



Universiteit
Leiden
The Netherlands

Hard Cases in Scripture

Cliteur, P.B.; Kwak A.J.

Citation

Cliteur, P. B. (2009). Hard Cases in Scripture. In *Holy Writ: Interpretation in Law and Religion* (pp. 67-111). Surrey (GB) and Burlington (USA): Ashgate. Retrieved from <https://hdl.handle.net/1887/14471>

Version: Not Applicable (or Unknown)

License: [Leiden University Non-exclusive license](#)

Downloaded from: <https://hdl.handle.net/1887/14471>

Note: To cite this publication please use the final published version (if applicable).

Cliteur, Paul, "Hard Cases in Scripture: A Reflection on Legal and Religious Interpretation", in: Arie-Jan Kwak, ed., *Holy Writ: Interpretation in Law and Religion*, Ashgate, Surrey (GB) and Burlington (USA) 2009, pp. 67-111.

Chapter 5

Hard Cases in Scripture: A Reflection on Legal and Religious Interpretation

Paul Cliteur

This contribution is in many respects inspired by Herman Philipse's chapter in this book. But his conclusions are exactly opposite to mine. He considers liberal interpretation the appropriate approach in law and contends that textualism and originalism are more fruitful in theology and religion. I defend that liberal interpretation is more appropriate in religion and theology (perhaps even inevitable) and textualism and originalism are more suitable for law. The reason is that Holy Scripture cannot be amended so 'interpretation' is the only way to avoid unacceptable results. The law, on the other hand, is amendable, so we do not have to 'interpret' to make it up to date.

Introduction

In 1977, the American legal philosopher Ronald Dworkin published a collection of articles under the title *Taking Rights Seriously*. One of those articles dealt with 'hard cases' in law (1977: 81–131). What do judges have to decide when the law seems to offer no answer for the problem that presents itself to them in a legal case? And what is the obligation of judges if adherence to the law would result in a verdict that is morally hardly acceptable?¹ One of those 'hard cases' is the old jurisprudential chestnut of *Riggs v. Palmer* (1889) (Dworkin 1986: 15).

The case was this. Elmer Palmer murdered his grandfather in 1882. He knew that he was the recipient of his grandfather's large estate. However, the old man had remarried and he probably would change his will after having done this. Elmer decided to take action and poisoned his grandfather. Unfortunately (for Elmer, that is), his crime was discovered and Elmer was sentenced to a term of years in jail. Now a new question arose. That legal question was a moral problem as well: was Elmer legally entitled to the inheritance that his grandfather's last will provided? Hard cases are so hard because the strict application of the rules of the law would result in a situation that we find difficult if not impossible to accept on moral grounds.

¹ A classic discussion on this theme is Hart 1958 also in Hart 1983: 49–87, Fuller 1958: 630–72, also in Feinberg et al. 1991: 82–102.

One of the judges in this case was Judge Gray. Gray insisted that the real statute, constructed in the proper way, contained no exceptions for murderers. If the court would deny the estate to Elmer this would add significant further punishment to what Elmer received under the criminal statute. The written statutes that existed at the time did not exclude murderers from inheritance. That pleads for Elmer. The court cannot create or imagine such statutes simply to obtain a morally pleasing result. So Judge Gray voted for Elmer. The majority, however, did not, and Elmer did not receive the inheritance.

The majority opinion for the court was written by Judge Robert Earl (1868–1894). According to Earl, Elmer should not get the inheritance. Why?

The answer is given by, among others, Ronald Dworkin who analyzed the problem of *Riggs v. Palmer* in his book *Law's Empire* (1986). Dworkin sided with the majority of 1889, revising the dominant legal positivism of his time. The law, so Dworkin contended, was not only a system of rules (as legal positivists like H.L.A. Hart had contended: Hart 1961), but of principles as well. A principle as that one cannot profit from one's own wrongdoing prohibits giving Elmer the inheritance.

The difference of opinion between Judge Gray on the one hand and the majority of the court and Ronald Dworkin on the other, manifests also a dispute on how to interpret written texts. Judge Earl gives the legislator's *intentions* an important influence over the real statute. Earl wrote: 'It is a familiar canon of construction that a thing which is within the intention of the makers of a statute is as much within the statute as if it were within the letter; and a thing which is within the letter of the statute is not within the statute, unless it be within the intention of the makers' (Dworkin 1986: 18).

The question of how to interpret authoritative texts is not only relevant for jurisprudence. The same problems that judges and legal scholars encounter in interpreting statutes and the Constitution also arise in other situations where texts have to be interpreted. One can think of the literary critic trying to come to grips with a poem.² What has W.B. Yeats meant with 'Sailing to Byzantium'? (Dworkin 1986: 17). And is it relevant what Yeats had intended?³ Another situation where we have to deal with the interpretation of texts is theology. How should we read Holy Scripture? The analogy between law and Holy Scripture may even be more illuminating than between law and literature. The law, like Scripture, has authority over us (something a poem is lacking). And just as with law, the interpretation of Holy Scripture presents us with vexing problems: situations where our moral sense severely clashes with what a literal interpretation of the holy text seems to require. What are we to do in such situations? More specific: what are we to do when Holy Scripture seems to contradict common sense, our most firm moral convictions or civil law?

2 A classic introduction is Eagleton 1983.

3 Dworkin dwells on the comparison of law and literature in Dworkin 1985: 146–66 and Dworkin 1982: 165–88, also in Adams 1996: 93–9.

In this chapter I will draw mainly on some similarities between legal interpretation and theological or religious interpretation but highlight some aspects of literary interpretation as well.⁴

To make the comparison between legal interpretation and theological interpretation, I need to concentrate on those parts of Holy Scripture where the conflict between our moral convictions and the worldview of Holy Scripture is maximal. To some this may seem one-sided if not disrespectful. Why focus only on the problematic passages from Scripture? The sincere believer will retort perhaps that the passages I will dwell upon are not representative of the totality of the religious inheritance. This is undoubtedly true but, so I would argue, it is irrelevant. I have to concentrate on 'hard cases' in law (like *Elmers case*) and similar passages in the holy book because those instances in particular ignite our creativity with regard to the question how to deal with difficult situations. I will start with scriptural passages which deal with the topic of freedom of religion.

I do this because in contemporary societies the freedom of religion is considered to be an important value. According to some scholars the freedom of religion is the cradle of all human and civil rights (Jellinek 1927). It is enshrined in most constitutions and treaties of human rights. Modern freedom of religion does not only encompass the freedom to have a religion and the free exercise of it, but also the right to change a religion for another and even relinquish all religions.⁵

But like the abolishment of the death penalty, the freedom of religion is a typically *modern* ideal. In the ancient world it was relatively unknown or acquired only limited acceptance. In holy books it gets scarce recognition. In this chapter I will first highlight the position of freedom of religion in the Bible, more especially in the books Deuteronomy, Judges and Numbers. Subsequently I will show the relevance of this discussion to the topic of theological and legal interpretation.

The conclusion of my contribution will be that consistent analysis indicates that although theological interpretation and legal interpretation have on a superficial level much in common, they ultimately point in different directions. A textualist and originalist approach with regard to religious scripture would lead to draconic results. So theologians and ordinary believers are more or less forced to adopt the device of the 'Living Scripture'. Not doing that, would make them 'fundamentalists' (people preoccupied with a literal interpretation of the text) and even religious terrorists (people who are prepared to use violence if Scripture seems to require this). With regard to legal scripture (in contrast to theological interpretation), textualist and originalist interpretations are much more fruitful. They contribute to legal certainty and exclude judicial arbitrariness. So whereas the idea of a 'Living Constitution' in law leads to the undermining of central moral and political values, the idea of 'Living Religious Scripture' is inescapable if we want to avoid the consequences of religious zealotism.

4 See on interpreting the Bible and the Constitution Pelikan 2004, Grey 1984: 1–25.

5 'the right to free exercise of religion implies the right to free exercise of non-religion' Sullivan 1992: 197. See also Hegener 2005. For a critique see Sapir et al. 2005.

The structure of the argument is as follows. First I will dwell on the problematic passages in religious scripture on freedom of religion (or rather the absence of freedom of religion). Subsequently I will show that in the Bible itself we find the archetype of the religious terrorist in the figure of Phinehas who on God's command slays two religious dissenters who disobey the divine will. After this I will illustrate that the religious believer has three choices if scripture seems to require violence: (a) do what seems required as Phinehas did, (b) rejection of scripture as something that has authority over us as Thomas Paine did, (c) 'interpreting' the text in such a way that the moral problem vanishes as advocated by Kant.

This systematic part is followed by an analysis of the way Immanuel Kant developed the 'third way' out of the dilemma. Kant reconciled moral autonomy with the religious tradition and scriptural authority. Via the hermeneutics of Schleiermacher and others this kind of 'liberal interpretation' gained the upper hand in the theory of legal interpretation as advocated by legal scholars as William Brennan and Ronald Dworkin. But, so my argument goes, what seems inevitable in the field of theological interpretation because we cannot change scripture openly is less convincing in the legal field as is made clear by Antonin Scalia and Robert Bork. A legal Constitution is not the same as Religious Scripture. A Constitution can be amended by the royal way (changing the text on the initiative of the legislature) whereas religious interpreters are forced to use 'interpretation' to change their Holy Scripture.

'A Warning Against Idolatry'

A good place to start our argument is with Deuteronomy 13: 1–3 ('a warning against idolatry', as the English Standard Version euphemistically puts it). There we find the following passage:

If a prophet or a dreamer of dreams arises among you and gives you a sign or a wonder, and the sign or wonder that he tells you comes to pass, and if he says, 'let us go after other gods', which you have not known, 'and let us serve them', you shall not listen to the words of that prophet or that dreamer of dreams.

The warning exemplified in this passage cannot come as a shock to a well-informed reader. Every faith will discourage its devotees to go after other gods.⁶ Every religion tries to keep its flock together and so does the Jewish religion. The Bible says: 'You shall walk after the Lord your God and fear him and keep his commandments and obey his voice, and you shall serve him and hold fast to him' (Deut. 13: 4–5).

⁶ Usually backed by legal threats. See on this Levy 1993. See on religious liberty Ruffini et al. 1912.

The theory of ethics that is implicit in this passage is what has been called the ‘divine command theory’ of ethics (Idziak 1979: 1–38). The believer is supposed to follow the ethical injunctions that are revealed by God, manifested in Scripture (‘keep his commandments’). There is a problem though. Doing this can imply tensions with what we consider morally appropriate or what is legally required or prohibited by civil law or ‘human law’ (as contrasted with ‘divine law’).

So far Deuteronomy has suggested nothing that can be considered problematic in the sense of violating the moral or civil law, but in Deuteronomy 13:5 there is a turn. After the turn, we read: ‘But that prophet or that dreamer of dreams shall be put to death, because he has taught rebellion against the Lord your God, who brought you out of the land of Egypt and redeemed you out of the house of slavery, to make you leave the way in which the Lord your God commanded you to walk. So you shall purge the evil from your midst’ (Deuteronomy 13: 5–6).

So the prophet or the dreamer of dreams ‘shall be put to death’.

If this is interpreted as a description of what will happen after death, this text may still be compatible with contemporary civil and penal law for these are only applicable to the situation here on earth. It is not very polite perhaps to tell other people that they will burn in hell for what they believe or not believe, but as long as the furnace is not ignited *in this life* these visions about what happens in the hereafter are everybody’s own concern. It appears from the context, however, that the Bible is not simply making a factual statement about what will happen to our souls in future life, but admonishes the believers in this world to execute the false prophet or the ‘dreamer of dreams’ among the living. That means: the individual believer is exhorted – in contemporary jargon – to ‘take the law in its own hands’ and purge the community from false prophets.

That the Bible takes this point seriously appears from further commentary on the way this prescript should be interpreted. There it appears that this injunction is not restricted to unknown people but should also be applied to those most intimate and dear to us. Our brother, our son, daughter, wife or friend – they should all be put to death if they preach rebellion against the Lord. In Deuteronomy 13:6–12 we read:

If your brother, the son of your mother, or your son or your daughter or the wife you embrace or your friend who is as your own soul entices you secretly, saying, ‘let us go and serve other gods’, which neither you nor your fathers have known, some of the gods or the peoples who are around you, whether near you or far off from you, from one end of the earth to the other, you shall not yield to him or listen to him, nor shall your eye pity him, nor shall you spare him, nor shall you conceal him. But you shall kill him. Your hand shall be first against him to put him to death, and afterwards the hand of all the people.

You shall stone him to death with stones, because he sought to draw you away from the Lord your God, who brought you out of the land of Egypt, out of the

house of slavery. And all Israel shall hear and fear and never again do any such wickedness as this among you.

