Christianity and Law in the Enlightenment

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The European and American Enlightenment movements of 1688 to 1815 transformed the Western legal tradition, notably in areas of constitutional law, criminal law, private law, legal and political theory, and legal education. Particularly the American and French Revolutions effected massive and sometimes violent changes to traditional patterns of law, politics, and society — separating church and state and placing a new premium on democratic rule of law by the general will and public opinion. These legal reforms were grounded in part in new Enlightenment liberal beliefs in deism, rationalism, individualism, and nationalism — ideas that came to strong expression in the many new constitutions and codes issued in the later 18th and 19th centuries. Even so, Enlightenment legal reformers often worked side by side with Christian legal reformers, and they reconstructed traditional Christian legal teachings more than they created laws anew. As a consequence, until the mid-19th century, there was more continuity than discontinuity between Enlightenment-based legal teachings and practices and those of the Western Christian tradition. The Enlightenment, however, provided new secular logics for many of the traditional laws that it adopted and then adapted, and these secular teachings would later fuel the more strident post-Christian, if not anti-Christian, legal campaign of modern liberalism.

INTRODUCTION

Twenty years ago, the two of us had the privilege of hosting the great federal Judge and long-time Berkeley law professor John T Noonan Jr for a few days in our Center for the Study of Law and Religion at Emory University. Among many highlights of this visit was a long dinner discussion with Judge Noonan and other Center colleagues. The topic was Noonan's bold claim, made in his lecture earlier that day, that 'there was no such thing as an Enlightenment'. This 'fictional era' of the 18th century, Noonan argued, 'is an invention of modern liberals in search of intellectual paternity. The reality is that Enlightenment liberals are simply the radical sons of the Christian church.' Look beneath their 'masks', Noonan instructed, and you will see that most of them are in reality 'prodigal Christians'.[1]

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[**] This chapter draws in part on Harold J Berman, 'Law and Belief in Three Revolutions' (1984) 18(3) *Valparaiso Law Review* (1984) 569, 569–629, especially 613–29; Harold J Berman, 'The Impact of the Enlightenment on American Constitutional Law' (1992) 4(2) *Yale Journal of Law & the Humanities* 311, 311–34 ('Impact of the Enlightenment'); John Witte Jr, *Church, State, and Family: Reconciling Traditional Teachings and Modern Liberties* (Cambridge University Press, 2019) 151–83; John Witte Jr, Joel A Nichols and Richard W Garnett, *Religion and the American Constitutional Experiment* (Oxford University Press, 5th ed, 2022) 35–58. The writing herein is largely new but includes passages adapted from these texts. Berman died in 2007; Witte is his literary executor and had worked with Berman on the first article listed above when serving as his research assistant. Another version of this article is slated to appear in John Witte Jr and Rafael Domingo (eds), *Oxford Handbook on Christianity and Law* (Oxford University Press, 2024).

[1] For more on his perspective, see John T Noonan Jr, *The Lustre of our Country: The American Experience of Religious Freedom* (University of California Press, 1998); John T Noonan Jr, *The Persons and Masks of the Law: Cardozo, Holmes, Jefferson and Wythe as Makers of the Masks* (University of California Press, rev ed, 2002).

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This was a striking claim. It challenged many liberals today who dismiss Christianity as an impediment to law, liberty, and democracy. It also challenged many Christians today who dismiss liberalism as an enemy of faith, hope, and love.[2] A lengthy debate broke out over dinner about whether there really was an Enlightenment. What about all the new liberal theories of rationalism, individualism, empiricism, contractarianism, utilitarianism, and more, that emerged in the Enlightenment, we asked Noonan? What of the massive assault on the church and its clergy, property, polity, and canon law during the French Revolution? What of Laplace's dismissal of God as an 'unnecessary hypothesis' in a new scientific world? And on and on. None of this was new, Noonan retorted, as he drew from his vast historical knowledge many earlier examples of such radical and sometimes violent reforms in Christian history. 'The Enlightenment is a modern historical and philosophical fiction', he insisted. 'At most, this movement produced a mere bend in the long stream of law and learning going back to classical and biblical times.' An attentive waiter, an Emory PhD student in history as it turned out, had been listening in on the conversation. 'Who's right?' Noonan asked the waiter at the end. 'Who's paying?' came the reply.

After Noonan's visit, the two of us rehearsed that memorable conversation with Judge Noonan several times. We remained convinced that the Enlightenment was a major intellectual, political, social, and legal movement that produced a seismic shift in Western law and religion, society, and institutional life — even a violent revolution in France that reverberated through much of Western Europe and still has influence today in Western lands. But we also recognized that Noonan's image of the Enlightenment movement as a 'mere bend in the stream' underscored its ample continuity with earlier Christian traditions. And Noonan's characterisation of Enlightenment liberals as the 'radical' if not 'prodigal sons of the Christian church' highlighted the dependence of these liberal titans on traditional Christian legal and political ideas and institutions, albeit often cast into new norms and forms.

We use the 'Enlightenment' as a canopy term to cover a wide variety of intellectual and political movements in early modern Europe and North America: rationalism, empiricism, positivism, utilitarianism, liberalism, contractarianism, nationalism, and democratic revolution-making. These movements drew on some of the greatest Western minds of the long 18th century (1688–1815).[3] Included among the Enlightenment illuminati were: Montesquieu, Diderot, Voltaire, d'Alembert, Condorcet, and Rousseau in France; Hobbes, Locke, Priestly, Newton, Paley, and Bentham in England; Hume, Hutcheson, Reid, Home, and Smith in Scotland; Leibniz, Wolff, Spinoza, and Kant in Germany; Beccaria and Vico in Italy; Franklin, Jefferson, Paine, Hamilton, and Madison in America. What helped to bring these great minds together was their relentless publication program — from massive encyclopedias that galvanized human knowledge to pithy pamphlets that catalysed popular revolutions. What also helped was their ability to translate their teachings into enduring legal, political, social, and scientific reforms.[4]

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[2] See, eg, recently Symposium, 'Liberalism, Christianity, and Constitutionalism' (2023) 98(4) *Notre Dame Law Review* 1439, 1439-1848; Rafael Domingo, *Law and Religion in a Secular Age* (Catholic University of America Press, 2023).

