

Introduction to the Special Issue

THE STUDY OF LAW AND RELIGION IN AUSTRALIA: IT MATTERS

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In *The Edges of the Field: Lessons on the Obligations of Ownership*, Joseph William Singer of the Harvard Law School and an internationally renowned scholar of property law and theory recounts the story of Mr Aaron Feuerstein, owner of the Malden Mills textile factory in Lawrence, Massachusetts. Just before Christmas, 1995, the Malden factory suffered a devastating fire. Mr Feuerstein assembled the 3000 workers the next day in the local high school. The workers, fearing that the factory would close permanently and they would lose their jobs, were astonished when Mr Feuerstein announced that rather than shutting down, the factory would be rebuilt and the business would rehire every worker who still wanted a job. What is more, in the meantime, they would continue to be paid for the next month and each would get a Christmas bonus of \$275. Of course, while there was no legal obligation to do so, Mr Feuerstein made good on these promises; indeed, each worker was paid for several more months, until the money ran out. Ultimately, the factory was rebuilt and as of 1998 almost all of the workers had been rehired. For the town of Lawrence, this avoided economic collapse; for the workers, it avoided personal ruin.¹

When questioned, Mr Feuerstein said these steps followed from a personal sense of moral obligation: ‘The workers are depending upon me. The community is depending upon me. My customers are depending upon me. And my family.’² He knew his actions, one way or the other, would have consequences far beyond himself. ‘There was no way I was going to take about 3000 people and throw them in the street. There was no way I was going to send the city of Lawrence into economic oblivion.’ Why? ‘Because it wouldn’t be right.’³ As an Orthodox Jew, Mr Feuerstein relied on traditional Jewish teachings about the moral obligations of property owners. In answering questions about his actions, Mr Feuerstein quoted Talmudic sayings of the great Jewish teacher Hillel.⁴

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¹ Joseph William Singer, *Edges of the Field: Lessons on the Obligations of Ownership* (2000) 7–8.

² Ibid 8.

³ Ibid.

⁴ Ibid.

For Professor Singer, Mr Feuerstein's actions model the behaviour of a *mensch*. The Yiddish word '*mensch*' captures the essence of what it means to be a 'human being': a person of compassion and care, integrity and honour, seeking to do the right thing, looking out for others, whose actions warm your heart. In short, someone you wish you were like.⁵ We might ponder why a Harvard law professor, a person steeped in the logic and analysis of law, might write a book that begins with a story about people acting in ways that 'warm your heart.' Yet Singer explains this by writing that he was interested in understanding 'the cultural, moral, religious, and legal traditions that help define our understanding of private property.'⁶

That objective, to understand the traditions, whatever they might be, that define our understandings of law, lies behind the establishment in 2008 of the University of Adelaide Research Unit for the Study of Society, Law and Religion ('RUSSLR'). Because religion is an undeniable part of both the public forum and the world in which we live, never has it been more important to apply this approach not only to property law, but also to law as a whole. The exploration of the underlying motivations for and the historical background to the liberal tradition⁷ and the western legal tradition founded upon it stands as an important reason for the study of law and religion. As academics, as lawyers, and as members of the social world, to ignore this background is to ignore something important about both our own history and about our contemporary life.⁸ Yet there are at least four other important reasons for exploring the relationship between law, society and religion.

First, while political liberalism confers choice, and liberal law protects it, it is at least arguable that liberalism, alone, may not always differentiate good from bad choices. Stephen L Carter of the Yale Law School, for instance, argues that

because secular morality is not linked to any sense of the transcendent, its hold on human personality is often weaker than the hold of religion. I do not contend that the hold is always weaker, any more than I contend that religious moral systems always generate better choices than secular ones; history refutes that idea. I contend only that virtuous adult citizens could believe quite rationally (*pace* Hume) that their religious faith is the appropriate source of values to guide both private and public actions, and that a theory of the state that implies that it isn't will neither win, nor deserve, their adherence.⁹

⁵ Ibid 8–9.

