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REVIEW ESSAY

BREAKING THE SILENCE: LAW, THEOLOGY AND RELIGION IN AUSTRALIA

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‘Theology and Law: Partners or Protagonists?’ edited by Christine Parker and Gordon Preece, 8(1) *Interface: A Forum for Theology in the World* (Adelaide: ATF Press, 2005) pages i–ii, 1–125. Price A\$19.95 (softcover). ISBN 1929691 46 4.

[The collection of essays found in Theology and Law: Partners or Protagonists? makes a valuable contribution to the exploration of the relationship between law and religion. Still, there is a flaw with the volume: it fails to define and distinguish ‘theology’ and ‘religion’. Drawing a distinction between the two terms has methodological implications. This review essay offers a means of distinguishing the two terms, from which two methodological approaches flow: ‘law and religion’ and ‘theology and law’. A volume devoted solely to the latter would make a significant and unique contribution to existing Australian legal literature, while one devoted to the former would merely add to a relatively well-established body of research. While this review essay argues that the volume is directed more to law and religion than theology and law, it also concludes that the volume is significant and important because it opens a sustained and focused dialogue between religion (which includes theology) and law.]

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I INTRODUCTION

Is there a relationship between theology and law? If so, is there any relevance in exploring this relationship? And can the endeavour to find possible parallels,

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overlaps or intersections bear fruit? The paucity of Australian legal literature in this area suggests a negative response to each of these questions. In introducing the collection of essays in *Theology and Law: Partners or Protagonists?*,¹ Gordon Preece suggests that this may be a consequence of the fact that theology and law are ‘two of the currently least popular and least esteemed disciplines and professions in western societies.’² Nevertheless, because ‘these are two institutions at the very heart of our society, whose individual health and healthy relationship society has a vested interest to maintain’, *Theology and Law* ‘explores that relationship with a view to renewing the health of both’.³ This is an important goal, for while the two disciplines may arguably be lacking in public esteem, and there may exist a gap in the Australian legal literature on the relationship between them, it does not mean that engaging with them bears little fruit or is irrelevant to a full understanding of Australian society.

The rich and diverse American legal literature reveals a number of possible dimensions to society’s relationship with both theology and law.⁴ Some scholars consider the ways in which law exhibits theological dimensions, the ways in which law is a dimension of theology, and the fact that theology played a role in, and influenced the development, application and operation of, ‘secular’⁵ domestic civil law.⁶ Each of the three monotheistic traditions — Judaism,⁷ Christianity⁸ and Islam⁹ — are represented in this enterprise. Others study religious law, itself based upon theological conclusions, as an inherently interesting and important field in its own right.¹⁰ Still others note the necessity of

¹ Christine Parker and Gordon Preece (eds), *Theology and Law: Partners or Protagonists?* (2005) (*Theology and Law*).

² Gordon Preece, ‘Editorial’ in Christine Parker and Gordon Preece (eds), *Theology and Law: Partners or Protagonists?* (2005) 1, 1.

³ *Ibid.*

⁴ The seminal works in this area, and those which masterfully summarise the historical evidence of this relationship, are those of Harold J Berman: see, eg, Harold J Berman, *The Interaction of Law and Religion* (1974); Harold J Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (1983); Harold J Berman, *Faith and Order: The Reconciliation of Law and Religion* (1993). See also the stimulating collection of essays found in J Rowland Pennock and John W Chapman (eds), *Religion, Morality, and the Law* (1988).

⁵ See Berman, *Law and Revolution*, above n 4, ch 8.

⁶ Berman, *The Interaction of Law and Religion*, above n 1, chs 1, 3; Berman, *Law and Revolution*, above n 4, pt II; Berman, *Faith and Order*, above n 4.

⁷ See N S Hecht et al (eds), *An Introduction to the History and Sources of Jewish Law* (1996); Alan M Dershowitz, *The Genesis of Justice: Ten Stories of Biblical Injustice that Led to the Ten Commandments and Modern Morality and Law* (2000).

⁸ See Robert E Rodes Jr, *Pilgrim Law* (1998); Mary Jo Bane and Lawrence M Mead, *Lifting Up the Poor: A Dialogue on Religion, Poverty and Welfare Reform* (2003); Robert F Drinan, *Can God and Caesar Coexist: Balancing Religious Freedom and International Law* (2004).

⁹ See Khaled Abou El Fadl, *Speaking in God’s Name: Islamic Law, Authority and Women* (2001); Khaled Abou El Fadl, *Islam and the Challenge of Democracy* (2004); Ron Greaves, *Aspects of Islam* (2005); Seyyed Hossein Nasr, *The Heart of Islam: Enduring Values for Humanity* (2004); Richard Bonney, *Jihad: From Qu’ran to Bin Laden* (2005).

¹⁰ In relation to Judaic law: see, eg, Donna Litman, ‘Jewish Law: Deciphering the Code by Global Process and Analogy’ (2005) 82 *University of Detroit Mercy Law Review* 563. In relation to Christian law: see, eg, ZENIT, ‘Michael Scaperlanda on a Person-Centered System’ (Press Release, 13 February 2005). Michael Scaperlanda is a Professor of Law at The University of Oklahoma College of Law. In relation to Shari’a law: see, eg, Abou El Fadl, *Speaking in God’s Name*, above n 9; Abou El Fadl, *Islam and the Challenge of Democracy*, above n 9; Jamila Hussain, *Islam: Its Law and Society* (2004); Asaf A Fyzee, *Outlines of Muhammadan Law* (4th

understanding the history of a theological tradition in order to comprehend the contemporary operation of a modern legal system.¹¹

The search for historical connections and influences in the development of modern law has been particularly illuminating in the case of Christianity.¹² The earliest courts in England, for instance, were not the courts of common law but the ecclesiastical courts. By the 12th century, when judicial process was only just beginning in the English secular courts, ecclesiastical courts had already long looked very much like what we would call a court today: a judge trying to find out what had happened between the parties, comparing evidence given by witnesses, and applying rules that could be looked up in books.¹³ Harold J Berman, in his monumental study *Law and Revolution: The Formation of the Western Legal Tradition*, writes that:

basic institutions, concepts, and values of Western legal systems have their sources in religious rituals, liturgies, and doctrines of the eleventh and twelfth centuries, reflecting new attitudes toward death, sin, punishment, forgiveness, and salvation, as well as new assumptions concerning the relationship of the divine to the human and of faith to reason. Over the intervening centuries, these religious attitudes and assumptions have changed fundamentally, and today their theological sources seem to be in the process of drying up. Yet the legal institutions, conceptions, and values that have derived from them still survive, often unchanged. Western legal science is a secular theology, which often makes no sense because its theological presuppositions are no longer accepted.¹⁴

In other words, the history of the Western legal tradition, of the common law itself, is intimately bound up with Christian theology.¹⁵ Recent American scholarship builds upon this conclusion, elucidating the extent to which the *United States Constitution* was strongly influenced by the Christian faith of its authors.¹⁶ It was S F C Milsom who famously argued that it is only '[o]ur own

ed, 1974); Lawrence Rosen, *The Justice of Islam* (2000); Imam Feisal Abdul Rauf, 'What Is Islamic Law?' (2006) 57 *Mercer Law Review* 595; Anver Emon, 'Understanding Sharia Law: Further Education about Islamic History and Islamic Law Necessary', *The Bulletin* (University of Toronto), 31 October 2005, 20.

