

JOURNAL OF Law and Religion

VOLUME XXV NUMBER 2 2009-10

ARTICLES

Defining the Unspeakable: Incitement in *Halakhah* and Anglo-American Jurisprudence
Jonathan K. Crane

The Religious Perspective of the Judge's Role in Talmudic Law
Yuval Sinai

The Enforceability of Arbitration Decisions Made by Muslim Religious Tribunals: Examining the *Beth Din* Precedent
Lee Ann Bambach

Catholic Thought and Intellectual Property: Learning from the Ethics of Obligation
Gabriel J. Michael

Broadening the Picture of Nineteenth-Century Baptists: How Battles with Catholicism Moved Baptists Toward Separationism
Marty McMahon

Church and State in the Early Republic: The Covenanters' Radical Critique
Robert Emery

Tradition in Religion and Law
H. Patrick Glenn

Pro-Justice Ethics, Water Scarcity, Human Rights
Richard A. Hughes

REVIEW ESSAY

The Many Windows of the Wall
Reid B. Locklin

BOOK REVIEWS

Conscience and the Common Good: Reclaiming the Space Between Person and State, by Robert K. Vischer
Chad Flanders

We Have a Religion: The 1920s Pueblo Indian Dance Controversy and American Religious Freedom, by Tisa Wenger
Jenna Gray-Hildenbrand

Woman's Identity and the Qur'an: A New Reading, by Nimat Hafez Barazangi
Afra Jalabi

The Sins of the Fathers: The Law and Theology of Illegitimacy Reconsidered, by John Witte, Jr.
Paul E. McGreal

Introduction to the History of the Sources of Canon Law: The Ancient Law up to the Decretum of Gratian, by Brian Edwin Ferme
Edward N. Peters

Confucian Political Ethics, edited by Daniel A. Bell
Sarah A. Queen

Sponsored by: Hamline University School of Law

Published by: Hamline University School of Law
ISSN: 0748-0814

JOURNAL OF LAW AND RELIGION

VOLUME XXV

2009-2010

NUMBER 2

EDITORIAL STAFF

Editor in Chief

MARIE A. FAILINGER, Hamline University School of Law

Associate Editor

HOWARD J. VOGEL, Hamline University School of Law

Book Review Editor

LESLIE GRIFFIN, University of Houston Law Center

Technical Editors

MARY L. DUNNEWOLD, Hamline University School of Law

STEPHEN LIEBO, Hamline University School of Law

GRACE MILLS, Hamline University School of Law

Production/Subscription Manager

LINDA BERGLIN, Hamline University School of Law

EDITORIAL ASSISTANTS

CASEY BERNDT

PATRICIA DICKERSON

JOSHUA MELGAARD

BENJAMIN SORENSON

LYNDSAY STEUSSY

EDITORIAL BOARD

JOSÉ ROBERTO JUÁREZ, University of Denver, Sturm College of Law, Chair

FRANK S. ALEXANDER, Emory University School of Law

DEBORAH CANTRELL, University of Colorado Law School

PAULA COOEY, Macalester College

ANTHONY E. COOK, Georgetown University Law Center

ANVER M. EMON, University of Toronto

MARIE FAILINGER, Hamline University School of Law

Ex Officio

LESLIE C. GRIFFIN, George Washington University Law School

Ex Officio

EMILY ALBRINK HARTIGAN, Saint Mary's University of San Antonio School of Law

AFRA JALABI, Islamic Scholar, Beaconsfield, Quebec

HOWARD LESNICK, University of Pennsylvania Law School

DONALD LEWIS, Hamline University School of Law

Ex Officio

ROBIN LOVIN, Perkins School of Theology, Southern Methodist University
NANCY MILLER-HERRON, Attorney at Law, Dresden, Tennessee, Secretary
RUSSELL PEARCE, Fordham University School of Law
MICHAEL PERRY, Emory University School of Law
THOMAS PORTER, JUSTPEACE Center for Mediation & Conflict Transformation
ASIFA QURAISHI, University of Wisconsin Law School
KATHLEEN SANDS, University of Massachusetts Boston
STEVEN D. SMITH, University of San Diego School of Law
EARL SCHWARTZ, Hamline University
DARRYL TRIMIEW, Medgar Evers College
AMELIA UELMEN, Fordham University School of Law
HOWARD J. VOGEL, Hamline University School of Law, Treasurer