[3] This dating takes in the 1688 Glorious Revolution and the signature work of John Locke, and ends with the Treaty of Vienna in 1815 that settled Europe after the Napoleonic wars.

[4] Among many accounts, see Ernst Cassirer, *The Philosophy of the Enlightenment* (Princeton University Press, 1979); Peter Gay, *The Enlightenment: An Interpretation* (Knopf, 1966); Arthur Herman, *The Scottish Enlightenment: The Scots' Invention of the Modern World* (Fourth Estate, 2001); Jonathan I Israel, *Radical Enlightenment: Philosophy*

A number of these Enlightenment figures were church-attending Christians and a few early liberal writers, such as John Locke, wrote treatises and commentaries on the Bible and theology. But the Enlightenment movement also gradually generated a new set of secular beliefs that liberalised and eventually supplanted traditional Christian teachings and practices. For Enlightenment exponents, God was not so much an intensely active sovereign, involved and invoked in the daily lives of persons, peoples, and political affairs. Rather, God had created a clockwork universe that now operated autonomously by the laws of nature (and nature's God) and their elaboration by state positive laws. The individual was not so much a sinner seeking eternal salvation through faithful sacramental living under the guidance of the church. Rather, every individual was created good and equal in virtue, vested with inherent rights of life and liberty, and capable of choosing their own means, measures, and modes of happiness. Reason was no longer the handmaiden of revelation, rational disputation no longer subordinate to homiletic declaration. Rather, the rational process, conducted privately by each person in accordance with conscience, and collectively in the open marketplace of ideas, was a sufficient source of private morality and public law. The nation-state was not so much a national church or a divinely blessed covenant people under God's vice-regents, who exercised political authority by divine right. Rather, the nation-state was to be glorified in its own right. Its constitutions and laws were sacred texts reflecting the general will of the collective national culture. Its rulers and officials were secular priests, democratically representing the sovereign people.[5]

These Enlightenment teachings helped to transform the Western legal tradition in the 18th and 19th centuries. These teachings figured widely in new revolutionary declarations and constitutions that limited government and enhanced liberty; new injunctions to separate church and state; new limits on church authority and canon law; new criminal laws and procedures and methods of criminal investigation and punishment; new expansion of the rights to marry, divorce, and remarry; new commercial, contractual, and other laws of the private marketplace; new laws of private property and inheritance; new harm-based, not fault-based, laws of delicts and torts; and new agitation for the abolition of slavery and the liberation of women, children, workers, and others. A number of these Enlightenment-inspired reforms came to prominent display in sweeping new legal codes that systematized and modernized the law and promoted the legal unity of nations and territories. The most influential were the Prussian General Civil Code of 1794; the new Napoleonic codes of civil law, criminal law, civil procedure, and commercial law of 1804–1811; the Austrian Civil Code of 1811; the Bavarian Penal Code of 1813; and the scores of new codes that followed. The French Civil Code of 1804 was adopted in territories conquered by Napoleon (such as Belgium, Luxembourg, and the Netherlands, and portions of Italy, Poland, Switzerland, and Germany), but also became the model for many other codifications worldwide, especially in Romania, Spain, Portugal, and much of Latin America, as well as Quebec, Louisiana, and later Egypt and several French colonies in Africa.

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and the Making of Modernity 1650–1750 (Oxford University Press, 2001); Henry F May, *The Enlightenment in America* (Oxford University Press, 1976); Louis Dupré, *The Enlightenment and the Intellectual Foundations of Modern Culture* (Yale University Press, 2005); Luigi Vallauri and Gerhard Dilcher (eds), *Christentum, Säkularisation und Modernes Recht* (Nomos Gesellschaft, 1981) vols 1–2. For a distillation of recent literature, see, eg, Steven Wall (ed), *The Cambridge Companion to Liberalism* (Cambridge University Press, 2015); Ole Peter Grell and Roy Porter (eds), *Toleration in Enlightenment Europe* (Cambridge University Press, 2000). For a good collection of primary texts, see Knud Haakonssen (ed), *Natural Law and Enlightenment Classics Series* (Liberty Fund, 2000–).

[5] See detailed sources in note 4, above.

Some of these legal reforms were born of firm and violent rejections of Christianity and its traditional legal teachings. The 1789 French Revolution, in particular, featured a devastating attack on the French Catholic Church and its clergy, art, buildings, literature, schools, charities, canon law, and legal institutions — anti-Catholic measures that echoed in other parts of Europe and North America until the 20th century. Some of these legal reforms deliberately combined traditional Christian and new liberal teachings. The 1776 American Revolution, for instance, and the massive state and federal constitutions that followed drew as heavily on Anglican, Baptist, Calvinist, Methodist, and Quaker teachings as on the liberal teachings of the Enlightenment. Moreover, many Enlightenment-based legal reforms were often generalized versions of longstanding Christian teachings and practices. Thus, covenants were translated into contracts, sins into crimes, righteousness into justice, sacraments into civic rituals, and creation narratives into mythical states of nature. And longstanding Christian legal ideas and institutions of rights and liberties, sovereignty and authority, marriage and family, charity, education, and more, were now recast with new rational, natural, and utilitarian logics in lieu of the old biblical, theological, and dogmatic arguments that had sustained them for many centuries before.