¹¹ Berman, *The Interaction of Law and Religion*, above n 4, ch 2; Berman, *Law and Revolution*, above n 4, 'Introduction', 'Conclusion'; Berman, *Faith and Order*, above n 4.

¹² See especially Berman, *Law and Revolution*, above n 4; Berman, *Faith and Order*, above n 4; Francis E Peters, *The Monotheists: Jews, Christians, and Muslims in Conflict and Competition* (2003) vols 1–2; F E Peters, *The Children of Abraham: Judaism, Christianity, Islam: A New Edition* (2004).

¹³ S F C Milsom, *Historical Foundations of the Common Law* (2nd ed, 1981) 25. See also at 87–8.

¹⁴ Berman, *Law and Revolution*, above n 4, 165.

¹⁵ *Ibid* 33–45; Berman, *The Interaction of Law and Religion*, above n 4, ch 2; Berman, *Faith and Order*, above n 4, 23–238.

¹⁶ See, eg, Sydney E Ahlstrom, *A Religious History of the American People* (2nd ed, 2004) ch 23. See especially James H Hutson (ed), *The Founders on Religion: A Book of Quotations* (2005) 76–8, which deals with the *United States Constitution*. Still, this remains a point of controversy and debate: see Frank Lambert, *The Founding Fathers and the Place of Religion in America* (2003); David L Holmes, *The Faiths of the Founding Fathers* (2006). For a more popular account: see Jon Meacham, *American Gospel* (2006).

age ... which has felt able to relegate the relationship between law and morals to the class-room.¹⁷

The Australian legal academy seems to have forgotten — and perhaps overlooks, in favour of a more secular account — the historical relationship between theology and law.¹⁸ This results in a more serious contemporary omission: a failure of the two disciplines to speak to, and learn from, one another.¹⁹ While there may be reasons for this, such as the comparatively recent rejection of natural law as having anything useful to say in the modern legal academy,²⁰ it is nonetheless disappointing. Writing in the American context about property, Harvard law Professor Joseph William Singer explains that by studying theology

we can learn from centuries of study and debate about the appropriate role of morality in the economic world. Major religions have grappled with the question of what obligations a good person has in the world of commerce, and have suggested ways to make an economic system compatible with the full range of our values. By looking at religious traditions, we may deepen our engagement with those values and find some inspiration on how to negotiate tensions we face between the pursuit of profit and the pursuit of humanity.²¹

The interdisciplinary study of theology and law seeks to determine the ways in which both may actually be pursuing the same goal — morality and justice — and how, in that common pursuit, they might offer insights to one another.²²

The novelty of *Theology and Law*, therefore, lies in its contribution to Australian legal literature. Australia's theologians — indeed, those of most countries — have long recognised the interplay between the two disciplines, and they continue to grapple with the impact of theological understanding and religious conviction upon law, law-making, and legal processes.²³ Those in the law schools, however, remain in need of rediscovering the theological background to Anglo-Australian law and a fuller understanding of the world in which we live.

¹⁷ Milsom, above n 13, 25. Yet, while there are legal ethics subjects in contemporary Australian law schools, very few teach law and religion, unlike so many of their American and Canadian counterparts.

¹⁸ For instance, the authoritative legal history of Australia: Alex C Castles, *An Australian Legal History* (1982), makes no explicit reference to the established role played by Christianity in the development of the English common law. As such, the Christian heritage, through the English common law, of Australia's law and legal structure is wiped away in favour of a more secular account.

¹⁹ This problem has been identified in Berman, *The Interaction of Law and Religion*, above n 4, ch 2. See generally Berman, *Law and Revolution*, above n 4.

²⁰ See generally M D A Freeman, *Lloyd's Introduction to Jurisprudence* (7th ed, 2001) 120–3. However, there are some significant recent works which argue persuasively that natural law still has something to contribute to contemporary jurisprudence: see, eg, Germain Grisez and Russell B Shaw, *Beyond the New Morality: The Responsibilities of Freedom* (1980); John Finnis, *Natural Law and Natural Rights* (9th imp, 1997); Robert P George, *In Defence of Natural Law* (2001).

²¹ Joseph William Singer, *The Edges of the Field: Lessons on the Obligations of Ownership* (2000) 41–2. See also Pennock and Chapman, above n 4.

²² See Dershowitz, above n 7; Berman, *Law and Revolution*, above n 4, 33–45; Singer, above n 21, 41–2; Berman, *Faith and Order*, above n 4.

²³ Berman, *The Interaction of Law and Religion*, above n 4, ch 2. In Australia, this is demonstrated by events such as the Bonhoeffer Conference, hosted by Whitley College, the Baptist Theological College of Victoria, The University of Melbourne, 21–24 September 2006, which dealt in part with what Dietrich Bonhoeffer, a World War II-era German dissident theologian, would say to modern Australians in light of legal and political developments over the last decade.

The collection of essays applies existing theories to early and contemporary manifestations of the interplay between theology and law in Australia. The essays found in *Theology and Law* — written by antipodean academic lawyers and theologians²⁴ — open a much-needed dialogue between theology and law in relation to both the historical antecedents of the Western legal tradition, and the deeper relationship, as concerns morality and justice, between them. This allows each to learn from the other. And while it may add little to the American literature on the topic, it makes a unique contribution to Australian legal literature. Still, as this review essay will show, one weakness emerges.

This review essay is divided into six parts. Part II identifies the weakness with *Theology and Law* — its failure to define and distinguish ‘theology’ and ‘religion’ — and also provides a means of distinguishing the two. Part III outlines two methodological approaches which flow from the distinction between theology and religion. Using the two approaches set out in Part III, Parts IV–V reorganise the essays found in the volume on the basis of whether they deal with the relationship between religion and law, or theology and law. Part V offers some concluding reflections on the study of the relationship between theology and law.