‘Warning against idolatry’ is an unduly euphemistic qualification of what we find here, so it appears. It is a warning to idolaters, false prophets, dreamers of dreams, but the text also spells out in no uncertain terms what has to be done with them. They deserve the death penalty. And the execution of this death penalty is not reserved to God in the hereafter, but the text proclaims it to be the specific duty of all members of the Jewish tribe to execute this punishment.

Furthermore, we should not be distracted from our religious duties when the false prophet is our son, our daughter, brother or wife. Especially when it comes to those dear to us: we should be the first to throw the stone, the rest of the community has to follow.

In modern terminology we should qualify this as a prohibition of apostasy.⁷ When we compare this provision in the Bible with modern constitutions and modern text-books of penal law there is a manifest contradiction. Modern constitutions and treaties on human rights proclaim the freedom of religion. That freedom also comprises the freedom to reject one specific religion or relinquish all religions. So here we have a manifest contradiction of modern constitutional ‘Scripture’ and ‘holy Scripture’ as handed down by the ancient religions of the book.

That contradiction is not restricted to the matter of apostasy. The text in Deuteronomy also has a completely different view on taking the law in your own hands from the modern state. Deuteronomy presents no guiding rules for how worldly government has to deal with the matter of apostasy; it does not even refer to God. It is the individual member of the community that is assigned as law officer and executioner. We all have to stone the apostates ourselves and those inciting others to embrace the false gods.

It requires no elaborate argument that this would be detrimental to civil order. And this would not only be detrimental to the *modern* civil order, by the way, but it would also undermine *ancient* states and communities. No state, whether ancient or modern, can condone violence perpetrated by citizens themselves. A clear example of what this would imply we find in the biblical story of Phinehas.

The Story of Phinehas: A Biblical ‘Religious Terrorist’

The story of Phinehas is told in the book Numbers. Numbers 25 is dedicated to Baal Worship at Peor. While Israel lived in Shittim, the people of Israel began ‘to whore with the daughters of Moab’, the Bible informs us. These invited the Israelites

⁷ In several European countries there is a debate about apostasy in Islam. See on this Zwemer 1924 who answers the question why there are so few Moslem converts, and who gives examples of their moral courage and martyrdom, Warraq 2003, Jami 2007, Ahadi 2008.

to the sacrifices of their gods and those 'daughters of Moab' had apparently considerable success with their invitations because the Israelites 'bowed down to their gods' (Numbers 25: 2). The Bible spells out what this means: 'So Israel yoked himself to Baal of Peor'.

This made the Lord angry. He directed himself to Moses and said: 'Take all the chiefs of the people and hang them in the sun before the Lord, that the fierce anger of the Lord may turn away from Israel.'

Moses took action and said to the judges of Israel: 'Each of you kill those of the men who have yoked themselves to Baal of Peor.'

It is not so clear whether the last command of Moses is identical to what the Lord commanded. The Lord seemed to exact the killing and punishment of *all the chiefs*. Moses though seems to build in a proviso: he ordered killing only those who had actually yielded to the temptation of the daughters of Moab. So for Moses a precondition for punishment was personal guilt (*mens rea*).⁸ From a modern perspective this seems almost self-evident, but not everybody in the community was satisfied with the way Moses handled the matter. There was a certain Phinehas who defied the authority of Moses and took the law in its own hands. The immediate occasion for this was the following.

Phinehas saw how one of the men of Israel brought a Midianite woman to his tent (Numbers 25: 6). When Phinehas saw this, he rose and left the congregation and took a spear. He 'went after the man of Israel into the chamber and pierced both of them, the man of Israel and the woman through her belly' (Numbers 25: 8).

So far, we only have an exciting although gruesome story. What makes the story interesting, however, is the reaction of the Lord. What did God say about Phinehas' slaying of the people who, according to modern standards, were perfectly justified to pray to the gods of their own choosing (protected by the freedom of religion, after all)? The Lord sided with Phinehas and the authority of Moses was clearly defied on the basis of the subsequent events. The Lord said to Moses: 'Phinehas the son of Eleazar, son of Aaron the priest, has turned back my wrath from the people of Israel' (Numbers 25: 10). Phinehas was even rewarded for the public execution without trial of the man and the woman. The Lord said: 'Behold, I give to him my covenant of peace, and it shall be to him and to his descendants after him the covenant of a perpetual priesthood, because he was jealous for his God and made atonement for the people of Israel' (Numbers 25: 13).

So those who flout the legitimate authority of the temporal leaders of the people (Moses) are rewarded by God. Apparently, the religious zeal of Phinehas is appreciated more by God than the cautious way of dealing with the matter by Moses. This stance can have (and is likely to have) grave consequences. This can be seen as substantial encouragement to those who claim special knowledge of God's will and are prepared to perpetrate violence in defiance of the traditional political leaders of the state. Phinehas can be seen as the archetypical religious terrorist (Selengut 2003, Griffith 2002, Juergensmeyer 2003). Phinehas is prepared, on

8 See on criminal intent Slapper et al. 2004: 206.

religious considerations ('I know what God wants') to use violence against citizens of the state, thereby violating the law of the state and defying legitimate authority. That is the essence of the religious terrorist. When Yigal Amir killed Yitzak Rabin in 1995 on religious considerations or when contemporary Islamist terrorists kill people because their victims are considered to be guilty of 'blasphemy' (cf. the Danish cartoonists or the Dutch writer Theo van Gogh) this is all according to the same pattern. The religious terrorist wants to punish the blasphemer and instil fear into the hearts of the citizenry.

What makes the story interesting and disconcerting at the same time, is that the ruthless behaviour of Phinehas is more appreciated by the Lord than the way Moses had handled the matter. After all, Phinehas brought the people of Israel back on the right track, the Bible tells us. The people of Israel are expected to serve one God and one God only: the Lord. In the Ten Commandments this is put thus: 'You shall have no gods before me' (Exodus 20:3).

It is clear that this attitude and the whole worldview connected with it is hard to reconcile with modern freedom of religion, freedom of worship, freedom of speech, freedom of conscience, free inquiry and other fundamental rights ingrained in the concept of liberal democracy.⁹ It is of course possible to acknowledge the prohibition to venerate strange gods as a private religious command, but the state cannot act upon this political morality without violating modern human rights.

What Options are Open to the Believer?

Now let us see what these stories about freedom of religion imply for the idea of theological interpretation. Passages like those quoted before present believers with a vexing dilemma. How do they have to interpret those seemingly authoritative commands from God if they contradict common sense or the principles of shared morality? How can they reconcile the idea of a Holy Text with modern civil order? Here we have to return to the legal domain because the individual believer is in a similar position as the judges were in the case of Elmer as mentioned at the beginning of this article.

My comparison between the believer and the judge requires some clarification though. Presupposed to this analogy is the presumption that both the Bible and a legal text claim a certain moral, political or legal authority. With a legal text that is more or less self-evident. Suppose a judge would tell us that he considers the law and also the Constitution to be some kind of poetry. It is inspiring to read, but the text has no bearing on the legal decisions that he makes, the judge tells us. That judge would be declared mad and evicted from his office.

Now, let us shift our attention from the judge to the ordinary believer and to the theologian. Suppose the believer tells us that the story of Phinehas is a source of interesting reflections but it has no influence on his attitude towards apostates,

⁹ See for a conceptual analysis Holden 1993.

heretics and unbelievers. Would that believer be declared mad, as would be the case with the judge? Probably not. Actually, in a time of religious fundamentalism and even religious terrorism this believer is likely to be praised for his liberalism and broadmindedness.

Nevertheless, we have to discern between praising somebody because of his ethical behaviour or his moral attitude and praising him for the soundness of his theology. It is perfectly possible that the liberal believer is a bad theologian.

But what would make a good theologian? And what is the relation between a theologian and a believer? One thing is sure: not every theologian is a believer. But can a believer also refrain from being a theologian altogether? With regard to the three theistic religions the answer is 'no'. This has to do with the specific nature of the god that the three theistic faiths subscribe to. They subscribe to a belief in the existence of a personal god with specific characteristics (almighty, perfectly good, eternal, creator of heaven and earth).¹⁰ That personal god is not some Epicurian god that does not meddle with human affairs but He has expectations from his community of believers in this world as is made abundantly clear from the Bible and the Qur'an. The believers are required not only to acquire theoretical knowledge about God (the job of a theologian), but also act upon that knowledge (behaving according to His precepts).

So the good theologian tries to construe a concept of God and the sincere believer tries to make up what God expects of him.

Let us dwell a little longer on the job of the theologian. I said: being a sincere believer presupposes being a theologian as well (at least as good as you can). But what about the situation of the theologian? Must he be a believer? I said 'no'.

To illustrate my point let me make a small excursion. W.B. Drees in this volume comments on the title of one of my books: *God houdt niet van vrijzinnigheid* (2004). Translated in English that would be: 'God does not favour a liberal attitude' or (more freely) 'God is no supporter of liberal theology'. A variant would be: 'God doesn't like freethinkers.' Drees, knowing I am not a believer, is puzzled by that title and wonders how I can claim to have knowledge about God. How do I know that God is no supporter of freethought?

Drees offers two options to inquire into the matter. The first option is that I derive my knowledge about God's characteristics from God Himself (special revelation; think about Abraham, Phinehas, Moses). But in my case that is unlikely. Unbelievers do not hear the voice of God. Precisely that is the reason for their unbelief. The second option is that I have studied the behaviour and the convictions of 'real believers'. If so, then it is from the real believers that I derive my knowledge about God. But then a second problem arises: how do I know who is the 'real believer'? If I pick out the conservative believers the title of my book seems justified, but selecting the liberals would point in another direction. So the title of my book is a misnomer, Drees concludes. Q.E.D.

10 See several contributions on 'the divine attributes' in Peterson et al. 1996: 97–145.

Is it? Or is this too hastily? I think it is. Why not consider a third option? *Tertium non datur*? Of course there is. Precisely that third way makes it possible for scholars of different persuasions at the faculties of theology, religious studies, cultural anthropology or ancient history to study the Greek gods or the Hindu gods. Every non-Greek scholar can read the *Odyssey* or the *Iliad* and learn about the characteristics of the Greek gods. He does not need special revelations from Apollo or personal communication with Poseidon. And if this is the way we acquire knowledge about the Greek gods, why should not the atheist or unbeliever, living in the twenty-first century, proceed in exactly the same way with regard to the Christian god? Unbelievers can read the Bible, can't they?

The same applies to the Qur'an and Islam. How can Theo van Gogh (of all people) know that 'Allah weet het beter' ('Allah knows best')? (2003) and is Chahdortt Djavann qualified to answer the question 'Que pense Allah d'Europe'? (2004). Another testimony is to be found with Nahed Selim. She pretends to know something about the predilections of Allah as well: 'Allah houdt niet van vrouwen' ('Allah does not like women') (2007). How does she know? Judged by the criteria of Drees these are all unjustified pretensions. But are they really? With regard to Allah Van Gogh, Djavann and Selim can do the same as I do with regard to God: reading scripture. It is from Scripture that we can get an idea of the qualities of God. Unbelievers do not have to believe in the real existence of this God (as Drees seems to presume) in order to ascertain certain of His qualities.

The next question is, of course, whether we can, by reading the Bible or Qur'an, get a general idea of the characteristics of God. Does it not all depend on *what* passages we refer to (the same problem Drees had referred to with individual believers now pops up with biblical passages)? Certainly, we have the story about Adam and Eve, being punished for their disobedience. We have the story of Phinehas who was more eager to obey God than pay reference to the authority of Moses and was being praised for that. We have the test of Abraham, the test of Job. These all point in the direction of the title of my book: 'God does not like insubordination'. But there is also the Sermon on the Mount and stories that point in a different direction, my critics can contend. How to choose what stories give the right picture of God? Isn't it all in the eye of the beholder?

The postmodern reading of texts will answer 'yes'.¹¹ We cannot get something out of the text that we did not project into it beforehand. Personally, I do not favour that position. In all texts, whether they are legal, literary or religious, there is an element of vagueness, ambiguity and open texture, but that does not mean that 'anything goes' (Bix 1993). This would result in what has been called 'cherry picking theology' or – with reference to Christianity – 'cafeteria Christianity' (D'Souza 2007: xii). The theological debate about the Bible should be about whose conception of God is more in accordance with the text of the Bible. If that sounds too 'Protestant' one may add that also the interpretation of Holy Scripture by the

11 Excellent analysis and criticism of postmodernism is to be found in Searle 1993 and Gellner 1992.

Church should be taken into account. But whatever additional sources one may advance, that does not alter the fact that there is something to be interpreted and that interpretation is something different from simply stating your own opinions.