This article samples this legally transformative era in the Western legal tradition. It offers four examples: (1) the reforms of politics and constitutional law (which featured both cooperative and antagonist relations between the Enlightenment and Christianity); (2) the reforms of legal education; (3) the reforms of criminal law and procedure (both of which were more decisively Enlightenment-based); and (4) the reforms of marriage and family law (where the Enlightenment largely accepted Christian teachings albeit with modernisation).

POLITICAL REFORMS AND CONSTITUTIONAL LAW

Both the antagonistic and cooperative interactions of the Enlightenment and Christianity were on full display in the political and constitutional reforms born of the American and French Revolutions of 1776 and 1789. In the 18th century, Enlightenment writers built a powerful new contractarian theory of natural rights and constitutional powers, drawing in part on pre-Christian Greek and Stoic teachings. Locke, Hobbes, Rousseau, Jefferson, and many others argued that all persons were created equal and vested with natural rights of life, liberty, property, and the pursuit of happiness. All persons in their natural state were free to exercise their natural rights fully. But life in this mythical 'state of nature' was, at minimum, 'inconvenient' as Locke put it — if not 'solitary, poor, nasty, brutish, and short', as Hobbes had said. For there was no means to balance and broker disputes between one person's rights and the rights of all others; no incentive to invest or create property or conclude contracts when one's title to property or the fruits of one's labour were not sure; no means to marshal collective action in the face of war, disaster, or force majeure. Ultimately, the state of nature was a 'war of all against all'.[6]

Consequently, Enlightenment writers continued, rational persons chose to move from this state of nature into societies with stable governments. They did so by entering into social contracts and by ratifying constitutions to govern and protect their newly created societies. By these instruments,

[6] Thomas Hobbes, *Leviathan*, ed Ian Schapiro (Yale University Press, 2010) ch 12; Jean Jacques Rousseau, *The Social Contract and Later Political Writings,* ed and tr Victor Gourevitch (Cambridge University Press, 2nd ed, 2019); the classic study, JW Gough, *The Social Contract: A Critical Study of its Development* (Clarendon Press, 1957).

persons agreed to sacrifice or limit some of their natural rights for the sake of creating social order and peace and not harming their neighbours. They also agreed to delegate their natural rights of self-rule to elected officials who would represent and exercise executive, legislative, and judicial authority on their behalf. At the same time however, these social and political contracts enumerated the various 'unalienable' rights and liberties that all persons were to enjoy, and the conditions of due process of law under which alienable rights could be limited, abridged, or taken away by the state. These contracts also stipulated the rights of the people to elect and change their representatives in government, and to be tried in all cases by a jury of their peers.[7]

American Developments

These Enlightenment teachings on social contracts and constitutions came to robust expression in the American Revolution against English colonial rule. In the 1760s and early 1770s, the American colonists sought to secure 'all the rights, liberties, and immunities of free and natural-born subjects' of England, which had been largely foreclosed to them.[8] These rights went back to Anglo-Saxon Charters, the 1215 Magna Carta, the 1628 Petition of Right, the 1689 Bill of Rights, and other documents born of earlier Christian legal teachings. This strategy of adducing ancient constitutional rights and their Christian foundations had worked effectively for earlier Christian revolutionaries in England, Scotland, France, and the Netherlands. Thus, in the run-up to the Revolution, American Christian preachers and pamphleteers pushed this same argument for how to resist and revolt against their new English oppressors.[9] But as English oppression persisted, the American colonists changed course. Under Thomas Jefferson's inspiration, they issued the Declaration of Independence of 1776, which pulsed with strong Enlightenment sentiments:

> We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. —That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed, — That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.[10]

This iconic statement was deistic in its reference to nature and nature's God; rationalistic in its declaration of self-evident universal truths; individualistic in its affirmation of the equal fundamental rights of all; and democratic in its assertion of the right of the people to establish the kind of government that represents their will.[11]

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[7] See detailed discussion in John Witte Jr, *The Blessings of Liberty: Religious Freedom and Human Rights in the Western Legal Tradition* (Cambridge University Press, 2021) ('*The Blessings of Liberty*').

[8] 'Declarations and Resolves of the First Continental Congress' in Henry S Commager and Milton Cantor (eds) *Documents of American History to 1898* (Prentice Hall, 10th ed, 1988) vol 1, 82–5.

[9] See earlier examples in John Witte Jr, *The Reformation of Rights: Law, Religion, and Human Rights in Early Modern Calvinism* (Cambridge University Press, 2007).

[10] 'Declaration of Independence: July 4 1776', *The Avalon Project Yale Law School* (Web Page, House Document no 398) <https://avalon.law.yale.edu/18th_century/declare.asp>.

[11] See detailed sources and further discussion in Berman, 'Impact of the Enlightenment' (n 1) 321–5.