II THE NEED TO DEFINE AND DISTINGUISH ‘THEOLOGY’ AND ‘RELIGION’

Notwithstanding the great value of *Theology and Law* in opening dialogue and exploring the relationship between theology and law, there is a weakness: the failure to define and distinguish ‘theology’ and ‘religion’. While these terms are obviously related, they are not the same. This may seem a minor point, yet in fact it makes all the difference; as we will see it has implications for the methodological approach one adopts.

There are many ways in which one might have approached the task of defining and distinguishing theology and religion — a vast literature covers this area, and no claim is made here to be comprehensive.²⁵ In offering a means of defining and distinguishing the two terms, the intent is not to criticise what is done in *Law and Theology*, but to strengthen its impact. We must, then, begin with definitions.

For the purposes of this essay, ‘theology’ can be taken to mean, literally, ‘god discourse’. It involves reflection on the existence of god(s), the nature or being of god(s), and the relationships that exist between god(s) and humanity and

²⁴ The academic lawyers are Associate Professor Adrian Evans, Faculty of Law, Monash University; Garth Blake SC, practising barrister in Sydney; Professor Fr Frank Brennan SJ AO, School of Law, The University of Notre Dame Australia and Institute of Legal Studies, Australian Catholic University; Dr Nicky Jones; Reid Mortensen, Reader in Law, TC Beirne School of Law, University of Queensland; Dr Christine Parker, Australian Research Council (‘ARC’) Research Fellow, Faculty of Law, The University of Melbourne. The theologians are Dr Christopher D Marshall and Rev Dr Gordon Preece.

²⁵ T Jeremy Gunn, ‘The Complexity of Religion and the Definition of “Religion” in International Law’ (2003) 16 *Harvard Human Rights Journal* 189, 193–5.

between humans.²⁶ Theology begins from the baseline assumption of the existence of, and human faith in, god(s), and then attempts to understand that faith.²⁷ The origins of this concept of theology as ‘faith seeking understanding’ can be traced back to Saint Augustine’s famous exhortation to both ‘understand, in order to believe’ *and* ‘believe, in order to understand.’²⁸ The word ‘god(s)’ captures the use of theology to describe the process of enquiry in relation to either monotheistic traditions (belief in one god) or polytheistic traditions (belief in more than one god). This is not an uncontroversial approach to theology. One must be sensitive to the fact that, as a discipline, theology is typically associated with Christianity — a monotheistic faith. As such, non-Christians, especially those who adhere to polytheistic traditions, sometimes consider ‘theology’ to be pejorative and imperialistic when used in relation to their traditions.

As with theology, many have attempted to define ‘religion’, but with little agreement.²⁹ Some offer tentative definitions while others refer to ‘facets’. John Bowker, for instance, takes the former approach, emphasising that religions are organised systems which hold people together.³⁰ The origins of, and reasons for, this systematisation lie in the fundamental condition of human life and survival, which in turn lies in the human biogenetic structuralism that prepares humans, in a gene/protein sense, for those characteristic behaviours which we might call ‘religious’.³¹ This preparedness and its role in human survival in turn give rise to somatic exploration and discovery. It might be said that survival and biological preparedness are what give rise to theology — the somatic search for an understanding of faith. Finally, once all of this occurs, various forms of organisation may arise: large-scale, coherently organised and hierarchical, as is the case with Roman Catholicism; large-scale and loosely organised, with virtually no structure at all, such as Hinduism; or small-scale and local, of which there are a great variety of examples. Countless variations on these three ideal-types can be found. But the unifying theme is that the organisational structure which defines religion grows around theology. And whatever its level and degree of organisation, a religion typically views itself as being metaphysical — not an end in itself but a means to an end — based upon a theology built upon particular texts, traditions, and stories, which are themselves based upon core myths, rituals, and symbols.³²

In lieu of a definition, T Jeremy Gunn offers three central ‘facets’ of religion. The first, *belief*, refers to the convictions that people hold regarding such matters as god(s), truth, or doctrines of faith. Secondly, and in contrast to belief, *identity* emphasises affiliation with a group — religion is experienced as something akin

²⁶ See the definition of ‘theology’ given in John Bowker (ed), *The Oxford Dictionary of World Religions* (1997) 970.

²⁷ *Ibid.*

²⁸ St Augustine, ‘Sermon 43 — On What Is Written in Isaiah: Unless You Believe, You Shall Not Understand’ in John Rotelle (ed), *The Works of Saint Augustine: A Translation for the 21st Century: Sermons* (Edmund Hill trans, 1990 ed) vol 2, 238, 241–3.

²⁹ See, eg, Gunn, above n 25, 193–9; Willard G Oxtoby (ed), *World Religions: Western Traditions* (2nd ed, 2001); Willard G Oxtoby (ed), *World Religions: Eastern Traditions* (2nd ed, 2001).

³⁰ Bowker, above n 26, xv–xxiv.

³¹ *Ibid* xvii.

³² *Ibid* xv–xxiv.

to family, ethnicity, race or nationality. Finally, and analytically distinct from belief and identity, but tied to one of them in the mind of the religious person, is *way of life* — religion is associated with actions, rituals, customs and traditions that may distinguish the believer from adherents of other religions.³³

Defining theology and religion allows us to distinguish between them, and so explain their relationship to one another. Based on the definitions used in this essay, we can say that theology captures the attempt to explain and explore the existence of god(s), our relationship to god(s) and its impact on our relationship with one another, while religion describes the institution that grows up around, and which is based upon, a particular theology. The important point here is that religion is an organisational structure by which one gains identity and a way of life, founded upon a metaphysical (that is, theological) assumption or set of assumptions about god(s). Thus, religion as an institution may be broadly understood, as in the case of the Christian church, or narrowly understood, as in the case of the Orthodox Church, which is a denomination within the Christian church. But in either case, theology is the core of the religion — both Christianity and Orthodoxy are institutions founded upon a particular theology.

An example assists: consider religious law — a legal system based upon the theological assumptions that underlie a particular faith. The system of laws is a structure established by humans founded upon the theological assumptions that form the core of that religious tradition. The system of laws is part of the religion, while the underlying theological assumptions are its core. Islamic or Judaic law are examples of this. Or, to take a recent and controversial issue, consider the Christian debate over intelligent design. Assuming that intelligent design is correct, theology would ask what that might tell us about the Christian understanding of God and God's relationship to humanity. Christianity, whether Catholic, Orthodox, evangelical, or any other confessional group falling under that banner, might issue dogmatic teachings about how the conclusion of intelligent design structures the lives of those who make up the institution.

