of order lie in contingency and power—the rule of law is inherently subject to politics, to coercion, to choices without any certain transcendental foundation, to the sovereign will (9–73). Or to put this in the terminology of political theology, the sacred is always immanent in the profane order of creation, animating its original constitution and rupturing its predictability. There is a rhythm to human history, or at least the genealogies of the West, but it is a dialectic between two human impulses that arise at the

interplay of law and religion.¹ We cannot escape value choices that demand sacrifice to uphold. We are all too human—by which I mean inalterably religious—and coercion and violence are baked into peace and virtue.²

Our contemporary moment in governance and academia is deeply tilted toward the impulse for closure and stability, seeking to entrench a historical arrangement over the political economy of all aspects of human existence. In particular, social life is increasingly subordinated to the economic and political calculability of a bureaucratic legality in service of a supposedly secularist bourgeois capitalism—what often is assimilated to a spirit of so-called modernity. This spirit, we learn through the text, is a centuries-long architecture of actions and ideas developed to mute any deviation that could call the cosmic stability of this dispensation (“system of management”) into question (69). As such, the modernist sensibility whitewashes history to half of human nature, blocking attempts to transcend the prison-house of value as transactional monetary calculations and objective at-will rational choices, and minimizing the deeply spiritual character to our bureaucratic world. Though Yelle never shares the exact ramifications for modernity suppressing charisma, the intimation is imminent destruction to (at the very least) Western society.³

The prescription for this malady, according to Yelle, is to free our thought from the confines of modernity through a genealogical study that “overcomes the false dichotomy between secular modernity and its theological past” and the “imperialism of contemporary ideologies” (36, 186). While the text engages with diverse intellectual traditions across discipline, geography, and time periods, three techniques or targets seem to drive the narrative. First, the disenchantment thesis is shown to not only be historically inaccurate, but in fact itself a Christian mytheme used to “bludgeon other traditions,” a device of polemics not facts (63). Second, the claims to equality, freedom, and tolerance within liberal rule of law regimes are revealed to rely on forms of sacrificial violence and hierarchical value-propositions that clamp down and routinize actual human creativity and expression. Third, the assignment of all life experience to the market calculations of scarcity, productivity, and money is shown to be an incomplete description of actual human behavior and social organization, and may in fact come at significant opportunity costs. Genealogies that reconnect the sacred/sovereign conditions of human existence are envisioned to help us imagine another world that might better overcome suffering through a commitment to creativity and grace (18).

If these traditions are essential to our modern predicament, they do not offer easy certainties; they are as paradoxical as they are perennial. To his credit, Yelle seems to delight in these ambiguities. Disenchantment is characterized as an intellectual mode of Protestant argumentation at odds with actual lived experience, but it is also described as a social fact of growing rationalization and repression of charisma through social life (52–73). The spiritual economy that removes human activity from utilitarian money-driven calculations is also shown to be intimately dependent on this mundane economy whereby the surplus vitality that escapes market logic is itself also dependent on its capacity to extract surplus (117–18). The wild energy of sovereignty and the antinomian impulses that undergird bureaucratic legality require careful stewardship, ultimately becoming as

¹ For a discussion of ways that European historical and theoretical orientations claim universality, see Martti Koskeniemi, “Histories of International Law: Significance and Problems for a Critical View,” *Temple International and Comparative Law Journal* 27, no. 2 (2013): 215–40.

² For an early twentieth-century variation on this theme, see Robert Hale, “Coercion and Distribution in a Supposedly Non-coercive State,” *Political Science Quarterly* 38, no. 3 (1923): 470–94; for a more recent example, see David Kennedy, *The Dark Sides of Virtue: Assessing International Humanitarian Law* (Princeton: Princeton University Press, 2004).

³ According to Yelle, there is an “urgency” for “re-envisioning” the “foundations of the [Western] polity” (1).

much an opportunity for management as a force with which to be reckoned (184–85). Freedom and order, miracles and routines, sovereignty and law, grace and calculation, the sacred and the profane: all these expressions of human nature, timelessly unstable, call for mediation without ceasing.