⁶ Ibid 3.

⁷ See Elizabeth Mensch, 'Christianity and the Roots of Liberalism' in Michael W McConnell, Robert F Cochran, Jr, and Angela C Carmella (eds), *Christian Perspectives on Legal Thought* (2001) 54, 54–72.

⁸ See Harold J Berman, *The Interaction of Law and Religion* (1974) 49–76; Harold J Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (1983) 33–45; Harold J Berman, *Faith and Order: The Reconciliation of Law and Religion* (1993) 23–238.

⁹ Stephen L Carter, 'Liberal Hegemony and Religious Resistance: An Essay on Legal Theory' in McConnell, Cochran, and Carmella, above n 7, 25, 49.

Second, religion and faith influence values and behaviour—the values and behaviour that are part of making decisions when faced with liberal choice—and those values and behaviours ultimately become law. To fail, then, to explore what religion says about any legal issue is to abdicate our responsibility to uncover those dimensions of social life that become law.¹⁰ Phillip E Johnson of the Boalt Hall School of Law at the University of California Berkeley says this:

Religious questions have to do with our perceptions of ultimate reality, our sense of what life is really about. Such beliefs form our values, and law reflects those values.¹¹

The third, and closely related reason for exploring the relationship between law and religion is that by overlooking the societal importance of religion, we miss something central to what law is and what it is becoming. In other words, plural and communitarian approaches to understanding human existence tell us that many social inputs construct law. Each makes a valid contribution, and each ought to be heard in order to assist in understanding and critiquing the legal order.¹² Religion assists in understanding how law ought or ought not to develop; understanding religion, in turn, assists in determining whether or not it ought to have a place in the public forum.

Finally, by failing to recognise the place of religion in these debates, those in the academy and beyond it who study legal, political, and social structures, fail to address an increasingly important part of contemporary social life, and so fail to connect with ‘the deepest interests and most pressing concerns...’¹³ of those in the society in which we live. In the case of law, ‘the central problem ... is a doctrinal one, a question of how we should relate to each other.’¹⁴ Leaving religion out of this mix, therefore, tells us only part of how we relate to each other.

This Special Issue of the *Adelaide Law Review* draws together the papers presented by leading Australian scholars at the RUSSLR workshop entitled ‘Law and Religion in Australia: Contemporary Scholarship’ held at the University of Adelaide on 14 November 2008. Each article explores dimensions of the four reasons outlined above for why we ought to study the relationship between law and religion in Australia.

In the opening essay, Michael Spence writes about what it might mean for those living in contemporary society, who are members of divergent and overlapping

¹⁰ See David S Caudill, ‘Law and Belief: Critical Legal Studies and Philosophy of the Law-Idea’ in McConnell, Cochran, and Carmella, above n 7, 109.

¹¹ Phillip E Johnson, ‘Do You Sincerely Want to Be Radical?’ (1984) 36 *Stanford Law Review* 247, 288–329.

¹² Michael W McConnell, Robert F Cochran, Jr, and Angela C Carmella, ‘Introduction’ in McConnell, Cochran, and Carmella, above n 7, xvii–xxii. See also Charles Taylor, *A Secular Age* (2007).

¹³ C John Sommerville, *The Decline of the Secular University* (2006) 3–22.

¹⁴ *Ibid* 132.

communities, both secular and religious, to live together. Picking up on this theme, Ngaire Naffine explores the role of religion generally within a secular western liberal society; Ben Clarke extends that examination to the role of religion in those systems in which religion and state are merged in legal structures; and Alex Bruce explores, from a novel perspective, the way in which those who attempt to bridge the divide between conflicting communities might more meaningfully and sensitively approach that dialogue.

Carolyn Evans and Leilani Ujvari tease out the implications of living within overlapping communities in the context of Australia's religious schools, while Pauline Ridge considers the way in which law might respond to religious giving. Each article, in its own way, demonstrates that the challenges we face today require the exploration of the relationship between law and religion within the broader social context. Not only is this work important; it is necessary.