Comparable Enlightenment sentiments inspired several of the new American state constitutions, but now often in combination with traditional Christian teachings. The influential Virginia Declaration of Rights (1776), for example, provided in art 1: 'That all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.'[12] The Declaration went on to specify the rights of the people to vote and to run for office; their 'indubitable, unalienable, and indefeasible right to reform, alter or abolish' their government if necessary; various traditional criminal procedural protections; the right to jury trial in civil and criminal cases; and freedom of press, speech, assembly, and religion.[13] But the Virginia Declaration of Rights also reflected traditional Christian sentiments in Articles 15 and 16: '[N]o free government, or the blessings of liberty, can be preserved to any people but by a firm adherence to justice, moderation, temperance, frugality, and virtue and by frequent recurrence to fundamental principles.' Further, 'it is the mutual duty of all to practice Christian forbearance, love, and charity towards each other.' And the Virginia Declaration left in place the traditional establishment of Anglicanism in Virginia; that was only later outlawed by Jefferson's Act for the Establishment of Religious Freedom in Virginia.[14]

Similarly, the 1780 Massachusetts Constitution combined Enlightenment contractarian theory and Puritan covenant morality. The preamble provided:

> [T]he people of Massachusetts, acknowledging, with grateful hearts, the goodness of the Great Legislator of the Universe, in affording us, in the course of his Providence, an opportunity, deliberately and peaceably, without fraud, violence, or surprize, o[f] entering into an Original, explicit, and Solemn Compact with each other; and of forming a New Constitution of Civil Government for ourselves and Posterity; and devoutly imploring His direction in so interesting a Design, DO agree upon, ordain and establish the following Declaration of Rights and Frame of Government.[15]

While enumerating the executive, legislative, and judicial powers of the state government and the rights and liberties of the people, the Massachusetts Constitution demanded from its political leaders 'constant adherence to . . . piety, justice, moderation, temperance, industry, and frugality, [which] are absolutely necessary to preserve the advantages of liberty, and to maintain a free government.'[16] It guaranteed the 'right as well as the duty of all men in society, publicly, and at stated seasons to worship the Supreme Being, the great Creator and Preserver of the universe', on the ground that 'the public worship of God and instructions in piety, religion and morality, promote the happiness and prosperity of a people and the security of a republican government.'[17] And the Massachusetts Constitution strongly supported education, for 'the encouragement of arts and

[12] 'Virginia Declaration of Rights: June 12 1776' *The Avalon Project Yale Law School* (Web Page) art 1 <https://avalon.law.yale.edu/18th_century/virginia.asp>; Francis N Thorpe (ed) *The Federal and State Constitutions, Colonial Charters, and Other Organic Laws* (Government Printing Office, 1909) vol 7, 3813.
[13] 'The Virginia Declaration of Rights' (n 12) arts 2–14.
[14] Ibid arts 15–16.
[15] Thorpe (n 12) vol 3, 1888–9.
[16] Ibid 1819; 1780 Massachusetts Constitution pt I art 18. See detailed discussion in Witte, *The Blessings of Liberty* (n 7) 105–37.
[17] Thorpe (n 12) vol 3, 1889–90; 1780 Massachusetts Constitution pt 1 arts 2–3.

sciences, and all good literature, tends to the honor of God, the advantage of the [C]hristian religion, and the great benefit of this and other United States of America'.[18]

Like many of the individual state constitutions, the 1787 Constitution of the United States was cast as a government compact or contract by the American people in their several states: 'We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.'[19] The Constitution separated and enumerated the legislative, executive, and judicial powers of the national government and set checks and balances on the exercise of these powers. The 1791 Bill of Rights guaranteed citizens freedoms of religion, speech, assembly, and press; the right to bear arms; freedom from forced quartering of soldiers; freedom from illegal searches and seizures; various criminal procedural protections; the right to jury trial in civil and criminal cases; the guarantee not to be deprived of life, liberty, or property without due process of law; and protection against eminent domain without just compensation.[20]

The United States Constitution prohibited the administration of 'religious test oaths' for federal office.[21] The First Amendment further prohibited the legal establishment of a national religion while guaranteeing the 'free exercise' of religion for every peaceable faith.[22] This was a marked change from legal patterns that went back to the fourth century Roman Empire, which first established Trinitarian Christianity by imperial law. Every European nation in the 18th century still had an established religion — whether Catholic, Anglican, Calvinist, Lutheran, or Orthodox. And most European nations systematically excluded, deprecated, or at best tolerated as second-class citizens various dissenting religions — whether Catholic, Protestant, Orthodox Christian, Jewish, Muslim, or others. By deliberate contrast, the United States as a whole insisted on the freedom of all religions, and the establishment of none. By 1833, every American state constitution provided the same guarantees. This new American constitutional experiment reflected not only Enlightenment liberal teachings, but also a variety of Puritan, Evangelical, Quaker, and Civic Republican views.[23]

French Developments

Enlightenment liberal views proved more singularly decisive — and disruptive — in shaping the constitutional reforms of the French Revolution (1789–1799). With ample popular and intellectual buildup in the prior decades, the Revolution erupted with violence against royalist government, aristocratic privilege, economic oppression, and Catholic hegemony. The initial constitutional texts had familiar terms, some of them drawn from American prototypes. The French Declaration of the Rights of Man and of the Citizen (1791) enumerated various 'natural, unalienable, and sacred rights,' including liberty, property, security, and resistance to oppression; 'the freedom to

[18] Thorpe (n 12) vol 3, 1906; 1780 Massachusetts Constitution pt 2 ch 5 § 1.
[19] United States Constitution Preamble <https://avalon.law.yale.edu/18th_century/preamble.asp>.
[20] See detailed documentation in Philip B Kurland and Ralph Lerner (eds), *The Founders' Constitution* (Liberty Fund, rev ed, 2000) vols 1–5.
[21] United States Constitution art 6 § 3 <https://avalon.law.yale.edu/18th_century/art6.asp>.
[22] United States Constitution amend I <https://avalon.law.yale.edu/18th_century/rights1.asp>.
[23] See detailed sources and discussion in John Witte Jr, Joel A Nichols and Richard W Garnett, *Religion and the American Constitutional Experiment* (Oxford University Press, 5th ed, 2022) 35–128.