ADVISORY COMMITTEE

- RICHARD HIERS, University of Florida, Chair*
TAHA JABER AL-ALWANI, Graduate School of Social and Islamic Sciences
AZIZAH AL-HIBRI, T.C. Williams School of Law, University of Richmond
ABDULLAHI AN-NA'IM, Emory University School of Law
ZAFAR ISHAQ ANSARI, Islamic Research Institute, International Islamic University, Pakistan
MILNER BALL, University of Georgia School of Law
GERARD BRADLEY, Notre Dame University Law School
MICHAEL J. BROYDE, Emory University School of Law
LYNN BUZZARD, Campbell University School of Law
Southern Methodist University
STEPHEN L. CARTER, Yale Law School
ROBERT F. COCHRAN, JR., Pepperdine University School of Law
MOHAMED S. EL-AWA, Islamic Scholar, Egypt
CARL ESBECK, University of Missouri-Columbia School of Law
EDWARD MCGLYNN GAFFNEY, JR., Valparaiso University School of Law
M. CATHLEEN KAVENY, Notre Dame University Law School
PATRICK R. KEIFERT, Luther Theological Seminary
DAMIEN KEOWN, University of London, Goldsmiths
MICHAEL KESSLER, Georgetown University
SANFORD LEVINSON, University of Texas School of Law
DAVID LITTLE, Harvard University Divinity School
ELIZABETH MENSCH, State University of New York at Buffalo, School of Law
EBRAHIM MOOSA, Duke University
SEYYED HOSSEIN NASR, George Washington University
LOUIS NEWMAN, Carleton College
KAY PRANIS, Saint Paul, Minnesota
JAWDAT SAID, Muslim Scholar and Activist, Syria
ELISABETH SCHÜSSLER FIORENZA, Harvard University Divinity School
THOMAS L. SHAFFER, Notre Dame University Law School
DONALD W. SHRIVER, Union Theological Seminary in New York
DANIEL SINCLAIR, Tel Aviv Law School
DOUGLAS STURM, Professor Emeritus, Bucknell University
PETER N. THOMPSON, Hamline University School of Law
CHARLES VILLA-VICENCIO, Institute for Justice and Reconciliation, South Africa
MICHAEL WELKER, University of Heidelberg, Germany
JOHN WITTE, Jr., Emory University School of Law
WILSON YATES, United Theological Seminary of the Twin Cities
STEPHEN B. YOUNG, Attorney at Law, Saint Paul, Minnesota

The JOURNAL OF LAW AND RELIGION is sponsored by the Hamline University School of Law and is a interdisciplinary, interfaith academic and professional publication devoted to investigating the interaction of religion and law.

Subscriptions to the JOURNAL OF LAW AND RELIGION, which is published twice annually, are \$25.00 per two-issue volume for individuals, \$35.00 for institutions, and \$12.00 for students. Add an additional \$10.00 for foreign postage. Subscription requests, manuscripts, and general correspondence should be addressed to:

JOURNAL OF LAW AND RELIGION
1536 Hewitt Avenue
Saint Paul, Minnesota 55104
lberglin@hamline.edu

The JOURNAL currently follows the Blue Book citation format. Citations to Jewish/Christian Biblical sources conform to the SBL Handbook of Style and the Jewish Law Annual. Unsolicited manuscripts will be returned only upon request.

Individual and back issues and complete sets of the JOURNAL OF LAW AND RELIGION may be ordered directly from William S. Hein & Co., 1285 Main Street, Buffalo, New York 14209. Back issues can also be found in electronic format for all your research needs on HeinOnline, <http://heinonline.org>

The views and opinions expressed in the JOURNAL OF LAW AND RELIGION are those of the authors and do not necessarily reflect the views of the editorial staff, the editorial board, the advisory board, or the sponsors of the JOURNAL OF LAW AND RELIGION.

Articles are indexed in the *Index to Legal Periodicals* published by the H.W. Wilson Co. (Bronx, New York), and in the *Legal Resource Index* available on-line on a variety of computer database services.

This periodical is also indexed in the *ATLA Religion Database*®, published by the American Theological Library Association, 300 S. Wacker Dr., Suite 2100, Chicago, IL 60606, E-mail: atla@atla.com, [www.http://www.atla.com](http://www.atla.com).

Internet access to information about the JOURNAL OF LAW AND RELIGION, including an index to past issues, is available at <http://www.hamline.edu/law/jlr>

All copyrights are reserved.

Cite as: 25 J.L. & RELIGION (2009-10)

JOURNAL OF LAW AND RELIGION

STATEMENT OF PERSPECTIVE

The *JOURNAL OF LAW AND RELIGION* was initiated in 1982 as a collaborative effort of the Council on Religion and Law and the Hamline University School of Law. It was born of a sense of historical malaise. The modern age with its strong propensity toward the secularization of all areas of life, while not without merit in its liberating effects, nonetheless has its dark side.