It is in this spirit of amplifying questions and paradox in accordance with eclectic historical and theoretical sensitivities that I develop a few vignettes here concerning Yelle's text and, more generally, reflect on the experience of working with law and religion literature. To speak of experiences and sensitivities indicates that even our most rigorous analytical attempts to nail down the most accurate methodological tools or to work in the shadow of revealed truth are equally a matter of aesthetics, of working in a specific vocabulary toward the production of distinct sensations, pre-occupations, and behaviors only partially cognitive or logical.⁴ Our object is not (only) some set of external dynamics exercising influence in society, but more intimately, the formal rhetorical economy of a discrete cadre of authors that shapes the way we frame the outside world.

My first vignette is about the character of modernity, both as a historical description and a filter of experience. Modernity is perhaps the arch-nemesis in the text. It is the confines of our thought, synonymous with subjecting all aspects of social life to the bureaucratic calculability of the market, with rule-obsession at the expense of justice, with the Enlightenment faith in an objective reality subject to ahistorical reason, with the historical creep of secularization and the erasure of the sacred in human experience, a type of "libidinal economy" where "all things are to be managed in a more sedate, cool, and silent manner. . . our disenchanting dispensation" —or in more familiar terms, the iron cage of modern life (60). Yelle deliberately sets up his study as a polemic against the historical fact and normative claims of this modernity.

But the aesthetics of Yelle's book are also those of modernity, and often intimate early twentieth-century high modernism. We can take these in turn: first as crisis, then as resolution. Humans have, of course, always given expression to anxiety about the present and the future. If we move back through Western intellectual traditions before the last century, catastrophe and worry is soothed by optimism surrounding scientific discovery and industrialization, the assurance that the hand of God or Providence or our innate nature works to humankind's good fortune, or that individuals and their social institutions are subject to the same endlessly recursive rhythms of the natural world. In contrast, the conceptual pedigree of modernity objectivizes anxiety as an alienating malaise that suppresses and empties meaning from the otherwise integrated and stable identity of society, its institutions and individuals. "Human life," writes the high modernist Georges Bataille (his thoughts a conscious inspiration for Yelle), "cannot be limited to the closed systems which reasonable conceptions assign to it."⁵ While struggling over the correct source of the sacred (such as traditional values of Christendom or antibourgeois revolutionary zeal), authors in these times would find agreement around a set of recurrent ideas. First, that a significant target was the idolatry of nationalism and inter-state jealousies. Second, that this drama was part of a single universal history unfolding through a discernible, almost formulaic, trajectory. And third, especially among international lawyers of this period, that the solution to this crisis lay in channeling these almost organic

⁴ For an extended discussion of aesthetics in US law, see Pierre Schlag, "The Aesthetics of American Law," *Harvard Law Review* 115, no. 4 (2002): 1047–1115. For an earlier discussion of this theme in the context of international legal and human rights, see David Kennedy, "Spring Break," *Texas Law Review* 63, no. 8 (1985): 1377–1423, at 1417–23, appendix.

⁵ Georges Bataille, *La Part Maudite* [The accursed share] (Paris: Les éditions de minuit, 1967), 43, as quoted in translation by Nathaniel Berman, *Passion and Ambivalence: Colonialism, Nationalism, and International Law* (Leiden: Martinus Nijhof, 2012), 403n23. For a discussion of Georges Bataille in the context of religion and international law, see Nathaniel Berman, "The Sacred Conspiracy: Religion, Nationalism, and the Crisis of Internationalism," *Leiden Journal of International Law* 25, no. 1 (2012): 9–54.

passions (regularly discussed in religious pathos) through legal reform. An ambivalent alliance was established between two forces of nature—order/chaos, freedom/security—that laid out a grand calling to an emerging professional class of experts involved in governance: to remake the modern moral conscious and revitalize the psychic and physical health of Western social institutions and their constituencies, and to do so through the legal redesign of sovereignty and its relationship with the polity.⁶

My second vignette stays with this theme of forgotten lineages, all the more curious because of the proximity in time and tone: the contemporary field of law and religion in the United States. At first glance, this claim seems out of step with the conceptual homologies between Yelle and early twentieth-century legal modernists, and with the more general sense that law and religion has been an ongoing concern within cultural intelligentsias for centuries. This is all true, but I am making a slightly different case here: first, that the intellectual tradition most pressing in Yelle's book is actually displaced as an object of conceptual or sociological study, and second, that recalibrating our genealogy allows us a different set of insights into the text and our experience as readers.