do everything which injures no one else'; the right to participate in the foundation and formulation of law; the equality of all citizens before the law, and equal eligibility to all dignities and all public positions and occupations according to one's abilities.[24] The Declaration also included basic criminal procedural protections, freedom of opinion, freedoms of speech and press, and rights to property. The 1790 Constitution further guaranteed 'the freedom of every man . . . to exercise the religion to which he is attached.'[25] This latter provision was a marked constitutional change; a century before, King Louis XIV had issued the Edict of Fontainebleau (1685) that violently killed and uprooted tens of thousands of French Calvinists from this predominantly Catholic land, driving the survivors, called Huguenots, throughout Europe, Great Britain, North America, and Southern Africa.[26]

In the 1790s, however, French revolutionary politicians unleashed their fury against Roman Catholicism, too. Vicious new policies exiled some thirty thousand Catholic priests, imprisoned and killed several hundred more, and killed untold thousands of Catholic lay men, women, and children in bloody battles and executions. The government closed all monasteries and convents, looted or destroyed much priceless religious art, and converted numerous churches into sites for state-designed rites. The government also severely truncated the jurisdiction of Catholic church courts and canon laws, and it closed down many of the church's traditional legal, political, educational, and charitable institutions, some of which had operated in France for nearly a millennium. The Concordat of 1801 between Napoleon and the Holy See temporarily restored a measure of peace, order, and restitution, but the Catholic Church and the French state remained in perennial conflict for the next century and more. French authorities gained control over much remaining church property, education, charity, and polity, and then severed the state's financial support for the church in the 1905 Law of Separation of Church and State.[27]

In response, the nineteenth-century papacy condemned liberalism, human rights, religious freedom, and separation of church of state — a formal position that slowly softened with the Catholic social teachings movement after 1890, but remained canonical until the sweeping reforms of the Second Vatican Council (1962–65). Similarly, Anglicans like Edmund Burke and Calvinists like Groen von Prinsterer inveighed strongly against the anti-Christian measures of the French Revolution. This sparked so-called 'counter-liberal' and 'anti-revolutionary' Protestant political and intellectual movements in various parts of Europe and North America.

LEGAL EDUCATION

These eighteenth-century constitutional reforms of church and state, and of religion and law, also transformed centuries-long patterns of legal education.[28] The first Western universities, founded already in the eleventh century, had been dominated by the faculties of theology, law, and medicine. Together, these three faculties were thought to provide a complete education about the

[24] 'Declaration of The Rights of Man – 1789'<https://avalon.law.yale.edu/18th_century/rightsof.asp>.
[25] See sources in Sidney Z Ehler and John B Morrall, eds., *Church and State Through the Centuries* (Newman Press, 1954) 201–13, 234–49, 355–71.
[26] Ibid 183–88, with revocation in ibid 208–13.
[27] See detailed sources in J F Maclear, *Church and State in the Modern Age: A Documentary History* (Oxford University Press, 1995) 75–118.
[28] This section is drawn in part from John Witte Jr, 'The Educational Values of Studying Law and Religion' in John Witte, Jr., *Faith, Freedom, and Family,* eds Norman Doe and Gary S Hauk (Mohr Siebeck, 2021) 21, 21–36.

soul, mind, and body respectively. It was common for law students to earn at least a dual doctorate in the canon law of the church and the civil or common law of the state, and for advanced students to combine the study of law with the study of theology. Indeed, bishops, deans, abbots, and other church leaders customarily had legal training alongside their theological formation, and many judges, law professors, and other legal professionals were ranking ecclesiastics. Until the 18th century, this interlacing of legal and theological education and professional life was considered normal for Western societies that routinely established Christianity by law. As part of these religious establishments, Catholic hierarchs and later Protestant rulers chartered most of the major universities and professional guilds of the West. They further licensed the professors, clergy, and jurists, and in return expected their allegiance and defence of the locally established church and state.[29] It was a commonplace of Western jurisprudence that 'Christianity is part of the common law' and the civil law, too.[30]

During and after the 18th century, however, this integration of law and theology gradually broke down under mounting new pressures associated with the Enlightenment. Strong philosophical attacks on traditional dogmas, together with violent attacks on churches and their clergy in France and elsewhere, shook Western Christendom to its foundations. Constitutional reforms, starting in America, led to the legal disestablishment of religion and to separation of church and state and eventually to *laïcité* movements in many Western lands. Comprehensive legal codification movements, starting on the Continent, transformed Western state laws and separated these laws from many traditional religious, moral, and customary norms and institutions. New secular universities, both public and private, sprang up in Europe and North America devoted to scientific methodology, free academic inquiry, and rigorous debate about all subjects. New (social) scientific and sometimes sceptical forms of religious study became ever more acceptable in state universities — and led, in the United States, to strong divisions between public state schools and universities and private religious schools, colleges, and seminaries. Positivist theories of knowledge separated higher education into growing numbers of increasingly specialized forms of exact, humane, and social sciences — each with its own language, methods, literature, libraries, faculty, and students, and each equipping professional specialists for the workplace. The proverbial 'renaissance man,' praised for wide learning in various fields including the classic liberal arts, theology, law, and medicine, gave way to the scientific and technical specialist.