Why is this distinction important? Simply because deciding whether one is dealing with theology or religion has methodological implications for a project such as *Theology and Law*. If this volume seeks to address the eponymous question whether religion and law are partners or protagonists, then we might anticipate that it would, of necessity, consider whether religion as an institution is a partner or a protagonist of law as an institution (a legal system). And because religion encompasses theology, such a volume could also have covered both religion and theology, and its relationship to law, either as an institution or in a theoretical sense. In other words, it may have included theoretical questions, such as the relationship between a particular theological assumption in a specified religion, and a legal system or theory of law.

If, however, as its title suggests, the volume is only aimed at theology and law, then it presumably seeks answers to questions about the relationship between the theory of law — jurisprudence, or what law is and how it structures relationships between people — and theories about the existence of, and faith in, god(s), and

³³ Gunn, above n 25, 204–5.

our relationship with god(s) and one another. The next Part outlines the two methodological approaches that follow from such a distinction.

III TWO METHODOLOGICAL APPROACHES

Preece outlines five possible approaches to the question of whether ‘theology and law’ are ‘protagonists or partners’:

- 1 The first approach attempts a *synthesis* of the two disciplines at a highly theoretical level.³⁴
- 2 The second approach involves the *search for essential themes* which find resonance with the other discipline at a less theoretical and technical level than the first approach.³⁵
- 3 The third approach seeks *integration* of the two disciplines — scholars who take this approach may view the two disciplines as being at war, as running parallel, or as being intimately engaged. Alternatively, they may argue that theology, being ‘the queen of all sciences’³⁶ is paramount to law, or that it transforms other disciplines such as law.³⁷
- 4 The fourth approach ‘examine[s] a range of contentious issues where *law adjudicates the contested boundary* between an allegedly secular society and public religion’.³⁸
- 5 The fifth approach asks questions about the ‘*character formation of professionals*’ in the light of theological and experiential narratives which sustain Christian and ethical character.³⁹

This Part argues that it is possible to consolidate Preece’s five approaches into two, both of which more closely correspond to the relationship between theology and religion outlined in Part II, and therefore, more accurately reflect the existing methodological approach found in the legal literature.

The first approach, which we can call ‘theology and law’ or simply ‘engagement’, comprises Preece’s first, second, third and fifth approaches. Remember that theology is discourse about god(s). Thus, if we seek answers to whether theology and law are protagonists or partners, we are really seeking answers to whether theology and law engage at the theoretical level. By calling such approaches ‘theology and law’ or ‘engagement’, we describe efforts to engage the two disciplines on their own terms — and sometimes to synthesise or integrate their positions — in a search for common objectives, pursuits or themes (typically, morality or justice). At a general level, such approaches might

³⁴ Preece, above n 2, 1.

³⁵ Ibid. This is not an unknown approach in the American literature: see, eg, Singer, above n 21.

³⁶ Preece, above n 2, 2. See also John Polkinghorne, *Serious Talk: Science and Religion in Dialogue* (1995) 58–9.

³⁷ Preece, above n 2, 2. This approach is known to the American academy through the integrative jurisprudence of scholars like Berman, *Faith and Order*, above n 4, 289–312.

³⁸ Preece, above n 2, 3 (emphasis added).

³⁹ Ibid (emphasis added).

consider, by way of a comparative approach, how theology and law, for their own reasons, are sourced in, related to, and constitutive of, the relationships that structure the world in which we live. More specifically, a theology and law approach might examine and analyse the positions taken by the two disciplines on any particular social or moral topic, and ask whether they seek the same or divergent goals. Thus, the theology and law approach seeks some level of engagement at the ontological level, allowing the two disciplines to speak for themselves as to the world in which we live — what it was, what it is, and what it might or ought to be. It is only at this ontological level that one can truly decide whether, in contributing to and constituting the structure of the world in which we live, theology and law act at cross-purposes or in concert. Aside from studies of Islamic law⁴⁰ — when they deal with the relationship between the underlying theology of Islamic faith and the system of laws which is based upon those assumptions — this approach is little represented in the Australian legal literature.

The second approach, which we can call ‘law and religion’, is captured by Preece’s fourth and fifth approaches.⁴¹ We know that a religion is an institution founded upon or growing around theology or theological assumptions or conclusions about god(s). If then, one is investigating the relationship between religion and law, one is exploring the relationship between religion as an institution, and a legal system. To the extent that it considers theology at all, the law and religion approach typically considers the legal issues and arguments surrounding the separation of Church and state or the protection of religious freedom in a given state or group of states. This approach is well-established in both Australian jurisprudence⁴² and legal literature.⁴³

As useful as a law and religion approach may be to understanding governmental structure and the role of religion in public life, aside from those scholars who examine religious law, it fails to examine questions concerning the relationship between theology and law. Why? Simply because of its implicit assumption: that law controls, regulates, and sometimes protects religion, either by securing religious freedom, or determining how much or how little religion should play a role in, or influence, public life. In contrast to the theology and law approach, the question is answered before one even begins: law and religion are neither protagonists, in the sense of being leading players in a drama or story, nor

⁴⁰ See, eg, Timothy Lindsey (ed), *Indonesia: Law and Society* (1998); Hussain, above n 10.

⁴¹ Preece’s fifth approach falls into both theology and law, and law and religion, because it is possible that in some cases, ethics may be founded upon theological assumptions, while in others they may draw upon the dogmatic teachings of a particular religion.

⁴² *Church of the New Faith v Commissioner of Pay-Roll Tax (Vic)* (1983) 154 CLR 120, in which the High Court of Australia dealt with the meaning of religion for the purposes of taxation laws.

⁴³ See, eg, Peter Radan, Denise Meyerson and Rosalind F Croucher (eds), *Law and Religion* (2005); Tom Frame, *Church and State: Australia’s Imaginary Wall* (2007); Frank Brennan, *Acting on Conscience: How Can We Responsibly Mix Law, Religion and Politics?* (2006); Carolyn Evans, *Freedom of Religion under the European Convention on Human Rights* (2001); Mark Janis and Carolyn Evans (eds), *Religion and International Law* (1999); Carolyn Evans, ‘Chinese Law and the International Protection of Religious Freedom’ (2002) 44 *Journal of Church and State* 749. This was aptly demonstrated at the Law, Religion and Social Change Conference hosted by the ANU College of Law, The Australian National University, Canberra, 25–27 May 2006.

partners. According to this analysis, law acts as a wall separating religion from public civic life. The wall may be higher or lower, thus keeping more or less of religion out of public life — but as a wall, it cannot cross into the domain of religion, and certainly never into that of theology.