Of course, the fact that literature engages tropes familiar to the law and religion canon does not mean there is a coherent single genre or unitary type of scholar, just as the introduction of new terminology does not necessarily signal any structural shift in disciplinary consciousness. Novel movements will possess similarities with earlier moments or parallel endeavors; the tell is in the differences, which are themselves often a matter of detail. For instance, in the mid- to late nineteenth century, Anglo-American and European jurists sought to translate Protestant cultural norms into the emerging professional canon of international law, but the anxiety of existential systemic crisis is absent from their efforts.⁷ If we move into to the interwar decades, international lawyers now worry about cultural decay and seek inspiration from spiritual sources for renewal, but their writings never cohere into any sustained disciplinary project or shared conceptual understanding around the theme of religion and law. Similarly, US-based legal scholars in the 1950s and 1960s would write about church/state relations and the importance of a Judeo-Christian heritage to counter their Cold War enemies, but these efforts lack any united intellectual or institutionalized program of action and rarely sought to seriously engage the methodological or theoretical toolkits available through their peers in fields such as anthropology, history, philosophy, or theology.⁸

The literature that begins to emerge in the 1970s and 1980s is conceptually and organizationally different from these earlier traditions of legal scholarship. While it shares the feeling of existential dread, the cultural decay is now seen to be caused by a particular assemblage of academic, social, and political factors: legal realism, functionalist jurisprudence, and critical legal studies have bred a (not so) latent nihilism; secular humanism has impoverished the bonds and imagination of community; and the federal government continues its overreach into the operations of daily life and the markets.⁹ The antidote will demand the renewal of law as a professional vocation committed to

⁶ See Nathaniel Berman, "But the Alternative is Despair: European Nationalism and the Modernist Renewal of International Law," *Harvard Law Review* 106, no. 8 (1993): 1792–903.

⁷ See John D. Haskell, "Divine Immanence: The Evangelical Foundations of Modern Anglo-American Approaches to International Law," *Chinese Journal of International Law* 11, no. 3 (2012): 429–67.

⁸ See John D. Haskell and Pamela Slotte, "Christianity and International Law: An Introduction," in *Christianity and International Law: An Introduction*, ed. John D. Haskell and Pamela Slotte (Cambridge: Cambridge University Press, 2021), 1–16, at 9.

⁹ "The crisis of the Western legal tradition—its impotence to resolve the crucial conflicts of the 20th century . . . is primarily due, I am convinced, to the breakdown of the communities on which the Western Legal tradition is founded . . . [T]he *populous Christianus*, constituted the true religious foundations of Western law. Where, however, as in America today, and increasingly throughout the West, social life is characterized by religious apathy and by

universal human ethics and the lived restoration of the marriage between law and religion in shaping the state and its populations, at home and abroad.¹⁰ Organizationally, it may be traced to engagement at Harvard between scholars in the schools of divinity and law, a deliberate strategy to establish ongoing working groups within professional academic bodies, to run research panels at annual law conferences, to host workshops and publish scholarship that might flesh out the field, and to set up new journals and research centers dedicated to the study of law and religion.¹¹ Politically, this is an era marked by the close of the Cold War and the social unrest of populations at home and abroad clamoring for enfranchisement and suspicious of the establishment. For many it was increasingly difficult to ignore the horrors of Vietnam, the atomization of the family, the consumerization of the citizen, the quiet despair of a working population beginning to run into wage stagnation and growing economic inequality, the rising tide of feminist demands for gender equality and sexual liberation, the civil rights struggles and the clashes between police and black liberation movements, former colonial countries struggling for political and economic independence from foreign rule, and all these dynamics washing across the new media landscape, a sensory bombardment that called into question the comforts and verities of a previous generation. In hindsight, the emergence of the law and religion movement seems very much of its time: favoring market fundamentalism over social welfare economics, embracing traditional values to shore up cultural skepticism at home, and espousing a Cold War ecumenicalism that supported the emerging US-led global governance regime of (civil and political) individual human rights. These histories and debates seem important to understanding the intellectual and sociological context of what it means to work within the field of law and religion today.