It may be argued, of course, that the Bible is not one book but a series of books. The god of the book Job is not the same god as the god of the book Matthew. In that case Christians, Jews and perhaps also Muslims are not monotheists but polytheists, although the majority of them do not openly acknowledge this (Miles 1995). Anyhow, I will follow the traditionalist pretension that it is possible to make generalizing comments on the image of God as it appears through *all the books* of the Bible. And comparing and analysing a representative selection of those stories, so I claim as a non-believing amateur-theologian, gives us the picture of God as someone who is against freethinkers, not in favour of them.¹²

Nevertheless, I have to emphasize that my argument in this chapter is not dependent on this generalization about the nature of God. I was challenged by Drees to articulate something about my worldview (and defend the legitimacy of 'god-talk' by unbelievers),¹³ but this worldview is in itself irrelevant for the point that I hope to make in this article. Here I want to reflect on some notorious hard cases in Scripture and therefore I need only the stories that I have presented here to make my point. Even if these passages are a minority and even if the amount of believers that 'takes them seriously' is small, their presence is real and they present real problems.

We have to take up a second question though. In what I have written before, I inquired whether the biblical text has any authority over us. Is the Bible for the serious believer more like a poem or more like a penal code? As Wim Drees makes clear in his contribution to this book: that depends on what part of the Bible we refer to. Some Psalms have primarily a poetical quality. But that does not exclude that the Bible also has parts that resemble a penal code or that offer ethical exhortation. The Ten Commandments, e.g., are not meant to be read as a poem. And if Jesus admonishes us 'You shall love your neighbour as yourself' (Matthew 22:39) it would be silly to say that this should not be taken seriously or that it was not meant as ethical exhortation. In passages such as Matthew 22:39 the Bible presents itself as moral guidance.

Now the question is: are the stories of people praying to strange gods who have to be killed more like poems or more like the penal code? If we interpret them as poems the problems that I dwell upon do not arise, of course. But that is not the way I read them and it is not the way I think they should be construed. Those stories, so I contend, tell us something about the obedience that God demands

12 Human autonomy is in many stories of the Bible presented as a manifestation of sin: 'man's rebellion against God, his effort to usurp the place of God'. See Niebuhr 1964: 179.

13 Even an 'agnostic' can claim to say something about the idea of God as manifested in Scripture. This is also what the great agnostics, Huxley and Clifford, have actually done. See Huxley 1992: 193–232; Madigan 1999: ix–xii; Pyle 1995: ix–xxvi.

from his believers.¹⁴ In those stories there is implicitly a theory of meta-ethics. That theory is: God knows best. Or: the best justification for a moral stance is that it is in accordance with divine will as manifested in special revelation or because it is in accordance with Holy Scripture.

To sum up: the ordinary believer is expected to do what God requires from him in Scripture. To understand what is required every ordinary believer has, apart from being a believer, to be an amateur-theologian as well, and inquire what the content of the will of God is. At least, this is the case in the Protestant tradition. Catholics have an interpretative aristocracy who do the job of interpreting Holy Scripture for the believers.

Having clarified my position about some possible misunderstandings I can now take up the line of my discourse. The question is: what do we have to do if following the prescriptions in the authoritative source conflict with common morality? Do we have to say with Judge Gray in the case *Riggs v. Palmer* *lex dura, sed lex*? Or should we, as Judge Earl defended, contend that immoral outcomes *simply cannot be the wish of the legislator*? Or is this either/or-dilemma false and are the seemingly different positions reconcilable?

There are three positions we have to distinguish in answering this question.

Do What is Required

The first option open to the believer is simply doing what seems to be required by God. God is perfectly good, almighty, in short: all perfections are united in his personality. So what could be a more reliable guide in the field of morals than divine will and wisdom? Isn't following the divine injunctions the most reliable guide in this complex world?

If we follow this course, the next step is figuring out what God tells us about moral dilemmas. How do we know the will of God? According to agnostics the will of God is inscrutable.

The term 'agnosticism' was coined by T.H. Huxley (1825–1895) in 1869. He used it to denote his own view on knowledge of the transcendent dimension of reality. 'Agnosticism is not a creed but a method', Huxley said. And the essence of this method he typified as: 'the vigorous application of a single principle.' This principle had two dimensions, one positive, one negative. 'Positively', so Huxley contends, 'the principle may be expressed in matters of intellect, follow your reason as far as it can take you without other considerations'. And negatively: 'do not pretend conclusions are certain that are not demonstrated or demonstrable.'¹⁵

Twenty years later Huxley wrote again on agnosticism in *Agnosticism and christianity* (1889). Here he contended: 'That it is wrong for a man to say he

14 This reading is in conformity with Dershowitz 2000.

15 Both essays are to be found in Huxley 1992. See for commentaries on agnosticism Pyle 1995. Excerpts from Huxley are also comprised in Stein 1980. See further comment in Stein 1985: 3–4.

is certain of the objective truth of a proposition unless he can produce evidence which logically justifies that certainty. This is what agnosticism asserts and, in my opinion, is all that is essential to agnosticism.'

Unfortunately for Huxley, this is not the definition of agnosticism that would become current meaning. Nowadays agnosticism almost denotes the complete opposite of what Huxley wanted it to mean. For Huxley agnosticism meant: not professing to have knowledge about things that you cannot have knowledge of.¹⁶ Nowadays agnosticism is delineated as 'leaving open' the question whether God exists or not. The agnostic is the one who can have a flirt with God and the transcendental although he knows that his positive knowledge does not warrant this. For some, agnosticism is a moderate and more modest form of theism. The mainstream of the believers, though, subscribe to the position that the will of God can be known because God has revealed his will to us. And some great religious leaders were directly visited by God, such as Moses, Abraham, Mohammed, Phinehas and Jesus Christ, but for the majority of the believers it seems a grotesque pretension to claim to know the will of God. They have to rely on what has been revealed to them by the religious leaders or by Holy Scripture.

The paradigm case of a revelation to a religious leader is Moses, receiving the Ten Commandments on the Mount Sinai. The bulk of the believers though are not directly addressed. They have to listen to what has been revealed to people like Moses. Only some audacious figures do not comply. I have presented Phinehas as an example. Phinehas is one of those rare examples of people who got away with interpretations of divine revelation that differ from the interpretations of official religious leaders (in his case Moses). Most of those non-official interpreters were burned at the stake, as Giordano Bruno was at the Campo dei Fiori in Rome in 1600, or otherwise punished on account of heresy or blasphemy.¹⁷

At first sight an orientation on the direct will of God seems a reliable guide to follow. But that is only appearance. In reality direct revelations confront us with all kind of problems. Those problems can best be illustrated when God seems to require something that we utterly abhor. Also the direct revelations have their 'hard cases'. The most famous of these is the sacrifice of Abraham.

In Genesis 22:1 the Bible tells us that God 'tested Abraham'. God said to Abraham: 'Take your son, your only son Isaac, whom you love and go to the land of Moriah, and offer him there as a burnt offering on one of the mountains of which I shall tell you.' And Abraham was prepared to do that (see the story in Genesis 22:1–13).

Because of this obedience Abraham is praised by the Lord. The angel of the Lord said to Abraham: 'By myself I have sworn, declares the Lord, because you have done this and have not withheld your son, your only son, I will surely bless you, and I will surely multiply your offspring as the stars of heaven and as the sand

16 In a similar way Clifford 1999: 70–96 and Stephen 1898 (republished 1969).

17 See for examples in Great-Britain Bradlaugh Bonner 1934. On the concept of heresy Evans 2003.

that is on the seashore. And your offspring shall possess the gate of his enemies and in your offspring shall all the nations of the earth be blessed, because you have obeyed my voice' (Genesis 22: 15–18).

So obeying the Lord gets heavy emphasis in this passage.

As I stated before, the theory of ethics or more precisely of 'meta-ethics' that is implicit in these passages is called the 'divine command theory' of ethics. The Divine Command Theory considers the moral 'good' as identical with 'willed by God'. 'Morally right' means 'ordained by God'. 'Morally wrong' means 'forbidden by God.'¹⁸ There is no independent or 'autonomous' ethical good, but morals is ultimately founded in the will of God.

Divine command ethics is by some ethicists characterised as 'supernaturalism'. Supernaturalism teaches that moral judgments give us a description of the will of God, so the ethicist and logician Harry Gensler writes. To call something 'good' means that it is in accordance with the will of God. Ethics is based on religion (1998: 33–46, 34).

A contemporary adherent of divine command ethics is Janine Marie Idziak. He formulates the core of the theory as follows: 'Generally speaking, a 'divine command moralist' is one who maintains that the content of morality (i.e., what is right and wrong, good and evil, just and unjust, and the like) is directly and solely dependent upon the commands and prohibitions of God' (1979: 1–38, 1).

Another ethicist who analyzed the central characteristics of divine command morality (although a fierce opponent of the theory)¹⁹ is James Rachels (1941–2003). He writes that according to divine command moralists God is seen as a legislative institution that issues laws that we, humans, have to obey (2003: 48–63, 50). Sometimes God 'tests' whether humans are prepared to bring the highest offer. The story of Abraham is a case in point. We could, however also point out other examples: the story of Job, for instance. In the story of Job God brings so many inflictions on Job that he could think that they were coming from the devil. But it was a test. The theologian Jack Miles writes about God: '[...] he tempts him (Job, PC) by speaking to him in the tones of merciless power. Job passes the test precisely as Abraham did' (1995: 322).

Adherents to divine command ethics we do not only find among biblical and Qur'anic religious figures (Moses, Abraham, Phinehas, Mohammed), but also among the great philosophers. Idziak presents an impressive list of adherents among the great philosophers of the western tradition: John Duns Scotus, William of Ockham, Pierre d'Ailly, Jean Gerson, Martin Luther, John Calvin, Karl Barth, Emil Brunner and many others (Idziak 1979: vii–ix). Divine command ethics is an important current in philosophical meta-ethics.

18 Blackburn 1996: 115–33. 'Ainsi, ce qui est bien, c'est que la divinité recommande ; ce qui est mal, c'est ce qu la divinité interdit' (1996: 116).

19 See in particular Rachels 1971: 325–37, also in Rachels 1997: 109–25.

But although the intellectual credentials of the theory are hard to contest, the practical consequences of adopting it seem dubious. Accepting the direct voice of God (Mohammed, Jesus, Moses, Phinehas) or his text (Fernández-Armesto 2003: 106–7) (the majority of the believers) as the ultimate foundation of ethics could lead to self-sacrifice and martyrdom (Davis 2003). And what is worse: it could lead to the sacrifice of others, as the story of Abraham and Isaac spells out. In an age of international terrorism this poses considerable problems for the maintenance of the political order (Esposito 2002, Selengut 2003).

Those problems stimulated several commentators and scholars to look for alternatives to divine command morality. Following the will of God, whatever that may lead to, may make us true believers and earn the praise of God, but it does not make us good citizens. It may even make us religious terrorists, as Phinehas was, trying to deter the people of Israel from worshipping the wrong gods. So we may be happy that great thinkers have always inquired whether there are alternatives for divine command morality.

Rejection of the Text as Authoritative

That brings us to the second option that is open to someone who is confronted with a hard case in Scripture. He can also choose to reject the text as something that has authority over us. According to the second position we have to follow our own moral considerations, independent on the divine will. According to adherents of the divine command ethics this second option is identical with ‘relativism’. Divine command moralists acknowledge only one strategy to evade moral relativism: the foundation of ethics in the divine will. But there may be many other ways to save ethics from relativism. In fact the philosophic tradition is full of alternatives, Platonism being one of the most well known.

What characterizes the second option is not its relativist bent, but the fact that ethics is not founded in the will of God. Whereas the first option subscribes to the position of ‘moral heteronomy’ (ethics dependent on religion), the second option subscribes to ‘moral autonomy’ (ethics as an autonomous discipline).

With regard to texts as have been quoted from Genesis (Abraham) and Deuteronomy (the slaying of the apostates) or Numbers (Phinehas murdering the worshippers of the wrong gods) the reaction of modern (or ‘liberal’ or ‘moderate’) believers is sometimes that those texts do not have authority over us because the New Testament has mitigated the rigid rules of the Old Testament. The Old Testament, so the argument goes, comprises injunctions for the Jewish people, not for the rest of humanity living under completely different conditions. The New Testament though comprises moral commands that are still valid for us today.

Is that a viable way out of the dilemma?