Of course, a law and religion approach accepts that religious traditions are founded on theological positions or assumptions; indeed that is the point of the analysis — law either keeps those assumptions out of public life, or it allows them in to a limited extent. But law never penetrates the surface of the religious tradition, whatever it happens to be, to comment upon the underlying theological assumptions themselves. To do that would violate the very premise of the exercise — that Church and state are separate and that the latter merely provides, through law, a wall *against* such encroachments occurring in either direction. This approach then, is little interested in the underlying theology of any particular religious tradition, and what it might have to say about the law and its operation in the world in which we live or vice versa. Rather, while it might consider what religion has to say about a particular moral or social problem in the course of determining separation or protection issues, it avoids exploring the underlying theology behind that religious-institutional position, and concerns itself only with the relationship between adherents to a particular religious tradition and the state in which they live. Clearly, law and religion analysis has value in developing the law controlling the separation of Church and state, and in protecting religious freedom; but it has limited utility in seeking answers to any deeper ontological relationship between theology and law. Law and religion analysis falls more comfortably within doctrinal categories of law such as constitutional law, civil rights law, or international human rights law.

The foregoing has implications for how we interpret *Theology and Law*. If the volume is about theology, then we might hope that it offers answers to the ways in which law and theology view relationships between individuals and how those relationships structure, and are structured by, the society in which we live. If, however, the volume is about religion, then it would fall into the well-established law and religion category and add to doctrinal categories like constitutional law or civil rights law. Both lines of enquiry are clearly useful, but the former would offer something quite novel and forge a new path within the contemporary Australian legal academy, while the latter would merely add to an existing body of literature and walk a comparatively well-worn track.

What then, does *Theology and Law* offer? Reorganising its contributions according to the two methodologies set out in this Part shows that it offers more of a law and religion analysis than a theology and law analysis.

IV LAW AND RELIGION

Four of the essays in *Theology and Law* employ a law and religion methodology. In the first, Garth Blake reports on the response of the Anglican Church in Australia to the sexual abuse of children and adults by the clergy and Church

workers who had pastoral responsibility for them.⁴⁴ Having canvassed the ‘catalogue of failures’ of the Anglican Church — criminal convictions, civil litigation, inquiries, Church discipline and resignations — Blake outlines the initial responses of the Church: the establishment of a child protection committee; a sexual abuse working group; and a national abuse protocol working group.⁴⁵ The essay concludes with the resolutions passed and the canons promulgated by the General Synod of the Anglican Church in October 2004.

One also finds law and religion approaches in the contributions of Reid Mortensen,⁴⁶ Nicky Jones⁴⁷ and Frank Brennan.⁴⁸ Mortensen’s essay examines what is termed the ‘soft’ approach to the separation of Church and state in Australia, Jones considers the Islamic headscarf controversy in France, and Brennan explores the same-sex marriage debate in Australia. Because all three address the same underlying issue — the separation of Church and state — this essay considers only the contributions of Mortensen and Brennan, which involve matters relevant to Australia.

Mortensen argues that notwithstanding appeals to the contrary, in the Australian polity, integration as opposed to separation of churches (religions) and state is the norm. Integration finds expression in ‘an anti-discrimination principle by which citizens have equal rights to bring their religious beliefs into the public square and government’s only role is to deal even-handedly between them.’⁴⁹ This ‘soft secular government’, as Mortensen calls it, occurs most frequently in the case of hospitals, welfare and private schooling.⁵⁰

While in principle, a soft approach to religion and law is not problematic, Mortensen argues that what is troubling is the fact that the Australian courts have effectively cancelled themselves out of any ability to police the ‘arrangements, which government and religious groups were prepared to strike themselves, to ensure that government remained impartial in its dealings with different religious and non-religious groups.’⁵¹ Mortensen’s conclusion is that the current state of judicial analysis⁵² of s 116 of the *Australian Constitution* ensures that a future ‘wall of separation’ between Church and state has poor prospects in Australia.⁵³ This means that ‘a harder form of secular government is unlikely ever to be accepted ... [because] the courts show no inclination to accept “separation” as

⁴⁴ Garth Blake, ‘Child Protection and the Anglican Church of Australia’ in Christine Parker and Gordon Preece (eds), *Theology and Law: Partners or Protagonists?* (2005) 112.

⁴⁵ *Ibid.*

⁴⁶ Reid Mortensen, ‘Judicial (In)Activism in Australia’s Secular Commonwealth’ in Christine Parker and Gordon Preece (eds), *Theology and Law: Partners or Protagonists?* (2005) 52.

⁴⁷ Nicky Jones, ‘The State of Secularism: The New Law and the Affair of the Islamic Headscarf in France’ in Christine Parker and Gordon Preece (eds), *Theology and Law: Partners or Protagonists?* (2005) 70.

⁴⁸ Frank Brennan, ‘Church-State Concerns about Same Sex Marriage and the Failure to Accord Same Sex Couples Their Due’ in Christine Parker and Gordon Preece (eds), *Theology and Law: Partners or Protagonists?* (2005) 83.

⁴⁹ Mortensen, above n 46, 53.

⁵⁰ *Ibid.*

⁵¹ *Ibid.* 69.

⁵² *Adelaide Co of Jehovah’s Witnesses v Commonwealth* (1943) 67 CLR 116; *A-G (Vic) ex rel Black v Commonwealth* (1981) 146 CLR 559.

⁵³ Mortensen, above n 46, 54.

the appropriate organising principle for secular governance in Australia.⁵⁴ And this in turn means that ‘in the deepening political debate about the role of religion in Australian public life, any appeal to “separation” as a tradition of the Australian *polis* itself lacks persuasive power.’⁵⁵ Given that its absence has not proven troublesome over the first 100 plus years of Australian federation, Mortensen might have presented evidence as to why such a ‘wall of separation’ may be necessary today. Absent such evidence, this essay seems equally supportive of the soft secular status quo.

Brennan’s essay, which asks whether ‘the civil institution of marriage ... [should] be expanded to include a same sex union in which two persons voluntarily commit themselves exclusively to each other for life’,⁵⁶ seems to confirm Mortensen’s conclusion that in Australia, separation may be more of the soft than the hard variety. Having set out a number of qualifying limitations, Brennan reviews the 2004 Senate debate on the proposed amendment to the *Marriage Act 1961* (Cth) to ensure that ‘marriage’ meant ‘the union of a man and a woman to the exclusion of all others, voluntarily entered into for life.’⁵⁷ The essay concludes that in contemporary Australia, a same-sex union should not be called ‘marriage’ because that term has a popular and religious meaning which reflects people’s lived experience in families headed by a mother and a father. For Brennan, ‘[t]he legal definition of marriage should continue to follow the contours of that meaning and experience.’⁵⁸

Given the polemical nature of this debate, one wishes that Brennan had presented evidence substantiating the claim that the popular and religious meanings of marriage in Australia reflect a lived experience. Unfortunately, other than the facts as found in various Canadian and American appellate court decisions, there is no mention of sociological or other studies that would support this claim. Moreover, Brennan does not provide any evidence as to what the ‘religious meaning’ of marriage might be. True it may be that most mainstream Christian traditions support the legal definition of marriage now found in the *Marriage Act 1961* (Cth), but that is more by way of assertion than proof of the link between the religious meaning of marriage and the lived experience of Australians.