These modern movements undercut the traditional prestige and integration of theology and law in the Western academy and broader society. Theology, once the proud 'queen of the sciences' that produced the coveted clerical leaders of society, was slowly reduced to just another discipline in the university, yielding ministers with shrinking cultural privilege and intellectual prerogative. The study of law, too, became more narrow, specialized, and isolated. In both Europe and North America, legal education became focused on local national law rather than the entire legal system viewed in full intellectual context. In Europe and England, law became an undergraduate department, with apprenticeships to follow for budding lawyers. In the United States, legal study

[29] See, eg, Wilfried Prest (ed), *Lawyers in Early Modern Europe and America* (Holmes and Meier, 1981); James A Brundage, *The Medieval Origins of the Legal Profession: Canonists, Civilians, and Courts* (University of Chicago Press, 2008); Karl Burmeister, *Das Studium der Rechte im Zeitalter des Humanismus im deutschen Rechtsbereich* (Guido Pressler, 1974).

[30] *Taylor's Case* (1676) 1 Vent 293, 86 ER 189; and further Stuart Banner, 'When Christianity Was Part of the Common Law' (1998) 16(1) *Law and History Review* 27, 27–62.

was sequestered into new separate professional schools, often at the edge of campus and heavily focused on legal practice.[31]

These reforms of legal education also led to the separation of the classical schools of legal positivism, natural law theory, and historical jurisprudence. Pre-Enlightenment Christian writers were not only natural law theorists, who believed that God had implanted reason and conscience in the minds of men and women and had written the law on their hearts. They were also legal positivists and historical jurists, who believed that God ordained earthly rulers with the power to make and enforce laws, and that the history of law represents the providential fulfillment of God's plan of bringing justice and order into this fallen world. Premodern Western jurists reconciled these natural, positivist, and historical dimensions of law by finding their source in the Trinitarian God, who is an all-powerful lawmaker, a just and compassionate judge, and the inspirer of historical change in legal as in other social institutions.[32]

After the Enlightenment, it was no longer possible to appeal to a common belief in a triune God or to a Christian anthropology that emphasized the integration of reason, will, and memory in human nature and that sought to reconcile the historical, rational, and voluntarist elements of law. Instead, natural law theory became increasingly suspect — 'a brooding omnipresence in the sky', as Oliver Wendell Holmes Jr later called it.[33] Historical jurisprudence became increasingly preoccupied with nationalist and cultural projects, especially with growing political dangers in Germany, Italy, and other fascist regimes.[34] Legal positivism by itself became ever more popular in legal education, with the study of law reduced to the concrete rules and procedures posited by the political sovereign and enforced by the courts. While churches and other institutions and practices might be normative and important for social coherence and political concordance, they were considered, as John Austin put it, beyond 'the province of jurisprudence properly determined'.[35]

CRIMINAL LAW AND PROCEDURE

The Enlightenment also catalysed striking reforms of criminal law and procedure, especially in France, Germany, Belgium, the Netherlands, and Spain and their American and African colonies. These reform movements produced dozens of important new codes of criminal law and procedure in the 19th century. The French criminal law reform after 1789 was 'one of the clearest success stories' of the Enlightenment, and it is worth lifting up as illustrative.[36]

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[31] Anthony Kronman, *The Lost Lawyer: Failing Ideas of the Legal Profession* (Harvard University Press, 1993).
[32] See Harold J Berman, 'Toward an Integrative Jurisprudence: Politics, Morality, and History' in Harold J Berman, *Faith and Order: The Reconciliation of Law and Religion* (William B Eerdmans, 1993) 289, 289–312. See detailed sources and discussion in John Witte Jr and Frank S Alexander (eds) *Modern Christian Teachings on Law, Politics, and Human Nature* (Columbia University Press, 2006) vols 1–2.
[33] *Southern Pacific Company v Jensen*, 244 US 205, 222 (1917) (Holmes J dissenting). Contrast RH Helmholz, *Natural Law in Court: A History of Legal Theory in Practice* (Harvard University Press, 2015) with Stuart Banner, *The Decline of Natural Law: How American Lawyers Once Used Natural Law and Why They Stopped* (Oxford University Press, 2021).
[34] Berman 'Toward an Integrative Jurisprudence: Politics, Morality, and History' (n 32) 292.
[35] John Austin, *The Province of Jurisprudence Determined,* ed Sarah Austin (John Murray, 2nd ed, 1861).
[36] Antoinette Wills, *Crime and Punishment in Revolutionary France* (Greenwood Press, 1980) xii.

Voltaire had not exaggerated when he wrote that the French criminal law and procedure of his day, in the mid-18th century, seemed to be 'planned to ruin citizens.'[37] Although the French Criminal Ordinance of 1670 had delineated different types of crimes and the punishments applicable to them, in fact public prosecutors and judges had discretion to indict and convict for many offensive or harmful acts not legally defined as crimes. Moreover, there was little official or popular control over their actions, since proceedings were not public, and courts left few records or judicial opinions in criminal cases. Punishments varied 'according to the status of rank of the offenders' and of their victims 'rather than the nature of the crime' committed and proved. Punishments were also cruel, featuring 'a prodigal use of bodily mutilations' and frequent resort to the death penalty for many offences — including homicide, treason, sacrilege, heresy, pandering, and various sex crimes. The arbitrariness and cruelty of the substantive criminal law was echoed in criminal procedural law. While under investigation, suspects could be held indefinitely in prison, incommunicado with minimal food and drink. Torture could be applied to secure confessions in capital cases. The judges, who had purchased their offices, were paid by the parties, and bribery was a common practice, exacerbating the injustice and the disparities between rich and poor defendants.[38]