We may doubt this. Let us underpin this doubt by some exegesis of a well known passage in the New Testament. In John 15:6 Jesus Christ proclaims: ‘If anyone does not abide in me he is thrown away like a branch and withers, and the branches are gathered, thrown into the fire, and burned.’ This text is further

elaborated in 2 Thessalonians 1:5–9 where under the heading ‘The Judgement at Christ’s Coming’ we read:

This is evidence of the righteous judgement of God, that you may be considered worthy of the kingdom of God, for which you are also suffering – since indeed God considers it just to repay with affliction those who afflict you, and to grant relief to you who are afflicted as well as to us, when the Lord Jesus is revealed from heaven with his mighty angels in flaming fire, inflicting vengeance on those who do not know God and on those who do not obey the gospel of our Lord Jesus. They will suffer the punishment of eternal destruction, away from the presence of the Lord [...].

According to these passages the difference between the Old Testament and the New Testament is not that great. Unbelief and apostasy are heavily punished. What is lacking in the New Testament, however, are incitements to kill the unbelievers by our own hands. The right to punish the unbelievers seems to be reserved to God or to Jesus. There is no mention of a Phinehas who with divine approval takes the law into his own hands. That is a great comfort to the unbelievers and apostates, of course, because now they do not have to fear for their lives if they change or relinquish their religion. There is no encouragement of religious terrorism.

But for all the differences: there are similarities as well. Neither the Old Testament, nor the New Testament seems to proclaim the ‘free exercise of religion’ (as the first amendment to the American Constitution proclaims) as a fundamental human right. The New Testament is an improvement on the Old, but it does not take the position of modern declarations of human rights, that is: proclaiming freedom of conscience, freedom of religion, including the freedom to change religion or even rejecting religion at all. Both the Old and the New Testament would imply problems for contemporary societies if the moral injunctions would be taken as the source of inspiration for the modern civil order.²⁰

Would that mean that only a complete rejection of the authority of the text could rescue the believer out of this dilemma? And is that possible within the confines of a religious position? Is it possible to remain *and* a believing Christian, Muslim, Jew *and* proclaim the text of the Bible and the Qur’an is no more than a ‘source of inspiration’, not a ‘holy text’?

It is only very liberal believers that subscribe to that position. And they are hardly to be distinguished from unbelievers. They call themselves ‘Christians’, ‘Jews’, ‘Muslims’, they call their book a ‘holy book’ perhaps, but it is ‘holy’ only in a very watered down meaning. It is only a ‘source of inspiration’. Most believers feel uncomfortable with such a very liberal position and shy away from this. They want to remain faithful to a ‘real’ holy text that has authority over us and at the same time avoid the nasty consequences that people like Abraham and Phinehas were so eager to draw. So they looked for an alternative route, hoping to sail between

20 As the so-called ‘Biblische Weisung’ advocates. See Wolbert 2005.

the Scylla of blind obedience to revealed truths and the Charybdis of denuding the text of supernatural significance. That third route is called 'interpretation' of a 'living text'.

'Interpreting' the Text

The third way to deal with problematic texts seems to make it possible to have your cake and eat it. That is: on the one hand we stick to the idea of the authority of the text, based on the supreme importance of its author; on the other we can by means of 'interpretation' modify and adapt the text in such a way that makes it palatable for modern moral conscience.

In this approach the text is presented as a 'living document'. The text has different messages to different people in different times. The text changes its content in historical perspective. Moral injunctions that literally interpreted would result in draconic measures are 'interpreted' in such a way that cruel and crude behaviour can be evaded.

The advantages of this strategy are clear. We combine the advantages of the first and the second interpretation strategy. We can remain faithful to the idea of the authoritative text, as the religious tradition seems to require (a clear advantage of the first strategy), but we can also reject immoral behaviour (as is the advantage of the second way in dealing with problematic passages). By means of the 'living text' we can have our cake *and* eat it. We do not have to be fundamentalists or even terrorists (as the first strategy could imply), nor atheists (as the second strategy seems to result in).

How does the third strategy in dealing with problematic texts function? To understand this we can perhaps best return to the story of Abraham and Isaac.

Over the centuries countless moral philosophers have noticed that this story and the morality that it conveys present great difficulties for a decent civil order and sound moral sense. One of the philosophers that wrestled with the story of Abraham is the great German thinker Immanuel Kant (1724–1804). Before entering into the question how Kant interprets the dilemma of Abraham it may be illuminating to say something about his religious position in general.

The Founding Father of Modernism: Immanuel Kant

Kant tried to reconcile the spiritual heritage of two great influences on his philosophy. On the one hand he was influenced by the scepticism of David Hume, on the other by the work of J.J. Rousseau. The work of Hume pointed in the direction of extreme scepticism towards religious thinking if not to outright atheism (something Hume was at pains to deny, as we all understand if we realize the draconic consequences this would have, if confessed openly). The work of Rousseau led to a new role for God in life, based on mainly moral considerations (Beck 1997: 63–83, 63).

The sceptical or secular strain in his work manifests itself in Kant's contribution to science. He developed what has come to be known as the 'Kant-Laplace hypothesis'. This is the astronomical theory that explains the origin of the solar system out of a primordial nebula, making use only of physical laws and without calling upon the intervention of God in nature.

Writing God out of science was not without danger though and Kant was read critically by the authorities of his day. Kant-scholar Lewis White Beck writes (1997: 65):

Perhaps the only real excitement in his otherwise quiet life was provided by the royal prohibition on his teaching and writing on the subject of religion. This ban of censorship was applied soon after his chief work on religion was published, though he had been having trouble with the censor during its publication and had had to employ somewhat tricky procedures to have it published.

Kant's response to the ban was: 'As your Majesty's humble servant, I agree not to publish or teach on religious subjects'. Kant was writing under Frederick William II (1744–1797), King of Prussia from 1786 till 1797. But when the king died, Kant again felt free to publish his thoughts on religion, because he felt bound to the king himself, not to his successors. So in the later editions of *Religion within the Limits of Reason alone* Kant felt more free.

In his previous work, mainly the *Critique of Pure Reason*, Kant had held that the theoretical proofs of the existence of God are fallacious. Nevertheless he did not say that God did not exist. He denied only that we could know it. In a famous sentence he declared: 'I have found it necessary to deny *knowledge*, in order to make room for *faith*' (quoted in Beck 1997: 71). In the work of Kant faith is contrasted with knowledge, not with reason. It is possible to entertain a reasonable form of faith. What Kant binds to Hume is that both writers undermined the rational theology that was popular in their time, but with Kant there is not a trace of irony in his religious philosophy as is the case with Hume. Kant takes religion seriously, as did Rousseau.

The question is: how could Kant found his rational faith if not on knowledge? The answer is: it was based on morality. Initially, Kant seemed to reject all traces of religion in the edifice of his thought. He rejects the divine command theory of ethics. Kant said that we respect the moral law because it is a law which we, as reasonable beings, legislate for ourselves. So in that sense morality is not dependent on religion. Nevertheless, religion that was in a way thrown out of the window by Kant on account of his theoretical philosophy, is smuggled in through the backdoor of his practical philosophy. Kant was impressed by the fact that the most virtuous people are not always the happiest. And he thought that in a rational world our moral values and expectations could not always be out of concord with how the world is like. There should be some proportioning of desert and reward in the world. If this proportioning could not take place in this world, then it should

be the case in the world after this: in the hereafter. According to Kant God is a postulate.

Let us now see how Kant struggles with the questions we have addressed in this article. How is his rational faith reconciled with the hard cases in Scripture that we have presented? How can Kant harmonize moral autonomy with an eternal legislator for this world? To answer these questions we have to go back to the story of Abraham and Isaac. And indeed, Kant contrasts his own ideas with the Divine Command Theory as manifested in the story of Abraham and Isaac. In *Die Religion innerhalb der Grenzen der blossen Vernunft* (1793) or *Religion within the Limits of Reason Alone*, (1981b: 649–879) the book that brought him under the censure of the Prussian government for having ‘misused his philosophy to the detriment of disparagement of many fundamental tenets of Holy Scripture and Christianity’ (Beck 1997: 77), Kant starts with the presupposition that nobody is free to take anybody else’s life on the basis of religious convictions.²¹ If God seems to have issued such a horrific command as we encounter in the story of Abraham, we should be skeptical about the content.

Kant was a very cautious thinker who tried his best not to give offence to the authorities and the clergy of his time. Nevertheless, implicitly his comment on the story of Abraham implies a radical critique of the concept of revelation, as the censor was not slow to figure out.

It is illuminating to compare the cautious way of dealing with this topic by Kant with the more straightforward and heretical position of the British freethinker Thomas Paine (1737–1809), who was Kant’s contemporary. In his controversial book *The Age of Reason* (1794), published one year after Kant’s *Die Religion innerhalb der Grenzen der blossen Vernunft*, Paine comments on Moses receiving the Ten Commandments from above. This was a ‘revelation’, so Paine tells us, but he adds: ‘revelation to that person only’ (1995a: 668). He means: only a revelation to Moses, not to us. What we know about revelation is always mediated by what I have before indicated as ‘religious leaders’. So anyone believing the Ten Commandment to be true does not do this on account of God’s authority but on the basis of the authority of Moses.²²

Kant’s position does not fundamentally differ from that of Paine, but he is at pains to put it far less bluntly than Paine did. What both writers have in common is a skeptic attitude towards what comes ‘from above’. Even if the command seems to be a command of God – as Abraham appeared to think – we have to leave the possibility open that we ourselves make a mistake in interpreting the command or that the religious leader makes a mistake.²³

21 ‘Dass einem Menschen, seines Religionsglaubens wegen, das Leben zu nehmen unrecht sei, ist gewiß.’ Kant 1981b: 861.

22 Similar arguments, although more cautiously formulated and represented by the figures in a dialogue, we find in Hume 1948.

23 ‘dass hier ein Irrtum vorwalte.’ 1981[...]: 861.

Now, what would the theoreticians of the Divine Command Theory answer to Kant? And more importantly: do they have an answer?

I think they have. What Abraham and Phinehas would answer to the great philosopher from Koningbergen is that there is a contradiction between what he pretends to be doing and what he is actually doing. What Kant pretends to be doing is trying to determine the will of God but once he decides that he will never accept injunctions as 'divine' in the sense of coming from God that violate moral conscience, he is actually establishing moral conscience as his final arbiter, not God. So *de facto* Kant accepts only moral autonomy as his guiding principle.

It is very clear that the theoreticians of the divine command approach make objections to this. For the final result of Kant's approach will be that he simply eradicates all elements from the theological heritage that do not fit in with his Enlightenment philosophy, they will respond.

The dilemma we should confront Kant with is the following. 'Is it possible that an interpretation of one of the injunctions of Holy Scripture leads to something that would horrify us from a moral point of view?' To this question Kant will answer 'no'. In the *Critique of Practical Reason* he writes: 'Religion is the recognition of all duties as divine commands' (1956: 134). That seems to be the language of the divine command theory. But that is only appearance. The reason why there is only a superficial and no real similarity to the divine command theory is because for Kant what is a moral duty cannot be decided by simply listening to the voice of God or read His Scripture. Our moral duty has to be delineated purely by philosophical reasoning. The outcome of that reasoning Kant calls a 'divine command'. That implies that the 'divine command' is not the *starting point* of his moral reasoning, but the final result. Kant first follows his moral reasoning and the result is sanctified as 'divine'. That implicates that from the perspective of Kant God is not legislating for man, man is legislating for God. Or, to put the same matter in different words, religion is not the basis for morality but the other way round: morality is the basis for religion. Lewis White Beck sums up the position of Kant with the words: 'Any religion that requires anything of man other than earnest and conscientious morality is mere superstition and idolatry' (1997: 76).

This is something the adherents of divine command simply cannot accept. They see this as an unacceptable limitation of the divine personality. God is a person. God must have a 'choice'. If God cannot do otherwise than he actually does, he would be no person. He would be an automaton, a 'Dieu machine', a Spinozistic *Deus sive Natura*, not the theistic personal God that we encounter in the scriptural tradition.²⁴

Here the response from the side of divine command moralists appears to be convincing, I would say.

As I said before, Kant always tried to avoid trouble with the authorities. He certainly did not volunteer for martyrdom. This attitude might be put with the words of Montaigne: 'I shall support the good side as far as (but, if possible,

24 Analogous to LaMettrie's *L'homme machine*. See LaMettrie 1974.

excluding) the stake' (1991: 894). So Kant struggles to reconcile his predilection for moral autonomy with confessional orthodoxy.