From here, Brennan notes that advocates of such change often follow a ‘twin track’ strategy of agitating for change both in legislatures and courts.⁵⁹ Yet, the essay fails to address the relationship between these two strategies or how they might influence one another. Rather, the remainder of the essay is a critique of the positions taken by final appellate courts in Australia,⁶⁰ Canada⁶¹ and the United States.⁶² Yet even here, Brennan’s argument seems sketchy — boldly asserting that ‘[s]uch a fundamental change to a social institution should be made

⁵⁴ Ibid 69.

⁵⁵ Ibid.

⁵⁶ Brennan, above n 48, 83.

⁵⁷ *Marriage Act 1961* (Cth) s 5(1), amended by *Marriage Amendment Act 2004* (Cth).

⁵⁸ Brennan, above n 48, 84.

⁵⁹ Ibid 95.

⁶⁰ Ibid 89–91.

⁶¹ Ibid 91–3, 95–101.

⁶² Ibid 94–5, 101–4.

by the citizens or their elected legislators rather than by unelected judges',⁶³ he does little to tap into the democratic underpinnings of this claim, with its long and rich pedigree which has champions on both sides of the ideological divide in the American constitutional literature.⁶⁴

V THEOLOGY AND LAW

While an engagement, or theology and law approach might offer the best means of testing the question posed in the subtitle of *Law and Theology*, Preece writes that synthesis was beyond 'space limitations'⁶⁵ and probably beyond the 'current abilities of each group to engage fruitfully with each other's deep structures and highly technical language'.⁶⁶ Thus, integration is 'still in its methodological infancy, despite many great theologians such as Tertullian and Calvin being lawyers by training'.⁶⁷ The rejection of these two approaches is disappointing, for very useful research in recent years has shown how beneficial engagement might be. To take but three such examples: Berman propounds what has been called an integrative jurisprudence;⁶⁸ Robert E Rodes Jr demonstrates how liberation theology⁶⁹ may be implemented in domestic law;⁷⁰ and Singer argues that the legal-political understanding of private property may benefit from insights gained from theology, which in turn leads to practical benefits for Western legal systems.⁷¹ Given this substantial body of American literature, it would have been valuable if *Theology and Law* had included some contributions making use of synthesis and integration. Still, Preece is mostly correct in saying that these techniques require a great deal of development and so, for that reason alone, there probably was insufficient space for a full development of theoretical synthesis or integration.

⁶³ Ibid 104. See also at 110–11.

⁶⁴ See, eg, Robert H Bork, *Slouching towards Gomorrah: Modern Liberalism and American Decline* (1997); Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* (1997); Laurence H Tribe, *Constitutional Choices* (1985); Laurence H Tribe and Michael C Dorf, *On Reading the Constitution* (1991); Laurence H Tribe, *God Save This Honorable Court: How the Choice of Supreme Court Justices Shapes Our History* (1985); Laurence H Tribe, *Abortion: The Clash of Absolutes* (1990).

⁶⁵ Preece, above n 2, 1.

⁶⁶ Ibid.

⁶⁷ Ibid 2–3.

⁶⁸ Berman, *Faith and Order*, above n 4, 289–312.

⁶⁹ The classic exposition of this school of theological thought is Gustavo Gutiérrez, *A Theology of Liberation: History, Politics, and Salvation* (Sister Caridad Inda and John Eagleson trans, revised ed, 1988) [trans of: *Teología de la liberación*].

⁷⁰ Rodes, above n 8.

⁷¹ Singer, above n 21. See also Paul Babie, 'Two Voices of the Morality of Private Property' (2007) 23 *Journal of Law and Religion* (forthcoming); Rachael Oliphant and Paul Babie, 'Can the Gospel of Luke Speak to a Contemporary Understanding of Private Property: The Parable of the Rich Man' (2006) 38 *Colloquium: The Australian and New Zealand Theological Review* 3; Paul Babie, 'The Ukrainian Catholic Church and Moral Theology: The Pastoral Writings of Metropolitan Andrei Sheptytskyi on Private Property' (2006) 6 *Australian Ejournal of Theology* <http://dlibrary.acu.edu.au/research/theology/ejournal/aejt_6/babie.htm>; Paul Babie, 'Private Property and the Gospel of Luke' (2004) 3 *Australian Ejournal of Theology* <http://dlibrary.acu.edu.au/research/theology/ejournal/aejt_3/Babie.htm>; Paul Babie, 'Private Property, the Environment and Christianity' (2002) 15 *Pacifica: Australasian Theological Studies* 307.

Two essays in the collection, however, utilise Preece's fifth category, to ask questions about the character formation of professionals in the light of theological and experiential narratives which sustain Christian and ethical character, and so use theology and law methodology. Adrian Evans,⁷² Associate Professor of Law at Monash University and Christine Parker,⁷³ ARC Research Fellow at Melbourne Law School, both attempt to identify ways in which Christian ethical values can direct, guide and shape the work of practising lawyers. And while both take what might be called a limited engagement approach — in the sense that they seek to integrate Christian ethical and moral stances not with legal theory, but with the practice of law — they nonetheless assert the importance of understanding underlying theological-moral stances in the context of legal practice. As such, both make novel and valuable contributions to the Australian literature on legal professional ethics.

Adrian Evans argues for introducing law students to

the need for lawyers' re-connection to values-based decision making, if only because lawyers as lawyers are incredibly powerful mediators of justice and injustice and none can practice successfully over the long term without some awareness of these 'value roots'.⁷⁴

Doing so means it is necessary to talk with law students about the 'big picture' issues of life, death, god(s) and community. The challenge is to find a way to achieve this within the traditional setting of legal education — a secular, materialistic environment which pretends to be value-neutral but is ultimately driven by success and hence conducive to the inculcation of scepticism about underlying spiritual values.⁷⁵ Evans argues that because 'the rest of the planet might be far more faith-conscious than Australia',⁷⁶ the way to engage law students in a dialogue about these big picture issues is through the surrogate concept of 'values', a modern euphemism for faith-related reflection and a crucial bridge to personal growth, whatever the sense of spiritual roots.⁷⁷ Brave talk indeed for an Australian legal academic!