My third vignette focuses on methodological and theoretical choices when evaluating the interplay of law and religion. It is striking to me how rarely authors seem to explicitly engage with their interpretative techniques. This is different from saying that the field lacks ambition or reflection. The literature openly celebrates interdisciplinary collaboration and enjoys a wide jurisdiction of themes (such as family, human rights, religious systems, warfare), time periods (such as medieval, post-World War I) and geographies (such as United States, Western Europe, Central Asia), and it regularly deliberates on the correct definition of terminology such as *religion*. What I am suggesting is that in carrying out its research program, the field tends to treat its interpretative choices as relatively uncomplicated, which requires sidestepping rich intellectual debates within and beyond the legal discipline. If this seems too abstract, consider a passage early in the book, where Yelle offers a definition of religion¹²: “Religion is an emergent, complex, adaptive network of symbols, myths, and rituals that, on the one hand, figure schemata of feeling, thinking, and acting in ways that lend life meaning and purpose and, on the other, disrupt, dislocate, and disfigure every stabilizing structure. It is important to emphasize at the outset that this definition of religion identifies two

fundamental divisions . . . where bonds of faith are weak and bonds of kinship and of soil have given way to a vague and abstract nationalism, it is useless to suppose that law can effectuate its ultimate purposes. Unless it is rooted in community, law becomes merely mechanical and bureaucratic.” Harold J. Berman, *Faith and Order: The Reconciliation of Law and Religion* (Grand Rapids: Wm. B. Eerdmans, 1993), 52–53.

¹⁰ See, for example, Christopher F. Mooney, “Public Morality and Law,” *Journal of Law and Religion* 1, no. 1 (1983): 45–58.

¹¹ For an overview of the rise of the law and religion community within the US legal academy, see Howard J. Vogel, “A Survey and Commentary on the New Literature in Law and Religion,” *Journal of Law and Religion* 1, no. 1 (1983): 79–169.

¹² The passage, part of a longer discussion grappling with how to define religion, comes from Mark C. Taylor, *After God* (Chicago: University of Chicago Press 2009), 12–13.

interrelated moments, one that structures and stabilizes and one that destructures and destabilizes. These two moments are inseparable and alternate in a kind of quasi-dialectical rhythm” (15).

It is difficult to determine what is specific to religion, as opposed to economics or law or politics—or for that matter, any information system characterized by feedback loops subject to entropy. The terms all seem to work interchangeably. The economy is also an “emergent, complex, adaptive network of symbols, myths, and rituals” that “lend life meaning and purpose” and that can also “disrupt” and “dislocate” existing modes of life.¹³ Nor does this problem disappear when the text turns to unpack the “spiritual economy” that is claimed to offer exit signs from the “mundane economy.” Again, this is not immediately self-evident. The profane logic of our times is described as “limited, alienating, unjust, illegitimate, intolerable, or simply boring,” driven by pecuniary calculation and individualizing ambition in a spirit of ahistorical technocratic pragmatism that empties human life of its ordained meaning (14). In contrast, Yelle attempts to show repeatedly that another world is possible through examples of the sacred in the daily life of law, politics, and society. If the mundane economy celebrates accumulation and debt, the spiritual economy advocates grace and forgiveness (such as Jubilee) (126–55). If the modern world is subject to relentless commodification, religious traditions offer examples of activity and relations outside market transactions (such as herem, total exclusion from the Jewish community) (156–83).

But we are also told that this sacred aesthetic, this “spiritual economy,” is sustained by and mirrors the mundane economy. “Religion exists in dependence on the mundane economy: is enabled by it, is modelled on it, is even in some cases indistinguishable from it,” explains Yelle, and when “religion denies the influence of the mundane economy, it only solidifies this dependence . . . a photographic negative or ghostly image” (158). Here, the sacred is, in relation to the profane logic of modernity, simultaneously its alternative, its reflection, and its surplus. If our religious doctrines and practices “cannot escape the power of debt and money,” it becomes difficult to see clearly how we might extract from them what is specifically otherworldly (158). Notice that Yelle’s claim is not that there is a complicated but distinct engagement between law and religion; it is that when we drill into the history and nature of any human phenomena, we find that what we call the sacred and the profane are so entangled that any claim to logically separate their constitutions can by the very same reasoning be easily shown as an artificial divide, that they are in fact inseparable.¹⁴ And even if the spiritual and mundane economies are unique impulses within our nature, there does not appear any reliable criteria to deductively associate each economy with its own discrete traits. As anyone who has spent considerable time in church on any given Sunday, the sacred can also at times feel “limited, alienating, unjust, illegitimate, intolerable, or simply boring” while the profane can seem “unstable, amorphous, or protean” (14). Freedom and meaning, as inherently value-oriented rhetoric, are inescapably contextual and open to the enchanted and disenchanted beholder alike. If anything, to claim that the sacred is intrinsic and known through our human nature as a set of emotional attributes seems to reduce spirituality to being all-too-human