We live, some say, in a time of profound historical crisis. Domestically and globally, we confront massive issues which force us to reconsider, in fundamental ways, the shape and quality of our common life. Yet many of the disciplines of thought and practice that should be a rich resource in such a time are found wanting—among them, law and religion. Law, a discipline presumably devoted to the ways of justice, has all too often become a set of complex, technical tools without concern for higher purpose. Religion, presumably given to the all-embracing promises and prescriptions implied in the sense of the sacred, has all too often become privatized and neglectful of our public life.

The *JOURNAL OF LAW AND RELIGION* is dedicated to a fundamental reappraisal of the disciplines of law and religion as they impinge on each other, might instruct each other, and taken in their conjunction, might offer a constructive response to the major issues of our times. As such its concerns are sixfold.

Historical The *JOURNAL* intends to encourage the examination of historical developments, movements, thinkers, and issues to enrich our understanding of how law and religion have, in various ways, been mutually influential.

Theoretical The *JOURNAL* intends to promote constructive work in religious and legal thought about fundamental theological and jurisprudential questions pertaining to professional practice and the structures of our public life.

Ethical The *JOURNAL* intends to support explorations into the foundations of ethical judgment and normative critiques of our social life, particularly as they draw upon resources from the life of law and religion.

Global The *JOURNAL* intends to be encompassing in its reach, seeking out voices from all the religious and legal traditions throughout the world and bringing them into conversations with each other.

Professional The *JOURNAL* intends to stimulate collaboration between jurists and religious leaders given their respective commitments, as professionals, to the common good of all peoples.

Spiritual The *JOURNAL* recognizes that human existence is grounded in the spiritual, which is represented in many forms and expressions.

The *JOURNAL* is thus a forum within which the disciplines of law and religion might together consider with utmost seriousness their joint responsibility for the creation of a civilization of genuine peace and justice. Within the compass of that purpose, the *JOURNAL* intends to be open-minded and non-prejudicial; it is receptive to submissions from all persuasions and perspectives.

**HAMLIN
UNIVERSITY
SCHOOL OF LAW**

A subscription to the
**JOURNAL OF LAW AND
RELIGION**

Cost per volume (two issues):

\$25.00 individual (U.S.)
\$35.00 individual (foreign)
\$35.00 institution (U.S.)
\$45.00 institution (foreign)
\$12.00 student

Print and send to:

Circulation Manager
JOURNAL OF LAW AND RELIGION
Hamline University School of Law
1536 Hewitt Avenue
St. Paul, MN 55104
U.S.

Please Enclose Payment made out to:

JOURNAL OF LAW AND RELIGION

Name: _____

Address: _____

City: _____ State: _____ Zip: _____

Country: _____

Phone: _____ Fax: _____ E-Mail: _____

Check out our website!

Journal of Law & Religion

<http://www.hamline.edu/law/jlr>



Books of Interest



Contemporary Conversations



Indexes



How to become a Subscriber



Lifetime Achievement Awards



Table of U.S. Supreme Court Decisions
Relating to Religious Liberty



ANNOUNCEMENT

We have acquired the entire
back stock, reprint and
microform rights to the

JOURNAL OF LAW AND RELIGION

Complete sets to date
are now available.
We can also furnish
single volumes and issues.

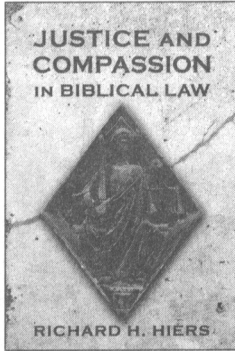
WILLIAM S. HEIN & COMPANY, INC.

1285 Main Street

Buffalo, New York 14209-1987

Orders may also be placed by calling Hein at 800.828.7571;
via fax 716.883.8100; or found in electronic format for all your research
needs on HeinOnline <http://heinonline.org/>

New from Continuum



Justice and Compassion in Biblical Law

Richard H. Hiers

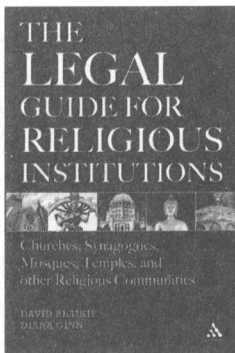
"The connections – and disconnections – between religion and law are often assumed but rarely grasped. *Justice and Compassion* presents in a delightfully accessible form a multitude of common elements between western law and biblical sources. Richard Hiers crafts a carefully nuanced approach in a field too frequently known for its dogmatism rather than its doctrines and insights. His frames of reference open the door to new insights into enduring truths."