In legal practice, values manifest themselves and are represented by legal ethics. Evans' contention is that the quality of ethics, the 'language of values for lawyers',⁷⁸ has suffered because lawyers' underlying values are so little acknowledged or understood. To study this, Evans conducted an empirical study designed to understand what values are important in determining lawyers' attitudes.⁷⁹ The study examined issues of conflicting loyalties within a context of self-interest and lawyers' perceived obligations to various stakeholders⁸⁰ such as

⁷² Adrian Evans, 'Encouraging Lawyer's [sic] Values in a Faith Conscious World' in Christine Parker and Gordon Preece (eds), *Theology and Law: Partners or Protagonists?* (2005) 6.

⁷³ Christine Parker, 'Christian Ethics in Legal Practice: Connecting Faith and Practice' in Christine Parker and Gordon Preece (eds), *Theology and Law: Partners or Protagonists?* (2005) 23.

⁷⁴ Evans, above n 72, 9.

⁷⁵ *Ibid* 10.

⁷⁶ *Ibid* 7.

⁷⁷ *Ibid* 7–9.

⁷⁸ *Ibid* 9.

⁷⁹ *Ibid* 9–10.

⁸⁰ *Ibid* 10.

those that might arise in pro bono work, reporting a client's husband for child abuse, and rounding-up hours on a bill.⁸¹ The results of the study are clearly of use to those who teach and research in the area of legal professional ethics.⁸² For our purposes, the engagement with theology and law makes this essay a valuable contribution to gaining an understanding of the ways in which Christian moral ethics can play a role in the practice of law and in encouraging lawyers to act ethically.

In 'Christian Ethics in Legal Practice: Connecting Faith and Practice',⁸³ Parker presents the results of a series of workshops prepared for lawyers to reflect on the creative tension between faith and legal practice. The workshops encouraged lawyers to forge their own connections between faith and practice, as well as providing a gospel perspective on the issues that Christian lawyers are likely to face over the course of their careers.⁸⁴ Parker writes that

Christian lawyers face the challenge of, not only being faithful at a personal and individual level (eg working with integrity and honesty), but also engaging with 'structural' tensions between the kingdom of God and aspects of our professional lives ...⁸⁵

This challenge occurs in the context of the broader tension between the 'way things are done' in the legal profession and the way things are ordered in the kingdom of God.⁸⁶ Based on the workshops, Parker found that different people handle these tensions and connections in different ways at different times in their lives: some keep the secular and Christian spheres mostly separate and focus mostly on the individual level of faith and work, others try to lead an exemplary ethical life, others become 'social reformers', while still others use legal practice as a Christian ministry.⁸⁷

Four themes emerged from the workshops. First, the pursuit of justice creates ongoing creative tension for the Christian lawyer, stemming from the difference in meaning between secular and Christian justice. In the case of the former, justice involves legal due process and a lawyer playing within the rules of the game, while for the latter, true righteousness or justice comes through God's grace and mercy. For the Christian, social justice is about the proper structuring of relationships between God and people and among human beings, involving the links of obligation, responsibility and care that bind people together in a covenant of love.⁸⁸ The second theme involves Christian lawyers using their legal skills and insights to assist their church to express the distinctive vision of justice framed by the gospel — this is known as the 'kingdom approach to justice'.⁸⁹ The third theme, proclaiming the gospel in words and actions, can be

⁸¹ *Ibid* 11–19.

⁸² *Ibid* 20–2.

⁸³ Parker, above n 73.

⁸⁴ *Ibid* 24–5.

⁸⁵ *Ibid* 26–7.

⁸⁶ *Ibid* 26.

⁸⁷ *Ibid* 27.

⁸⁸ *Ibid* 28–9.

⁸⁹ *Ibid* 30.

accomplished in many different ways: at one extreme, one may simply ensure that one acts honestly and conscientiously, while at the other, one may work solely for the poor and oppressed or take opportunities in conversations with colleagues or clients to discuss issues of faith.⁹⁰ The final theme — avoiding idolatry — explains attempts to avoid having all of one's time, energy and desire sucked into work and the practice of law. Parker writes that '[w]ork can be an idol' — one of the worst kind:

Many lawyers are unsatisfied with the long hours they have to work in large law firms, unrealistic time-based billing targets they must meet, lack of control over worklife and lack of meaningful work. Law firm culture can include lauding professional competence (sometimes to the exclusion of other aspects of life), ambition driven by money, elitism, prestige, lack of nurture of junior lawyers, breakdown of firm loyalties (even partners can be sacked for lack of performance), heavy drinking and competition to rack up billable hours. Many lawyers leave the profession while they are still young.⁹¹

Work becomes an idol when it, not God, becomes the thing that gives one's life meaning and '[i]t is obvious that this is very much at odds with the kind of community and behaviour to which Christians are called.'⁹² As with Evans' contribution, Parker's essay is equally valuable as an exploration of the way in which Christian theology plays a role in the formation of values for practising Christian lawyers.

A theologian, not a lawyer, wrote the only contribution offering a deeper engagement with theology and law. In 'Satisfying Justice: Victims, Justice and the Grain of the Universe',⁹³ Christopher D Marshall addresses the social responsibility imposed on people by the Scriptures to care for the victims of injustice. According to Marshall, this responsibility involves not merely *feeling*, but *doing* care for the needy. Both law and Christianity have much to learn: the former still finds it difficult to respond appropriately to the plight of victims, while the latter has much to learn about satisfying justice.⁹⁴ Having offered some reflections on the nature of victimisation and the ways in which a religious community might respond to victims,⁹⁵ Marshall turns to consider restorative justice — a legal framework which offers a 'third way' between the dominant retributive and rehabilitative models of penal philosophy.⁹⁶

While this novel paradigm involves a distinctive process that gives expression to, and prioritises, a set of values, Marshall argues that if it is to work as a legitimate third way, it must be anchored in a 'community of value' which prioritises 'mutual care and accountability, honesty and compassion, confession

⁹⁰ Ibid 31–2.

⁹¹ Ibid 33.

⁹² Ibid 34.

⁹³ Christopher D Marshall, 'Satisfying Justice: Victims, Justice and the Grain of the Universe' in Christine Parker and Gordon Preece (eds), *Theology and Law: Partners or Protagonists?* (2005) 35.

⁹⁴ Ibid 36.

⁹⁵ Ibid 37–42.