¹³ To follow interests in the twentieth-century history of economic thought and theories of markets, see Philip Mirowski, *Machine Dreams: Economics Becomes a Cyborg Science* (Cambridge: Cambridge University Press, 2001).

¹⁴ For a discussion about this challenge when analyzing the law and other social institutions, see Pierre Schlag, “The Dedifferentiation Problem,” *Continental Philosophy Review* 42, no. 1 (2009): 35–62.

and calls the question: is this actually a description of a universal human condition or is the terminology a projection (and erasure) of a historically situated self?¹⁵

More often than not, it seems to me that the sacred is a metaphor to describe how we experience our anxieties and hopes. Religion can simultaneously express the spontaneous contingency of life that escapes bureaucratic calculation and can embody universal values with long pedigrees—and how we decide to fill these categories, to describe what is spontaneous and fixed, to propose institutional reforms, and so forth, all this seems to at once resist any generalizable criteria while nevertheless following predictable modes of scholarly argument. It is relatively simple to imagine how we might make a richly supported case for the spiritual economy to call for massive wealth transfer through legal reform, but we are more likely to see the case made for values that generally support our existing regimes of at-will contract and private property.¹⁶ We could imagine new historical sociologies examining how Judeo-Christianity was constructed in the Cold War to support specific political configurations of power that had little to do with religious conviction, but we are more likely to see intellectual histories that return readers to more antiquated texts.¹⁷ As such, law and religion scholarship allows a style of expression that is attractive to certain preprofessional dispositions and tends to corral our dreams and fears within certain scripted imaginations—imaginations that are so often part of the very structures that we feel the need to escape.

At the same time, *Sovereignty and the Sacred* intimates certain tremors within the field of law and religion. Political theology gives ground to political economy as readers are familiarized with a range of historical examples where spiritual values seem to counsel collective political choices over the allocation and use of resources in society—and in directions that would be often regarded with a skeptical eye by the field. Comprehensive debt forgiveness enforced through law by the state! These sort of charged debates are too often missing from law and religion scholarship, especially when (perhaps) the central message of the tradition is to remind us that we are always living through value choices.¹⁸ It is a testament to Yelle that his book is drawn to show that our spiritual commitments are always entwined with political forms of coercion and that we can reimagine those commitments if we are so called. I am grateful to the community at the *Journal of Law and Religion* for the chance to share in these reflections, and for those who find themselves drawn to these themes in our discussion, Yelle offers us something worthwhile to think with together.

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¹⁵ For a discussion of this question as it relates to international law and religion, see John D. Haskell and Jessica Fish, “Law as Eschatology,” *Journal of Catholic Legal Studies* 53, no. 2 (2014): 185–209, at 201–08.

¹⁶ See Steven M. Teles, *The Rise of the Conservative Legal Movement: The Battle for Control of the Law* (Princeton: Princeton University Press, 2012).

¹⁷ For a discussion about the term *Judeo-Christian*, see Udi Greenberg, “The Right’s Judeo-Christian Fixation,” *New Republic*, November 14, 2019, <https://newrepublic.com/article/155735/rights-judeo-christian-fixation>.

¹⁸ For an example of the literature foregrounding the importance of having clarity about our values and committing them to action, see John Witte, Jr., “Christianity and Democracy: Past Contributions and Future Challenges,” *Emory International Law Review* 6, no. 1 (1992): 55–69; in the international law context, John D. Haskell, *Political Theology and International Law* (Leiden: Brill 2018).