– Frank S. Alexander, Emory University
School of Law, Atlanta, GA, USA.

PB 978 0 5672 6909 6 | \$34.95

HC 978 0 5672 9789 1 | \$120.00

December 2009



Legal Guide for Religious Institutions

Churches, Synagogues, Mosques, Temples, and
Other Religious Communities

David Blaikie and Diana Ginn

Every religious community in the US has reason to be concerned about its legal liability. Blaikie and Ginn's handy reference book takes readers, step by step, through all the legal implications of the daily operation of a church and parish community. It provides a legal context for understanding and responds to relevant legal issues, while at the same time providing answers and directions on specific legal questions. The Legal Guide for Religious Institutions provides a comprehensive legal overview, coupled with practical advice, that will be required reading for every American pastor, church administrator, and parish council member.

PC 978 0 8264 2874 5 | \$34.95

August 2010



*Books are available from your favorite bookseller,
or direct from Continuum*

1 800 561 7704 • www.continuumbooks.com

RELIGIOUS LIBERTY

Volume One

OVERVIEWS & HISTORY

DOUGLAS LAYCOCK

“The church-state field is blessed with serious scholars, persuasive advocates, dynamic teachers, astute political strategists, and public commentators. Douglas Laycock is one of a very few who are all of these. I welcome this multivolume collection of his always insightful and lucid writings.”

—J. BRENT WALKER

“Anyone who wants to understand the religious liberty battles being fought in today’s legislatures, courts, culture, and media will be enlightened by reading even one of the articles in this book. . . . These writings are lucid and compelling, completely accessible to every reader — lawyer or not, academic or not, religious or not. Doug has the gift for taking complex ideas and making them elegantly simple but never simplistic.”

—KIM COLBY

ISBN 978-0-8028-6465-9 • 888 pages • paperback • \$35.00

At your bookstore,
or call 800-253-7521
www.eerdmans.com



WM. B. EERDMANS
PUBLISHING CO.
2140 Oak Industrial Drive NE
Grand Rapids, MI 49505

THE JOURNAL OF LAW AND RELIGION

VOLUME XXV

2009-2010

NUMBER 2

TABLE OF CONTENTS

Editor's Preface	xiii
------------------------	------

For current & upcoming article abstracts, visit our website at
http://www.hamline.edu/law/jlr/index_of_issues.html

ARTICLES

Jonathan K. Crane	<i>Defining the Unspeakable: Incitement in Halakhah and Anglo-American Jurisprudence.....</i>	329
Yuval Sinai	<i>The Religious Perspective of the Judge's Role in Talmudic Law.....</i>	357
Lee Ann Bambach	<i>The Enforceability of Arbitration Decisions Made by Muslim Religious Tribunals: Examining the Beth Din Precedent.....</i>	379
Gabriel J. Michael	<i>Catholic Thought and Intellectual Property: Learning from the Ethics of Obligation.....</i>	415
Marty McMahon	<i>Broadening the Picture of Nineteenth-Century Baptists: How Battles with Catholicism Moved Baptists Toward Separationism.....</i>	453
Robert Emery	<i>Church and State in the Early Republic: The Covenanters' Radical Critique.....</i>	487
H. Patrick Glenn	<i>Tradition in Religion and Law.....</i>	503

JOURNAL OF LAW & RELIGION

Richard A. Hughes *Pro-Justice Ethics, Water Scarcity,
Human Rights* 521

For current and upcoming book reviews, visit our website at
http://www.hamline.edu/law/jlr/upcoming_reviews_essays.html

REVIEW ESSAY

Reid B. Locklin *The Many Windows of the Wall* 541

BOOK REVIEWS

Chad Flanders *Conscience and the Common Good:
Reclaiming the Space Between Person
and State,*
by Robert K. Vischer 567

Jenna Gray-
Hildenbrand *We Have a Religion: The 1920s Pueblo
Indian Dance Controversy and American
Religious Freedom,*
by Tisa Wenger 573

Afra Jalabi *Woman's Identity and the Qur'an:
A New Reading,*
by Nimat Hafez Barazangi 579

Paul E. McGreal *The Sins of the Fathers: The Law and
Theology of Illegitimacy Reconsidered,*
by John Witte, Jr. 583

Edward N. Peters *Introduction to the History of the Sources
of Canon Law: The Ancient Law up to the
Decretum of Gratian,*
by Brian Edwin Ferme 589

Sarah A. Queen *Confucian Political Ethics,*
edited by Daniel A. Bell 593