Enlightenment liberal reformers like Voltaire, Montesquieu, Beccaria, and many others waged a decades-long campaign against this oppressive system, deriding it as an 'irrational' and 'barbaric' betrayal of fundamental Enlightenment ideals of 'liberty, equality, and fraternity.' These reformist ideas came to powerful expression in the new penal policies of the 1789 Declaration of the Rights of Man and Citizen and the 1791 and 1795 Penal Codes of France. Together, these documents provided that officials could prosecute only those crimes that were expressly prohibited by statute — *nulla poena sine lege*. They could inflict only such penalties that were strictly and clearly necessary, and then in accordance with a graduated statutory scheme of penalties based on the severity of the proven crime. Defendants were to be tried by juries of their peers and given legal counsel to defend themselves. Defendants were presumed innocent unless convicted by overwhelming evidence. They could claim the privilege against self-incrimination, and they could not be tortured or otherwise forced to testify. If convicted, like offenses had to receive like punishments, regardless of the rank and station of the offender or the victim. Families of capital convicts could not be officially stigmatised, nor could their property be taken to reimburse the state for the costs of imprisonment, prosecution, and execution, as had been traditional.[39]

These early legal reform measures were ultimately replaced by the 1810 Penal Code, which bore the stamp of Napoleon's Enlightenment ideas. His guiding principle was that criminal punishment should serve the goal of deterrence, not retribution or rehabilitation, as had been traditional. Punishments should be calibrated to deter the defendant from further crime, and should be publicized to deter all others from committing crimes. Napoleon rejected retribution either in the sense of making the defendant pay a price for violating the law, or for enabling the society to

[37] Quoted in Leon Radzinowicz, *Ideology and Crime: A Study of Crime in its Social and Historical Context* (Heinemann, 1966) 1. See more fully for England, Leon Radzinowicz, *A History of Criminal Law and Its Administration from 1750* (Stevens and Sons, 1948) vols 1–4.

[38] Harold J Berman, 'Law and Belief in Three Revolutions' (1984) 18(3) *Valparaiso Law Review* (1984) 569, 623–4 ('Law and Belief') quoting, in part, Carl Ludwig von Bar, *A History of Continental Criminal Law,* tr Thomas S Bell (J Stevens, 1916) 315.

[39] See discussion and sources in Berman, 'Law and Belief' (n 32) 624–5; Mark Hill et al, (eds) *Christianity and Criminal Law* (Routledge, 2020).

avenge the violation of its morals. This strong emphasis on deterrence was characteristic of the individualistic and utilitarian philosophy of the Enlightenment. Criminal acts were to be punished because they harmed other individuals, not because they violated the divine or cosmic order, not because they were morally wrong, and not because they transgressed the customs or interests of the people. Punishment was primarily to deter not just the defendant but all others. The goal of rehabilitation of the offender was, of course, consistent with utilitarianism too, and had been reflected in the 1791 Code. In the 1810 Code, however, Napoleon opted for general deterrence and against rehabilitation. 'Prisons are to punish prisoners, not to reform them,' he said, echoing Beccaria; the state had no business educating criminals — or for that matter anyone else — in the ways of morality and virtue.[40]

These reforms of criminal law and procedure in France — and comparable reforms in other lands — were among the firmest Enlightenment rebukes of Christian legal traditions and practices. Both the Roman canonical and the inquisitorial procedures that had dominated Western law in the prior centuries closely combined crime and sin, righteousness and justice, punishment and purgation, the civil and spiritual uses of the law.[41] To be sure, both Protestant and Catholic reformers in the 16th and 17th centuries had curbed some of the barbarism and excesses of the criminal justice system. But it was the Enlightenment that instituted sweeping criminal law reforms, in conscious reflection and implementation of the secular liberal philosophies of rationalism, individualism, and utilitarianism.

MARRIAGE AND FAMILY LAW

Unlike the radical reforms of criminal law and procedure, the 18th century reforms of marriage and family law were more continuous with the Christian tradition. To be sure, in France and other 19th century European nations with Catholic majorities, traditional Catholic church courts were stripped of their marital jurisdiction, marital formation rules were relaxed, and men and women were granted rights to divorce for cause and to remarry thereafter — reform measures that defied centuries-long Catholic teachings and that brought these nations more closely in line with more recent Protestant family law traditions. Moreover, some Enlightenment liberal teachings helped prepare the way for the later 19th and 20th century movements for women's rights to property, contract, education, and suffrage, and for enhanced protection and rights of all children, regardless of birth status or economic condition — causes that rankled and divided Christians, although Christians were also in the vanguard of these reforms.[42]

Until the 20th century, however, most Enlightenment liberals supported the traditional marital family as the most natural, expedient, and desirable form and forum of domestic life. They warned against the dangers of condoning 'sexual libertinism' and removing traditional sex crimes, lest society slide into a sexual state of nature where women and children especially would suffer disproportionately from sexual predation and desertion. They warned against the destruction of the

[40] Berman, 'Law and Belief' (n 32) 625; Gerhard OW Mueller, *The French Penal Code* (Sweet & Maxwell, 1960).
[41] See Mathias Schmoeckel and John Witte Jr, 'Christianity and Procedural Law' in John Witte Jr and Rafael Domingo (eds), *Oxford Handbook on Christianity and Law* (Oxford University Press, 2024) 377, 377-89.
[42] See summary of the more liberal reforms proposals in Faramerz Dabhoiwala, *The Origins of Sex: A History of the First Sexual Revolution* (Oxford University Press, 2012).

marital household, for that would spell the 'doom of all mortals,' as David Hume put it.[43] For all their anti-establishment and sometimes anti-Christian crusades on many fronts, most Enlightenment liberals called for the continued integration of sex, marriage, childbirth, and child-rearing within a stable marital household, as Catholic and Protestant Christians had long taught.[44]