⁹⁶ Ibid 42.

and forgiveness and peacemaking.⁹⁷ This model brings satisfaction to victims and offenders, as well as meeting the needs of wider society — and it may achieve all of this in a spiritual way.⁹⁸ From a theological perspective, this model is grounded in something beyond human devising — according to Christian theology, it has an objective, metaphysical basis. This may be difficult for those who hold to secular humanism to accept, but ‘for those who believe that the Christian story is objectively true, such a conclusion is inescapable.’⁹⁹ Marshall concludes that according to the Christian world view, ‘*restoring love is the ground of the universe.*’¹⁰⁰

Marshall argues that this conclusion has enormous implications: as a model, restorative justice works because it accords with the way God made people and God’s plan for the universe.¹⁰¹ And to those (nurtured in a postmodern world on a steady diet of relativism) who call this attempt to find a metaphysical grounding for justice far-fetched, Marshall responds in much the same way that Berman or Milsom might — rather than being something new and outrageous, a model of justice grounded in theology is historically paradigmatic. Contemporary post-modern scepticism about such a grounding is unique in the history of human thought. In fact, while the legal academy today may reject such a claim, Marshall argues that the whole sweep of human history shows that the ‘just deserts’ concept of justice is grounded in the natural law tradition, which itself has origins in ‘Judeo-Christian values, virtues and beliefs about the nature of ultimate reality.’¹⁰² This

should not be confused for fuzzy sentiments or romantic ideals. They are costly commitments, fashioned in the furnace of human suffering and attested in full face of the ambiguities and contradictions of human life and of the sheer tenacity of evil. They are also the values and commitments that give human life its meaning and beauty, that put us in touch with the divine, and that inspire us to seek a better world, a world in which we do justice with a restoring face.¹⁰³

Marshall’s contribution is therefore both novel — it offers a deeper engagement with law and theology — and valuable as it argues for a reassertion of Christian theology and its understanding of justice as having played, and still being capable of playing, a paramount role in the development and understanding of justice in contemporary Western law and society. As Berman has argued in the American context, this is a necessary, although perhaps not always welcome correction to our understanding of the historical antecedents of our legal tradition and the contemporary operation of our legal system.¹⁰⁴

⁹⁷ Ibid 43.

⁹⁸ Ibid 43–4.

⁹⁹ Ibid 44.

¹⁰⁰ Ibid 46 (emphasis in original).

¹⁰¹ Ibid.

¹⁰² Ibid 50.

¹⁰³ Ibid 51.

¹⁰⁴ Berman, *Law and Revolution*, above n 4, vii–viii.

VI CONCLUDING REFLECTIONS

Having presented a means of defining and distinguishing theology and religion, this review essay argues that from that distinction, two methodological approaches flow for use in considering the relationship of those disciplines to law: theology and law, or law and religion. A majority of the essays in *Theology and Law* take the latter approach. Given that this approach is relatively well-established in the Australian legal academy, this part of the volume, while making a valuable contribution to the existing literature, is not especially unique.

The real importance of *Theology and Law* lies in the essays taking a theology and law approach. They demonstrate that, rather than being partners *or* protagonists, theology and law are *both* protagonist *and* partner to each other — at one moment protagonists, continually urging and prodding the other to restructure, develop and advance, while at the next, and as a result of their protagonism, partners in the common pursuit of morality and justice. Theology and law as a methodology is comparatively novel in the Australian legal academy. For that reason alone, the essays taking such an approach make a valuable and unique contribution to the existing literature.

As a whole though, whatever the methodology used, *Theology and Law* makes a substantial contribution simply by opening a sustained and focused dialogue between religion — which includes theology — and law. The contributors each demonstrate that there are both theoretical and practical benefits that flow from the paradoxical relationship between religion and law — benefits that help us better understand the nature of justice and how to promote it in the society in which we live. By going to the core of the interaction between law and theology, the essays by Marshall, Evans and Parker, for example, assert the Christian heritage of the Western legal tradition.

As Berman and others have shown, the Western legal tradition, far from being secular in its origins, owes much to Christian theology and the system of canon law that grew out of that theology.¹⁰⁵ True, throughout its history, Western law has used Christianity in ways that have produced profoundly negative outcomes for individuals and groups. But that does not vitiate the very important relationship that exists between theology and law. And it is this relationship that is not only under-studied and forgotten in the Australian legal academy, but also, much more alarmingly, sometimes denied. By failing to study this relationship, by forgetting it, by denying it, we blind ourselves to not only ‘the multiformity of the legal tradition ... [but also] the multiformity of history itself.’¹⁰⁶ Although addressing the American experience, Berman might just as easily have been writing about the contemporary Australian legal academy when he observed that in such an environment:

It is easier ... to complain about the compartmentalization of knowledge than to do something constructive to overcome it. Any effort to reintegrate past times is likely to be understood and judged in terms of the prevailing categories and

¹⁰⁵ *Ibid* pt I; Milsom, above n 13, 24–5, 87–8. See also J H Baker, *An Introduction to English Legal History* (1990) 146–54.

¹⁰⁶ Berman, *Law and Revolution*, above n 4, vii.

concepts. ... Yet without a reintegration of the past there is no way either to retrace our steps or to find guidelines for the future.¹⁰⁷

The dialogue between religion (and especially theology) and law is a necessary one — without it, we overlook, forget, deny and reject the origins of our contemporary law and legal tradition. And we do so at our peril, if for no other reason than to avoid the mistakes of the past while recognising that theology in the moral arena may still have much of value to say about, and to, our contemporary world. *Theology and Law* marks an opening to a much-needed Australian dialogue between law and theology, and a step towards a better understanding of the influence — past and future, negative and positive — of theology in law.

For us, the task is now to build on the start made in this collection. There will be sceptics, but for those of us involved in this work, we can only answer that we do it because we believe that theology had, has, and will have, something to say about the way in which law structures the world in which we live, just as any other discipline, such as politics, economics or sociology does. In other words, the study of the relationship between theology and law is inherently valuable. Islamic legal scholar and UCLA law Professor Khaled Abou El Fadl puts this best in a response to being asked about studying the Qur'ān:

I do believe in the authenticity of the Qur'ān as God's uncorrupted and immutable Word. Furthermore, I do believe that the Qur'ān is worth exploring, studying and, in one sense or another, following. I do not hold this belief as a social scientist who notes that the Qur'ān deserves to be studied because of the sociological fact that most Muslims hold it in high regard. The sociological reality is irrelevant for my purposes. I study the Qur'ān as a jurist who believes in the object of his study, very much akin to a Rabbi studying the Talmud or an American constitutional scholar analyzing the *American Constitution*.¹⁰⁸

To be more blunt, in Australian legal discourse, the theological voice behind our legal tradition has been silenced for too long. *Theology and Law* breaks the silence.

¹⁰⁷ Ibid viii.

¹⁰⁸ Abou El Fadl, *Speaking in God's Name*, above n 9, 6–7.