Kant addressed the same question five years later in *Der Streit der Fakultäten* (1798) (1981a: 267–393), and here, as he had done in *Die Religion innerhalb der Grenzen der blossen Vernunft*, he dwells on the problem of Abraham. In *Der Streit* he assures us that if God *seems* to speak to humankind ('wenn Gott zum Menschen wirklich spräche') we can never be sure that it is God who is speaking. Kant uses what can be called 'the agnostic argument': man will never be able to understand Infinite God with his finite capacities (1981a: 333). In some cases it is even possible to contend with absolute certainty that we cannot hear the voice of God, to wit: if what is commanded flatly violates the moral law. That voice may sound majestic, Kant tells us, but it should be considered as a fraud (1981a: 333).

As an example of this state of affairs Kant refers to Abrahams' offer and calls this *a myth*. The poor unknowing child himself brought the wood for the fire, Kant writes. Abraham should have answered: 'that I should not kill my son is clear, but that you, appearing to me as God are really God, is far from sure, not even if your voice would yell loudly from heaven' (1981a: 333, see also Bloch 1968: 121).

It is remarkable how such a 'dry' author as Immanuel Kant talks in such emotional terms about the story of Abraham. And what is remarkable: he calls it 'a myth'.

This is strong language. Kant qualifies a central part of Holy Scripture as mythological.

The Story of Jephthah

The story of Abraham continued to fascinate commentators through the ages. Theoreticians who felt sympathy for the central message of theism sometimes pointed out that on the supreme moment Abraham was not required to offer his son. Can't we interpret the story in such a way that God is not *requiring* but, on the contrary, *against* human offers? But that is not a very convincing interpretation when we realize that the story of Abraham is no isolated incident. The story of Job is similar. Job is 'tested' by Satan with knowledge and compliance of God. The most direct similarity with Abraham's offer however is to be found in the story of Jephthah.

Jephthah was a 'mighty warrior' (Judges 11:1) and he led Israel in a struggle against the Ammonites. In this struggle he was helped by the Lord. Jephthah made a vow to the Lord and said: 'If you will give the Ammonites into my hand, then whatever comes out from the doors of my house to meet me when I return in peace from the Ammonites shall be the Lord's, and I will offer it up for a burnt offering' (Judges 29: 30–32).

Jephthah went to war and the Lord gave the Ammonites into Jephthah's hand. The Ammonites 'were subdued before the people of Israel' (Judges 29: 33).

Then Jephthah came to his home at Mizpah. And what came out from the door of his house? 'His daughter came out to meet him with tambourines and with dances'. Jephthah, so the Bible tells us, 'did with her according to his vow that he had made' (Judges 29:39).

These are strange stories. The similarity between the story of Abraham offering Isaac and that of Jephthah offering his daughter is striking. Both appear prepared to offer their children. In both stories the children willingly comply. There is only one difference though. Abraham had not to offer Isaac at the last moment, but the daughter of Jephthah is actually sacrificed.²⁵ Another difference is that Abraham did not volunteer for a vow to God, whereas Jephthah more or less caused his own unfortunate destiny because he himself sought the help of the Lord for securing his military success. Also making a vow that you will offer 'whatever comes out from the doors' of your house is somewhat strange. What comes out of the doors of your house? Usually your wife, your children – in short: your own family. So it is hard to avoid the conclusion that Jephthah knowingly and willingly jeopardized his own kind for the sake of military success.

Voltaire was abhorred about this. He wrote about the 'abominable Jewish people' who complied to human sacrifices. They were barbarians and on the basis of those barbaric laws they were prepared to offer their children (1961: 487).

Is this an unduly harsh verdict by Voltaire? Not from the perspective of an autonomous ethics of course, but from the perspective of divine command ethics it is certainly not barbaric to conform to the commands of a perfect and eternal God that sometimes requires us to do things that from our limited point of reference seem impossible to justify. For the divine command theorist these consequences are 'all in the game': 'For as the heavens are higher than the earth, so are my ways higher than your ways and my thoughts than your thoughts' (Isaiah 55: 8–9).

Most commentators chose to ignore the tension between a central tenet of theism and morality. That is especially prevalent among the commentators who want to modernize Holy Scripture and revise holy tradition without telling openly what they are doing.

Kant's Legacy in Nineteenth-Century German Theology: 'Kulturprotestantismus'

The tradition initiated by Kant we may call 'the modernist tradition' in religious thought. The term 'modernism' covers a variety of movements and tendencies, but I will use it here to designate as the attempt to take moral autonomy in religious thought as a starting point but at the same time trying to avoid an open conflict

²⁵ Although there are some interpretations that this did not actually take place: 'the fact that his daughter was mourning the fact that she would never marry, instead of mourning that she was about to die (Judges 11:37) possibly indicates that Jephthah gave her to the tabernacle as a servant instead of sacrificing her' (www.GotQuestions.org).

with divine command ethics. Modernism in this sense is an attempt to reconcile modern science and philosophy with religious traditions. When applied to the theory of interpretation modernism means that the holy text and the holy tradition are interpreted against the background of autonomous morality. Sometimes commentators standing in the modernist tradition belittle the significance of autonomous reasoning and rationalism and the Enlightenment tradition. They want us to believe that the true core of the theistic religions had always been respect for moral autonomy and the Enlightenment values. And because this is their basic conviction it colors all their interpretations. In some cases these interpretations are rather weird. An unprejudiced reading of the stories of Abraham, Jephthah, Phinehas and Job cannot ignore that there is a strong element of heteronomy and divine command ethics in the holy Book and the holy tradition. But according to the more cautious or conciliatory voices among the modernists the autonomy of ethics is not an idea that germinated in a non-religious context and has gradually gained ground in the religious traditions, rather it is an inherent element of it. We find this tendency in Immanuel Kant but, for instance, also in the great French writer, politician and historian Chateaubriand (1768–1848).

Chateaubriand presents an eloquent apology of Christianity in his book *Génie du Christianisme* (1802; 1978), published nine years after Kant's *Die Religion innerhalb der Grenzen der blossen Vernunft*. Contrary to Kant, Chateaubriand presents a scathing critique of the Enlightenment authors. If we know that Kant wrote a superb vindication of the principles of the Enlightenment in his famous essay *What is Enlightenment?* (1981c: 53–61) the difference with Chateaubriand could not be greater, so it seems. But that is only superficial,²⁶ as we will notice as soon as we delve into the matter a little further.

One of the most important elements of the Enlightenment was the doctrine of moral autonomy. This is correctly described by the great historian of philosophy, F.C. Copleston, as the main contribution of the Enlightenment to the cultural heritage of mankind. What the Enlightenment authors accomplished, so writes Copleston, is that they separated ethics from metaphysics and theology (1960: 18). There was certainly difference in tone between the moral idealism of a Diderot and the utilitarian approach of LaMettrie, so Copleston tells us, but what all Enlightenment philosophers had in common is that they wanted 'to set morality on its own feet' (1960: 18).

If this is right – and I think it is right – every criticism of the Enlightenment should address this particular issue: can morality be put on its own feet?

What we see, however, in the tradition of what we may call 'moderate theism' is that one tries to belittle the significance of the Enlightenment and tries to insinuate that moral autonomy is an inherent element of the theistic tradition. This is what we find in Chateaubriand. What he tries to do in *Génie du Christianisme* is, he tells us, 'ne pas prouver que le christianisme est excellent, parce qu'il vient

26 As Joseph de Maistre was well aware of. See what he writes on Chateaubriand in Maistre 2007: 1147.

de Dieu; mais qu'il vient de Dieu, parce qu'il est excellent' (1978: 469). So Chateaubriand's point of departure is, just like Kant, moral autonomy, not divine command ethics. But what he does not realize (at least he does not tell) is that unknowingly he subscribes to the central tenets of the position he professes to criticize: the Enlightenment. Chateaubriand is an adherent of the Enlightenment philosophy *malgré lui*.

Let me summarize the central line of my argument and my conclusions so far. I started with hard cases in law. As I said before: hard cases are so hard because the strict application of the rules of the law would result in a situation that we find difficult if not impossible to accept on moral grounds. Hard cases do not only arise within a legal context though, but also when religious precepts are applied in a contemporary context. We have seen that Holy Scripture, like modern penal and civil law, contains passages that are difficult to reconcile with sound moral sense. As an example I referred to a prohibition to change your religion. The ancient precepts are evidently contradictory to modern human rights law and the freedom of expression as enshrined in most modern constitutions.

What can we do on this? Can we do anything at all? It is clear we can. The *first* strategy is simply to do what is required by Holy Scripture. That would mean: following the text of the Bible and proclaim contemporary moral sense, modern human rights law and modern constitutions as invalid in so far as these proclaim the freedom of religion. This is attractive from a dogmatic point of view, but morally unsatisfactory. It would make believers strangers in the modern world. In its most extreme consequences it would condone religious terrorism, as the story of Phinehas makes clear.

The *second* strategy is rejecting the pretension that ancient religious texts could be guiding us in the modern world. This is morally satisfying and would not make believers strangers in the modern world, but it is unattractive from a dogmatic point of view. It would proclaim moral autonomy. Believers would be openly rejecting God's word as Thomas Paine had done in *The Age of Reason*, and what serious believer could justify this? The second strategy comes close to atheism.

So the central dilemma for the modern believer is to avoid both terrorism (first option) and atheism (second option). He wants to save the holiness of the text and at the same time avoid the consequences of the hard cases that those texts put before him. The *third* strategy is devised to accomplish just that. The third strategy in dealing with hard cases is adopting the moral autonomy of the second point of view and the dogmatic right attitude of the first. This pretended reconciliation of moral autonomy with divine revelation is the gist of the modernist position with Immanuel Kant as its foremost ideologue.

Modernism was at the centre of German theological thought from Immanuel Kant onwards and exerted an overwhelming influence in modern culture. In this article we are not concerned with modernism as such, but especially with the way it manifests itself in the theory of interpretation. In theological circles it was defended by Friedrich Schleiermacher (1768–1834). In the nineteenth

century it developed in what has been called ‘liberal Protestantism’ or ‘cultural Protestantism’ (*Kulturprotestantismus*). ‘From its outset, liberal Protestantism was committed to bridging the gap between Christian faith and modern knowledge’ (McGrath 1994: 93). What the liberal Protestants did is: ‘they demanded a degree of freedom in relation to the doctrinal inheritance of Christianity on the one hand, and traditional methods of biblical interpretation on the other’ (McGrath 1994: 93). Elements of Christian belief which they regarded as seriously out of line with modern cultural values were treated in the following way. First, they were abandoned (as happened with the doctrine of original sin). Second, they were reinterpreted in a manner more conducive to the spirit of the age (McGrath 1994: 93). One of the main representatives of the movement, Albrecht Benjamin Ritschl (1822–1889), saw history as a divinely guided process toward perfection. In the course of history some people are bearers of special divine insights. Jesus Christ was such a person.

The most representative figures of the movement were, apart from Ritschl, Wilhelm Herrmann (1846–1922), Adolf von Harnack (1851–1930) and (in a certain sense) Ernest Troeltsch (1865–1923). A contemporary representative is Paul Tillich (1886–1965).

Mark Lilla calls those liberal protestants in his overview of the tradition of political theology ‘immensely learned scholars whose greater theological-political ambitions were usually clearer than the reasoning they used to achieve them’ (2007: 230). This is a devastating observation.

What is the background of their thinking? According to the liberal Protestants there could be no contradiction between Christianity and modern German life. Now, they could be right in this although we should never forget to mention the reason why this was the case. This was the case because they simply (1) *ignored* all the problematical texts I have quoted before or (2) ‘*interpreted*’ those texts in such a way that all contradictions with modern thought evaporated. Only thanks to their own interventions and interpretative work they could contend that, in the words of Mark Lilla, ‘there was an organic connection between Protestantism and modernity, a shared conception of the values of individuality, moral universalism, reason, and progress’ (2007: 231). Harnack had put it in his *What is Christianity* (1900) as follows: ‘Law or ordinances or injunctions bidding us forcibly to alter the conditions of the age in which we happen to be living are not to be found in the Gospels’ (Harnack quoted in Lilla 2007: 231).

Modernist movements did not only gain ground within Protestant Christianity but within the Jewish tradition as well. A great name was Hermann Cohen (1842–1918), professor in Marburg and together with Natorp the founder of the Marburger School of Neo-Kantianism. In his posthumously published treatise *Religion der Vernunft aus den Quellen des Judentums* or *Religion of Reason out of the Source of Judaism* (1919) he argued that Judaism is both the source and quintessence of all ethical monotheism. It was Kant again who was helpful to establish this conviction. Cohen followed Kant accepting that the core of religion was following the moral law and ‘that religious practice can be justified only

so long as it actualizes that law in social life, without straying beyond reason's bounds' (quoted in Lilla 2007: 240). Cohen censured Kant, however, because the great German thinker had overlooked that his convictions about the moral law and moral freedom 'had derived' from Judaism. Kant could hear in Judaism only the brute commands of heteronomous laws and he was deaf to the profound modernity of Judaism.