From various perspectives, Enlightenment writers repeated natural law arguments about marriage and family life that had been adumbrated by Aristotle, elaborated by Thomas Aquinas, and echoed by sundry early modern Catholics and Protestants for the prior three centuries. The heart of the argument was that exclusive and enduring monogamous marriages are the best way to ensure paternal certainty and essential joint parental investment in vulnerable and dependent children. If men and women could have random sex with anyone, men would be far more likely to exploit women mercilessly to gratify their sexual drives, and subsequently to ignore their children since they would have no certainty of their paternity. If men did not invest in the care of their children, many of those children would suffer or die, particularly as infants, when their mothers were weakened from childbirth and lack of sleep and least capable of caring for all their children and themselves as well. Given these conditions, the traditional argument went, nature has inclined the human species to centre their sexual and procreative activities within the marital household. Nature has further inclined a mother to bond deeply with her child during pregnancy and nursing, and to nourish and protect the child until it has grown. And nature has inclined a father to bond with a child that he knows is his own, that looks like him, that is an extension and creation of his being or substance, and that can carry on his name, work, property, and legacy.

Echoing some parts of the Christian tradition, Enlightenment writers encouraged husbands and wives to work hard to maintain active and healthy sex lives — even when, indeed especially when, procreation was not possible. They further emphasized that parents and children have reciprocal natural rights and duties within and beyond the home. They insisted that exclusive and enduring monogamous marriages are the best way to ensure that men and women are treated with equal dignity and respect, and that husbands and wives, and parents and children, provide each other with mutual support and protection throughout their lifetimes. They prohibited polygyny, incest, prostitution, fornication, adultery, domestic abuse, and easy divorce, because these practices jeopardized the centrality and stability of the marital household in the procreation of children, and they threatened the rights and duties of each household member, especially women and children.

English and Scottish Enlightenment liberals in particular — John Locke, Mary Wollstonecraft, Frances Hutcheson, David Hume, Adam Smith, William Paley, Jeremy Bentham, and others — pressed their arguments for traditional Western family and sexual norms using a surfeit of arguments from nature, reason, custom, fairness, prudence, utility, pragmatism, and common sense. Some of these Enlightenment writers were inspired, no doubt, by their personal Christian faith; others by a conservative desire to maintain the status quo. Yet most of these writers pressed their arguments for traditional norms and forms of family and sexuality on nonbiblical and nontheological grounds. They also were sometimes sharply critical of the Bible — denouncing Saint Paul's preferences for celibacy, the Mosaic provisions on unilateral male divorce, and the

[43] David Hume, *Essays: Moral, Political, and Literary*, ed Eugene F Miller (Liberty Fund, rev ed, 1987) 187–90.
[44] For this section, see detailed sources and discussion in John Witte Jr, *Church, State, and Family: Reconciling Traditional Teachings and Modern Liberties* (Cambridge University Press, 2019) 151–83; John Witte Jr, *The Western Case for Monogamy over Polygamy* (Cambridge University Press, 2015) 348–88.

tales of polygamy, concubinage, and prostitution among the ancient biblical patriarchs and kings. Moreover, most of these writers jettisoned many other features of the Western tradition that, in their judgment, defied reason, fairness, and utility — including, notably, the establishment of Christianity by law and the political privileging of the church over other associations. Their arguments were not a rationalist apologia for traditional Christian family values or a naturalist smokescreen for personal religious beliefs. They defended traditional family and sexual norms not out of confessional faith but out of rational and empirical proof, not just because they uncritically believed in these norms but because they made good sense and, for the most part, worked.

SUMMARY AND CONCLUSIONS

The Enlightenment featured the first European belief system since Roman times that was developed outside of any organised church by people who were mostly not conventional Christians and sometimes avowedly anti-Christian. It built, to be sure, partly on the writings of 17th century philosophers and scientists, such as John Locke and Isaac Newton, who themselves were devout Christians. But it ignored their Christian theology and focused on their secular writings. Instead, the Enlightenment adopted a new belief system, that started with the belief in a God of creation, who appointed a natural law and natural purpose for everything in the universe. God created human beings with certain qualities — above all, reason and rights — to determine their own paths and secure their own advancement. Humans were born good, not evil; they were by nature free and equal, and vested with the capacity to pursue — and to achieve — both knowledge and happiness. Rational humans formed societies and states through contracts and constitutions, and laws and policies through public deliberation and public opinion about the national interest democratically expressed.

This new Enlightenment belief system challenged traditional Roman Catholic, Anglican, and Protestant beliefs, and catalysed their own liberal reform movements in Christian theology and church life. The Enlightenment also stimulated ample legal reforms, particularly in constitutional law, criminal law, and legal education, which changed most dramatically in response to its teachings. Yet the 18th century Enlightenment drew heavily on the pre-Christian and Christian Western tradition of theology and law, even when it reformed that tradition along more liberal lines. Some of its new political and constitutional philosophy was Roman in inspiration. Some of its rationalist and contractarian teachings had a distinctly Stoic ring. Most of the rights and liberties it enumerated were already set out centuries before in medieval Catholic and early modern Protestant legal, political, and theological texts, and in charters and declarations of rights reflecting Christian teachings. Much of the Enlightenment's family law theory came straight out of the naturalist arguments of Thomas Aquinas and Francisco Vitoria. What the 18th century Enlightenment offered to the Western legal tradition more than anything else were more universal legal logics and more state-centric legal mechanisms that did not depend upon contested Christian creeds or controversial Christian legal practices. This change would prove to be a step along the path to the growing secularisation of Western law, but 'the secular age' was still two centuries ahead.[45]

[45] Charles Taylor, *The Secular Age* (Harvard University Press, 2007).