What Cohen did not understand (and this is crucial), is that from an ethical point of view it is irrelevant where our moral precepts *come from* (the historical origin). What counts is *how they can be justified* (the justification of our moral beliefs).²⁷ And once we have stated the dilemma in these terms, the conclusion is inevitable: they are *either* justified as expressions of the will of God as manifested in revelation *or* they are justified as conforming to the moral law. Either religion is the basis for ethics or ethics is the basis for religion. Cohen and other modernists obfuscated the issue by pretending that the religious tradition could never contradict our moral ideas. He said: 'There is comfort and hope for us in the fact that the moral ideas of our religion are in full accord with the exemplary ethics of the new era ushered in by the French Revolution' (quoted in Lilla 2007: 240). Comforting this certainly was, but was it rational to believe such a thing? It would be nothing short of a miracle if ancient religious texts would be in 'full accord' with the values and rights as exemplified in the French *Déclaration des Droits de l'Homme et du Citoyen*. Such a naïve or optimistic conviction could only be held by people who unconsciously or deliberately ignore the passages we have quoted before.

In one respect Cohen was right though. He was right when he implicitly criticized that the liberal Protestants unjustifiably elevated their point of view (i.e., Christianity) as compatible with modern moral ideas while insinuating that this could not be the case for the Jewish religion.²⁸ But for the rest Cohen and the liberal Protestants shared the same illusions. They defended that there was some kind of pre-established harmony between their religions and modernity and they both obfuscated that the miraculous harmony between their religion and modernism was not a fact of nature but the product of their own blinkers and the application of what we could call the 'trick of interpretation'. Therefore Mark Lilla is right (although for somewhat different reasons than he himself advances) when he calls the convictions of the modernists 'extraordinarily naïve'. He writes: 'Neither Troeltsch nor Cohen thought that the destructive forces within biblical religion, which had surfaced repeatedly in premodern Jewish and Christian history, could ever again pose a threat' (2007: 243).

Calling the modernists 'extremely naïve' may sound a bit harsh. For we have to remind ourselves that modernist 'interpretation' is the only strategy left for a believer who wants to avoid both the 'terrorist' and the 'atheist' option of the first and second approach to deal with hard cases. There simply is no other way out for the modern believer than pretend that Holy Scripture is a 'living text' sending

27 See on the justification of ethical beliefs Brandt 1959: 241–71.

28 Another scholar combating this view was Renan 1887: 341–74.

out different messages to different people in different times. So the theory of interpretation intimately connected with liberal Protestantism did not arise as the product of a harmonious scholarly development but out of a state of emergency. What the modernist motivated was a heartfelt need: reconciling the religious tradition with modern moral ideas.

It was Kant who was pivotal in this process of adaptation of religion to the stern demands of modernity, but a great influence on the theory of interpretation of liberal Protestantism was F.D. Schleiermacher (1768–1834). The tradition of thinking that he initiated was ‘hermeneutics’.

Whereas Kant initiated the *moral autonomy* that liberal Protestantism was based on, Schleiermacher provided the *theory of interpretation* that made it possible for moral autonomy to prevail in the religious context.

Schleiermacher lectured from 1819 onward on the interpretation of texts and speech. Initially the theory of hermeneutics supposed that it was possible to grasp the original meaning of the authors of a text, but in the subsequent development of hermeneutics the adherents became more and more sceptical. The interpreter of a text from a past culture belongs to and is conditioned by his own different culture. The interpreter always views the past from a particular ‘horizon’, involving a particular ‘pre-understanding’.²⁹

This hermeneutic tradition made the third option in dealing with hard cases ‘salonfähig’. We should not have qualms about reading texts in such a way that they suit our moral purposes. Again: this may sound as a fierce criticism of the third approach but we always have to remind ourselves that there is no other option left for the serious believer. Motivated by the wish to avoid both terrorism and atheism he has to be an ‘interpreter’.

But should we say that the same logic that drives believers and theologians in the direction of hermeneutics is also compelling for legal scholars? Do we have to interpret legal texts in the same way as theologians do with religious texts? Are legal interpreters, just like religious interpreters, more or less forced to see their central texts (laws, constitutions, treaties) as inalterable Holy Scripture that can only be modernized by the interpretation techniques of the third strategy? It is an element of historical truth that the development of legal theory has followed the same pattern as we can discern in theology, but the question is whether this was necessary. In the remainder of this chapter I will contend that the theory of *legal* interpretation has uncritically followed the same course as the theory of *religious* interpretation. Why this is the case can be easily understood. Fundamental legal texts like a Constitution have some resemblance to a holy text as the Bible or Qur’an. But how far the analogy goes is open to discussion.

29 The most important contribution to hermeneutics in the twentieth century was Gadamer 1975.

The Constitution as Sacred Text (and the Judiciary as Priesthood)

One of the classic texts comparing the American Constitution to a kind of Holy Scripture is *A Constitutional Faith* (1969) by the American Supreme Court Justice Hugo Black (1886–1971). The American Constitution is the foundational text of the United States, Black tells us. He writes about his ‘deep respect and boundless admiration and love for our Constitution and the men who drafted it’ (1969: 65). Black continues: ‘The Constitution is my legal Bible; its plan of our government is my plan and its destiny is my destiny. I cherish every word of it, from the first to the last, and I personally deplore even the slightest deviation from its least important commands.’³⁰

The similarity between Bible and Constitution is the focus of an impressive and ever growing literature. The philosopher Richard Taylor (1919–2003) draws a parallel between the American judiciary and priesthood and he contends that one of the resemblances between the two priesthoods is that each rests its authority in part upon a body of literature, the central part of which is deemed somehow sacred or inspired. ‘The similarity in the roles of the Bible and the Constitution within the religious and the secular priesthood is worth stressing. Priests, for example, as well as lesser functionaries in the church, swear their belief in and fidelity to the Bible, treating it as sacred, not just for its content, but in its own right’ (1889: 159). The Bible is not only a ‘source of inspiration’ or an ‘important book’ for the priest, but an object of veneration. And so is the Constitution for the judges. No one who knows anything about the ‘constitutional faith’ of judges could be surprised about Justice Hugo Black having a Constitution to accompany him into his grave.

That legal texts as a Constitution have some similarity with religious texts is clear. The question is, though, what conclusions we have to draw from this. And another question is how far the similarity goes. Both legal and religious texts are authoritative, but is it the same authority? This can be doubted. In the case of a legal text it is the authority of man over man and ultimately of man over himself. Compliance to legal texts like the law or a Constitution is obedience to oneself, at least in a democracy. Religious texts, on the other hand, have the pretension to be binding on the basis of some transcendent authority.

One may put the difference also like this. A legal text is man-made and can be openly changed by human intervention. So a legal community does not have to take its resort to ‘hermeneutic interpretation’ to adapt its legal culture to the demands of modern times. Religious believers are in a different position. Within the confines of their theistic worldview, they cannot openly change their religious document. The only way to do this is operating in a secret manner; religionists are required to ‘interpret’ their texts in order to change them.

To make that clear I will elaborate somewhat on the developments that have made liberal interpretation within legal circles the orthodoxy of the day, just like liberal Protestantism became dominant among nineteenth-century theologians in Europe.

30 See on Black’s position also Silverstein 1984.

Liberal Interpretation: The Ideal of the Living Constitution

One of the most outspoken advocates for the idea of a Living Constitution was the American Supreme Court Justice William Joseph Brennan (1906–1997). His worldview and manner of interpreting the holy text of the lawyers resembles the way liberal Protestants treated the Bible. Brennan was associate justice in the Supreme Court in the period between 1956 till 1990. So he was an active member of the Court during a period of 44 years. That is a long period and Brennan exerted a great influence on the development of American law.

In 1989 Brennan delivered the H.L.A. Hart Lecture in Jurisprudence and Moral Philosophy at the University of Oxford. That was one year before his retirement. In this lecture he looks back on his service at the Court and, more importantly, he gives a justification for his long-time activist approach on the bench. The immediate occasion for his lecture was the discussion in Great-Britain on the question whether it would be wise to enshrine human rights in a specially written document.³¹ Brennan asks: ‘Why have a bill of rights, that is, some fairly general codification of civil liberties, at all?’ (1989: 425). And because it is not only a declaration, but a document that can be interpreted by judges his question is: ‘whether an entrenched bill of rights, enforceable against government by individuals in courts of law, is worth having.’ 1989: 427) Brennan’s answer to this question is an unqualified ‘yes’ and his lecture is actually one long eulogy on the American legal system, especially if the judges consider themselves fit to interpret the Constitution as a ‘Living document’.

Brennan starts with some observations on the rights enshrined in the constitution. He is not against that. And, so he follows (1989: 426):

So long as they are not unduly vague, as I believe the European Convention and its American counterpart are not, broad formulations of personal rights are a virtue, because they permit judges to adapt canons of right to situations not envisaged by those who framed them, thereby facilitating their evolution and preserving their vitality.

Subsequently Brennan quotes Justice Brandeis (1856–1941), another Supreme Court justice, though from a previous generation (1916–1939), who once said that the Constitution is not a ‘straitjacket’. Brandeis had said: ‘It is a living organism. As such it is capable of growth – of expansion and of adaptation to new conditions (...) Because our Constitution possesses the capacity of adaptation, it has endured as the fundamental law of an ever-developing people’ (1989: 426).³²

This is the well-known theory of the ‘Living Constitution’ formulated by a judge who deceased in 1941 but whose ideas not only inspired the Warren Court (1953–1969) but also the Burger Court (1969–1986). The idea of the Living

31 See on this Zoethout 1998, 2006.

32 Brennan also quotes Bickel 1962: 107.

Constitution or the Constitution as a Living Document, a Living Text, has been the orthodoxy of the day for a very long time. Nevertheless, there emerged a reaction to the liberal interpretation of the Constitution by scholars and judges who stress the importance of judicial restraint, castigating the liberal hermeneutics as a pretext for arbitrary judicial omnipotence. Names of those 'restrainists' are, apart from Scalia, William Rehnquist (1976), Robert Bork (1990, 2003) and Hugo Black (1969).

The overwhelming majority of the American scholars and judges are committed to the school that favours some kind of liberal interpretation, just like most theologians were advocates of the liberal Protestant approach with regard to Holy Scripture.

Characteristic for the theory of the living constitution, so it seems, is its great rhetorical attractiveness. To explain this, let us revoke the imagery that is being used by its adherents and subsequently try to ascertain whether the popularity of the living Constitution is justified from a more rational and scholarly point of view. To do this I want to focus for a moment on the words of Brandeis as quoted above.

First: according to Brandeis the Constitution should not be a straitjacket. The word 'straitjacket' immediately has negative associations. In a straitjacket people are laced up. But how can a Constitution lace up people? Taken literally this has no meaning at all, but perhaps we should not take it that way. Does it mean that if the Constitution does not facilitate judicial law-making we have to consider it a straitjacket? But in that case Brennan's and Brandeis' use of the word 'straitjacket' would be nothing less than a *oratio pro domo*: it is a straitjacket if they, the judges, cannot do with the Constitution whatever they deem appropriate. In *that sense* the Constitution may be a straitjacket, but in this sense the Constitution *was meant to be a straitjacket*. Is that not the purpose of all law? If the law was like crystal ball, to be interpreted in every possible way, it would not be good law, would it?

A second part of the imagery of the rhetoric of the living Constitution is that it is a 'living organism'. Taken literally, this is a dubious comparison. A Constitution does not live, like an animal lives or a plant. A Constitution is more like a table than like a cat. Nevertheless, the imagery of a living Constitution is attractive. Why? What do we try to convey when we speak of a Constitution as 'living'?

That appears when Brandeis talks about 'growth'. Like an ordinary living being, also a Constitution has a beginning. The beginning of the Constitution of the United States was in 1787. But the Constitution that we have now, so Brandeis (and by implication Brennan) seems to convey to us, is not the same Constitution as the Americans had in 1787. The Constitution has 'grown' or, to use a more common metaphor, it has 'developed'.

Yet, characteristic of analogies is usually that the people that use them do this only in a restricted sense. The same is true here. If we would follow the metaphors of 'growth' and 'development' this would point in the direction of 'death'. All living beings ultimately die. So if a Constitution is a 'living text', the ultimate consequence of this would be that this text would die as well. The strange thing is, however, that the apologists of the living Constitution do not seem to subscribe to that position. On

the contrary, the imagery of the living constitutionnalists seems to have banned out all death. Their Constitution has eternal life, just like the word of God.

This is strange. If they would want to secure the eternity of their Constitution they had rather compare the Constitution with inanimate things, straitjackets for instance, than elaborate on the metaphor of life and organic growth.

Anyhow, that is not what the apologists for the living text do. They think the Constitution has to be adapted to 'new conditions', as Brandeis tells us. Perhaps a Darwinian comparison is illuminating here. The advocates of the living Constitution seem to think that the constitution, like a species, has to adapt itself to the changing circumstances. If not, the species will die out, and so will the Constitution.

Let us now leave Brandeis and return to Brennan. That is necessary because it is Brennan who explicitly says something that is only implicitly present in the quote from Brandeis. Brennan also tells us *who* has to develop the constitution. That is not the legislative power, it is the judiciary.

This is far from self-evident. In the wake of attractive imagery of 'life', 'growth' and 'development' an altogether different idea is smuggled in. This idea is that one specific institution should do all the developing, i.e. the judiciary. As I said: this is not self-evident. One could adopt all the rhetorical imagery of 'living', 'organism', 'adapting to changing circumstances' and so on and so forth, and still contend that it is the *legislative* power and not the judiciary that has to take the leading role. But that is not the opinion of Brennan and other liberal interpreters. He brings that to our attention when he writes that general rights are a virtue 'because they permit judges to adapt canons of right to situations not envisaged by those who framed them'.

Especially the word 'because' requires our attention. Brennan does not contend that he subscribes to a written declaration of civil rights *although* they comprise general formulations. No, he favours such a declaration exactly *because* it comprises those majestic generalities. That is to say: because those 'canons of right' make it possible to make decisions that the framers of the Constitution had *not* foreseen.

This is a rather revealing formulation from the perspective of the critics of the idea of a living constitution. Brennan seems satisfied with the Constitution not because what is in it but what is omitted. And the reason is that because of those omissions it is possible for judges to apply 'canons of right'. From the further development of his lecture it appears that Brennan is especially satisfied with those rights of the American people that the framers of the Constitution did *not* foresee and did *not* lay down in the constitution.

A great part of Brennan's lecture is dedicated to the 'new rights' that were invented by the judges on occasion of their interpreting the Constitution (or should we say: despite the Constitution?). He refers to *Brown v. Board of Education* (1954), an important ruling from the Warren-period in which the Court stated that the 'separate but equal' provisions for the black community were considered to be 'inherently unequal'. Another ruling that Brennan is very enthusiastic about is *Griswold v. Connecticut* (1965) that made it unconstitutional to prohibit

contraceptives for adults. A further ruling that Brennan mentions to illustrate his approving attitude of the Constitution is *Mapp v. Ohio* (1961) that made it impossible to use evidence that was illegally acquired. Another important ruling was *Miranda v. Arizona* (1966), in which, so Brennan says: 'we held that the police must inform a person subjected to custodial interrogation of his right to remain silent'. And last but not least, of course, *Roe v. Wade* from 1973, in which a right to abortion was deduced from the right to privacy that was introduced in the *Griswold* case some ten years earlier.

It would not be true to say that Brennan is completely uncritical about the Court. He certainly has some points of criticism. But in those cases he is dissatisfied because some hard cases have not been decided by the court, although they should. For instance Brennan thinks that capital punishment will one day be abolished by the court. Brennan is against capital punishment. So one day the court shall have to decide that the death penalty is a 'cruel and unusual punishment' and therefore violating the eighth amendment.

Gradually it must have dawned upon the British audience assembled to listen to Supreme Court Justice William Brennan in 1989 what his advocacy of a bill of rights means. It means that the judiciary will be put in a position to invent more and more rights.³³ Brennan is fully confident that the judges have to take the lead in this. Path breaking rulings like *Brown v. Board of Education* 'met with determined resistance thirty-five years ago', Brennan tells us enthusiastically, but that resistance has dwindled down (1989: 432). And so it is with all the other situations in which the judiciary took the lead. Some years later there is always 'almost universal acceptance'. Take *Roe v. Wade*, 'establishing a woman's fundamental right to choose whether to bear a child'. Who would not be happy with that decision after some elapse of time?³⁴

Antonin Scalia on the Living Constitution

Although it would not be right to say that the school of liberal interpretation that Brennan is such an outspoken voice of reigns unbridled, it is fair to say that the liberals were and are in the majority. The most vocal contemporary voices against the theory of the living Constitution are Robert Bork and Antonin Scalia.

I will now give an overview of Scalia's ideas on interpretation before elaborating on the difference between religious and legal interpretation that is the focal point of my argument.

The most comprehensive exposition of Scalia's view on statutory and constitutional interpretation we find in his *Common Law Courts in a Civil Law System The Role of the United States Federal Courts in Interpreting the Constitution*

33 See for a critique on this Wellman 1999, Glendon 1991.

34 That this is too optimistic appears from the continuous dissatisfaction of Christian groups with *Roe*. See on this Linker 2006 and Neuhaus 1997.

and *Laws* (1997). Scalia defends a textualist approach and rejects the theory of interpretation favoured by the idea of the 'Living Constitution'.

To understand the sorry predicament of American constitutional theory and practice one has to gauge into the background of American legal history. The American system is derived from the common law approach. And the common law is not so much 'customary law' as 'law developed by the judges' (1997: 3). In the very infancy of Anglo-Saxon law it could have been thought that the courts were mere expositors of generally accepted social practices, but in the further development of Anglo-Saxon law this was certainly not the case: any equivalence between custom and common law ceased to exist. That immediately appears if we read Oliver Wendell Holmes' well-known and influential book *The Common Law* (1963). This mainly deals with individual court decisions and the judges who wrote them. The law was *created* by the judges.

This common law approach is an important influence on American freshmen entering a judicial career. They learn the law not by reading statutes, but by studying judicial opinions. How exciting! This explains why first-year law school is so exhilarating. Scalia writes: 'it consists of playing common-law judge' (1997: 7). It is like playing the king, devising out of the brilliance of one's own mind, those laws that ought to govern mankind (1997: 7).

The Idea of the Living Constitution is both Undemocratic and Not in Accordance with the Rule of Law

Contrary to Brennan, Scalia contends that the problem with this approach is that it not so easily fits in with both democracy and the rule of law. Why that is the case had already been made clear by one of the adherents of the law-codification movement, Robert Rantoul, in a speech in 1836. Rantoul wrote: 'Judge-made law is ex post facto law, and therefore unjust. An act is not forbidden by the statute law, but it becomes void by judicial construction. The legislature could not effect this, for the Constitution forbids it. The judiciary shall not usurp legislative power, says the Bill of Rights: yet it not only usurps, but runs riot beyond the confines of legislative power' (quoted in Scalia 1997: 10). According the Rantoul judge-made law is 'special legislation'. The judge makes law by 'extorting from precedents something they do not contain' (1997: 11).

Scalia has no quarrel with the common law and its process. What he criticizes, though, is the *attitude* of the common law judge *extending its influence on contemporary American constitutional law*. We live in an age of legislation and most new law is statutory law. Nevertheless the attitude of the common law judge is still exerting a massive influence on the way we interpret statutes and also the Constitution. Many people – ordinary people but lawyers and constitutional scholars as well – see the Constitution as a charter for judges to develop an evolving common law of freedom of speech, of privacy rights, and the like (1997: 13). This is not right. What we need is a science of statutory interpretation. The most important question is: what are we looking for when we construe a statute?

The Intent of the Legislature is not Relevant

One of the answers to this question is that we have to look to the 'intent of the legislature'. But that is too subjectivistic, according to Scalia. What we have to look for is some sort of 'objective intent', specified as: 'the intent that a reasonable person would gather from the text of the law' (1997: 17).

Why should we look for objective intent and not subjective intent? Mainly: because only the first is compatible with democratic government. It is undemocratic and even unfair to have the meaning of law determined by what the lawgiver meant instead of what the lawgiver promulgated. Unfair because: 'Government by unexpressed intent is tyrannical' (1997: 17). But it is also not compatible with democratic theory that laws mean whatever they ought to mean, and that unelected judges decide what that is (1997: 22). Congress can enact foolish statutes as well as wise ones, and it is not for the courts to decide which is which and rewrite the former (1997: 20). A result of Scalia's view that the objective indication of the words, rather than the intent of the legislature, is what constitutes the law leads him to the conclusion that legislative history should not be used as an authoritative indication of a statute's meaning. He sides with Chief Justice Taney who wrote: 'The law as it passed is the will of the majority of both houses, and the only mode in which that will is spoken is in the act itself' (1997: 30). Or Felix Frankfurter who wittily remarked: 'I should concur in this result more readily if the Court could reach it by analysis of the statute instead of by psychoanalysis of Congress' (1997: 30).

Historical research may be necessary, though, but then not to ascertain the drafter's intent but to gauge the original meaning of the text. 'What I look for in the Constitution is precisely what I look for in a statute: the original meaning of the text, not what the original draftsmen intended' (1997: 38). So Scalia gives equal weight to Jay's pieces in *The Federalist*, and to Jefferson's writing, as to those of Madison and Hamilton, although only Madison and Hamilton were framers. What is important is that Jay, Jefferson, Madison and Hamilton were contemporaries and we have to interpret the text of the Constitution according to the meaning of the words used in the text at the time the Constitution was adopted. What is crucial to construe the law is not 'current meaning' of the words (the meaning those words have in our time) but 'original meaning' (the meaning those words had when the Constitution was enacted). For it is *that* meaning that the American people had voted for when they enacted the Constitution.

Against the Living Constitution and in Favour of 'Textualism' and 'Originalism'

Here Scalia opposes the idea of the Living Constitution. He sees this as 'the common law returned' but only much more powerful (1997: 38). The common law attitude applied to contemporary constitutional theory means that the Constitution might mean what it *ought* to mean. Is it morally desirable that there is a right to die? So, there is. Not the text of the Constitution is decisive, but whether the

judges want such a right. 'If it is good, it is so. Never mind the text that we are supposedly construing; we will smuggle these new rights in (...) ' (1997: 39).

Scalia is vehemently opposed to a theory – for instance defended by Eskridge in a book on statutory interpretation – that it is proper for a judge who applies a statute to consider 'not only what the statute means abstractly, or even on the basis of legislative history, but also what it ought to mean in terms of the needs and goals of our present day society' (1997: 22).

The judge has to follow the text, because the text is the law (1997: 22). This philosophy of interpretation is called 'textualism' by Scalia (1997: 23). So his theory of interpretation is based on two pillars. First: the text is central (textualism). Second: the text has to be interpreted according to what the words meant on the moment that the text was made (originalism).

Presupposed to Scalia's whole approach is a theory about language, meaning and interpretation. This is expressed clearly in the passage where Scalia contends that the good textualist is not a literalist, neither a nihilist. 'Words do have a limited range of meaning, and no interpretation that goes beyond that range is permissible' (1997: 24).

Liberal evolutionists tend to see the march of the Court in terms of a progressive liberalisation of men from the tentacles of oppression, but Scalia underscores that creating new restrictions on democratic governments requires very good reasons. The liberals take this very lightly. The future agenda of constitutional evolutionists is mostly more of the same: the creation of new restrictions upon democratic government, rather than the elimination of old ones (1997: 42). But shouldn't the Constitution be changeable, liberals will be inclined to answer Scalia and other originalists and textualists? As a matter of fact: no. The whole purpose of the Constitution is *to prevent change*. The aim of making a Constitution is to entrench certain rights in such a manner that future generations cannot readily take them away (1997: 40).³⁵ And *if* the Constitution has to change, we should follow the difficult procedure that the Constitution itself describes. People who complain that this would make constitutional change more difficult or even virtually impossible may be right but they misjudge that precisely this is the purpose of a Constitution: resistance against easy change.

What opponents of textualism and originalism present as a problem with this theory is exactly its great advantage. As things now stand, Scalia writes, the state and federal government may apply capital punishment or abolish it, permit suicide or forbid it. But when capital punishment is held to violate the Eight Amendment this is not longer the case. Then all flexibility with regard to those matters will be gone. Scalia concludes: devotees of The Living Constitution do not seek to facilitate change but to prevent it (1997: 42). Perhaps society as a whole is happy

35 The classic discussion on this point was between Edmund Burke, stressing the need to conserve the original plan of the Constitution, and Thomas Paine stressing that we cannot be governed by the 'dead hand of the past'. See on this Burke 1982 and Paine 1995b.

and pleased with what the Supreme Court did, but we should not pretend that some of the decisions of the Supreme Court did not *eliminate* a liberty that previously existed (1997: 44).

The most glaring defect of the concept of the Living Constitution to Scalia is that there is no agreement as to what is to be the guiding principle of the evolution. The evolutionists are divided into as many camps as there are individual views of the good. Here there is a great difference with the originalist. The originalist knows at least what he is looking for: the original meaning of the text (1997: 45).

For the evolutionist the Constitution is not a text like other texts. It means not what it says or what it was understood to mean, but what it should mean in the light of what are called the 'evolving standards of decency that mark the progress of maturing society' (1997: 46). Scalia rejects that.

Legal Interpretation and Religious Interpretation: Not the Same

Let us now, after having delineated the main features of Scalia's theory of legal interpretation, return to the comparison between legal and religious interpretation. Suppose we should apply textualism and originalism to the Bible or the Qur'an. We have seen with regard to the Bible: that would lead to disastrous consequences.³⁶ It would lead us to condoning the sacrifice of children (Abraham, Jephthah) or the violent overthrow of legitimate authority (Phinehas). So every serious believer who wants to avoid being convicted for murder or sedition and at the same time uphold the claim that the text is 'holy' (and accordingly has authority over us), is forced to the conclusion that those 'hard cases' have a hidden meaning that can only be disclosed by focussing on some 'spiritual meaning'. And that 'spiritual meaning' has to mean sometimes the complete opposite of what a textualist and originalist approach would lead to in order to acquire an acceptable result. Only by concentrating on a 'spiritualist meaning' it may be possible to prevent that we have to bring children's offers at God's command.

Jesus Christ was perhaps well aware of this. Although pretending to be a sincere textualist who had not come to abolish the law and the prophets (Matthew 5: 17), he continued: 'For I tell you, unless your righteousness exceeds that of the scribes and Pharisees, you will never enter the kingdom of heaven' (Matthew 5: 20).

It seems Christ is struggling in this passage with the eternal dilemma of all liberal Protestants: how can we remain faithful to Holy Scripture and at the same time avoid stoning women, offering children, slaying apostates and other problematic commands from Scripture and Jesus Christ, just like all liberal Protestants, uses the traffic island of 'interpretation'. He pretends that 'not an iota, not a dot' will be changed (Matthew 5: 18) from the law, and he says 'whoever relaxes one of the least of these commandments and teaches others to do the same will be called least in the

³⁶ With regard to the Qur'an as well, but for my argument the analysis of one Holy book suffices.

kingdom of heaven', but in fact he changes commandments on stoning women to something more acceptable by referring to 'righteousness' (Matthew 5: 20).

The advocates of Liberal Protestantism in the legal context or the proponents of the Living Constitution (Brennan *cum suis*) try to make us believe that what has happened in the religious context should also be done in the legal context: a move away from textualism to more 'open' approaches of the text.³⁷ This misapplied analogy between religious interpretation and legal interpretation seems convincing once we take the comparison between legal Holy Scripture and religious Holy Scripture too far. However, we have to remind ourselves: legal scripture is only 'holy' in the sense that the Constitution in 1787 was adopted after an extensive discussion in the country, by a qualified majority, and that the framers of the Constitution were very able men and that the content of the Constitution is very important for the country.³⁸ But the men who framed the Constitution, although wise,³⁹ were not 'infallible' like God is infallible or, according to Catholics, the pope is infallible.⁴⁰

Not only the framers are not infallible, the Constitution is not infallible either. It may be a fine piece of work devised by men, but it remains a human product with all the imperfections that belong to everything that we, humans, make.

And most important of all: the Constitution can be changed. Not in the sense of secretly changing it by judicial interpretation, as Brennan favours, but openly, by revising it through the legislative process, as Scalia advocates. That procedure is difficult and so it was meant to be, but it is not impossible.

The protagonists of liberal interpretation in law tend to portray their own stance as a manifestation of constitutional patriotism (Müller 2007). But that pretension can be challenged. The greatest constitutional patriot, Hugo Black, was very critical on liberal interpretation. That is interesting because Black was not, as Scalia and Bork are, politically associated with conservative or right wing politics.⁴¹ Black simply distrusted judicial power. He mitigated the high expectations that people had from judicial interventions to remedy social problems (1969: 11). He pointed out that the Supreme Court had once had completely different political proclivities and, so Black warned us, 'what has occurred may occur again' (1969: 11). The rule of law, one of the great ideals of American constitutional thought, meant much more to Black than only respect for constitutional rights. 'Ultimately it meant law based on clear and concise rules, which would check the discretion and will of the judiciary' (1969: 15). So a clear warning for hermeneutics à la Brennan.

* * *

37 A classic text in Dutch legal theory effecting this change is Wiarda 1988.

38 See on this Kammen 1987, Wood 1969, Bailyn 1992, 1993.

39 See for a manifestation of the high level of political philosophical wisdom of the time Madison et al. 1987.

40 See on the background of this doctrine Bury 1930: 47 ff.

41 Especially Bork is a fierce critic of liberal political culture. See Bork 1996.

Let us conclude with a final word on religious scripture as well. Not only the similarities, but also the differences between legal Scripture and religious Holy Scripture are manifest. Let us substantiate this insight a bit further by making the following comparison.

Suppose someone professing to be a serious believer would say that God is not infallible and that He has made several mistakes in Holy Scripture. God's ideas on women are outdated, this believer could contend, following Nahed Selim, Nawal El Saadawi (2007), or Ayaan Hirsi Ali (2007). Or he could state that God's ideas on homosexuality are not in tune with modern psychological and biological research on the causes of homosexuality. God should have read *Virtually Normal* (1996) by Andrew Sullivan and he could have freed himself from the ordinary misconceptions about homosexuality. For someone whose nature is to be gay it would be 'unnatural' to engage in heterosexual behaviour. It is also possible that this believer would argue that the lack of religious freedom that is manifest in the passages from Deuteronomy, Judges and Numbers quoted at the beginning of this treatise does not square with the Universal Declaration of Human Rights (1948) or with the provisions enshrined in the European Declaration of Human Rights and Fundamental Freedoms (1950). What can we do about this?

What we have to do, so this believer could argue, is literally *rewrite* Holy Scripture. In short: we have to revise the passages about Abraham and Isaac, Jephthah, Phinehas and other passages in such a way that they would be more acceptable to our contemporary moral taste. Perhaps our imaginary believer could also propose a procedure for this: we have to install an ethical commission whose task it is to produce a draft 'Holy Scripture Revised'. Perhaps that document could even be presented to the national parliament. And parliament could after careful consideration adopt the new text of Holy Scripture Revised as the public morality of our time.

What would we say of the proposal of this 'serious believer'? One thing is sure, the collection of books containing the sacred books of the Jewish and Christian religions and known as 'the bible', has been purified many times from passages that were considered to be offensive (Karolidis et al. 1999: 181). In 1818 the Swedenborgian John Bellamy published *The Holy Bible, Newly Translated*, declaring that no major biblical figure could have committed actions he found unacceptable. So the translation from Hebrew must be at fault and he revised passages he considered indecent. More or less the same conviction we encounter in Dr. Benjamin Boothroyd's *The New Family Bible and Improved Version* (1824). The Congregationalist Boothroyd wanted to circumvent 'many offensive and delicate expressions' in the Bible. Even more interventionist was John Watson who published in the same year *The Holy Bible Arranged and Adapted for Family Reading*. He replaced offensive passages with his own writing. Also William Alexander, a Quaker printer, changed words and passages in his *The Holy Bible, Principally Designed to Facilitate the Audible or Social Reading of the Sacred Scriptures* that he considered 'not congenial to the present age and refinement'. What makes this last remark interesting is that apparently Alexander endorsed the

idea of moral evolution and considered the Bible affected by the less improved moral ideas of former ages.

That brings us back to my 'serious believer'. Although there are historical precedents for his approach in rewriting scripture – one of the most notorious being Jefferson's elimination of all supernatural elements from the Gospels (1996) – and although he has some contemporary adherents as well,⁴² he has also met great and violent resistance. In former times he would have been stoned as a blasphemer or heretic and nowadays he would be laughed out of court as a lunatic (at least if he was so fortunate to be born in a country where blasphemy and heresy are not cases for capital punishment, as still is a reality in many countries of the world) (Levi 1993).

In the end, the only option left for our serious believer is to change the text by 'interpretation', not by open revision. Like Jesus Christ had done. But when we are dissatisfied with our legal documents (our constitutions, our treaties, and our laws) we can change them, simply by rewriting them, exactly according to the procedure outlined above.

References

- Adams, D.M. (ed.) 1996. *Philosophical Problems of the Law*, Second Edition, Belmont: Wadworth Publishing Company.
- Ahadi, M. 2008. *Ich habe abgeschworen: warum ich für die Freiheit und gegen den Islam kämpfe*, München: Heyne.
- Armstrong, K. 2007. *The Bible: The Biography*. London: Atlantic Books.
- Bailyn, B. 1992. *The Ideological Origins of the American Revolution*. Enlarged Edition (1976). Cambridge Mass. London: Belknap Press of Harvard University Press.
- Bailyn, B. (ed.) 1993. *The Debate on the Constitution, Federalist and Antifederalist Speeches, Articles, and Letters During the Struggle over Ratification, Part I & II*. New York: The Library of America.
- Beck, L.W. 1997. Kant in: Lewis White Beck, *Six secular Philosophers. Religious thought of Spinoza, Hume, Kant, Nietzsche, William James and Santayana*, Bristol: Thoemmes Press.
- Bickel, A. 1962. *The Least Dangerous Branch*. New Haven: Yale University Press.
- Bix, B. 1993. *Law, Language, and Legal Determinancy*, Oxford: Clarendon Press.
- Black, H.L. 1969. *A Constitutional Faith*. New York: Alfred Knopf.

42 Karen Armstrong among them. Writing about the scribes who did not regard the early material that would become the bible as sacrosanct, Armstrong says they 'felt free to add new passages, altering them to fit their changed circumstances' 2007: 11.

- Blackburn, P. 1996. L'appel au commandement divin et ses critiques in: Pierre Blackburn, *L'éthique. Fondements et problématiques contemporaines*. Saint Laurent: Éditions du Renouveau Pédagogique.
- Bloch, E. 1968. *Atheismus im Christentum. Zur Religion des Exodus und des Reichs*, Frankfurt am Main: Suhrkamp.
- Bork, R.H. 1990. *The Tempting of America, The Political Seduction of the Law*. London: Sinclair-Stevenson.
- Bork, R.H. 1996. *Slouching towards Gomorrah. Modern Liberalism and American Decline*. New York: Harper Collins.
- Bork, R.H. 2003. *Coercing Virtue. The Worldwide Rule of Judges*, Washington, D.C.: The AEI Press.
- Bradlaugh Bonner, H. 1934. *Penalties Upon Opinion: Some Records for the Laws of Heresy and Blasphemy*, Third Edition, revised and enlarged by F.W. Read, London: Watts & Co.
- Brandt, R. 1959. *Ethical Theory. The Problems of Normative and Critical Ethics*, Engelwood Cliffs, NJ: Prentice-Hall.
- Brennan, W.J., Jr. 1989. Why Have a Bill of Rights? in: *Oxford Journal of Legal Studies*, 425–40.
- Burke, E. 1982. *Reflections on the Revolution in France*. (1790) edited by Conor Cruise O'Brien, Harmondsworth: Penguin Books.
- Bury, J.B. 1930. *History of the Papacy in the 19th Century*, Edited, with a Memoir. London: McMillan and Co. Limited.
- Chateaubriand, 1978. *Génie du Christianisme ou Beautés de la Religion Chrétienne*, ed. Maurice Regard, Paris: Gallimard (1802).
- Copleston, F. S.J. 1960. *A History of Philosophy*, Volume 6, Part I, The French Enlightenment to Kant, New York: Image Books.
- Clifford, W.K. 1999. The Ethics of Belief (1877) in: W.K. Clifford, *The Ethics of Belief and Other Essays*, Introduction by Timothy J. Madigan, Amherst, New York: Prometheus Books.
- Cliteur, P. 2004. *God houdt niet van vrijzinnigheid*. Verzamelde columns en krantenartikelen 1993–2004, Amsterdam: Bert Bakker.
- Davis, J.M., 2003. *Martyrs. Innocence, Vengeance, and Despair in the Middle East*, New York: Palgrave, MacMillan.
- Dershowitz, A.M. 2000. *The Genesis of Justice. Ten Stories of Biblical Injustice that Led to the Ten Commandments and Modern Law*, New York: Warner Books.
- Djavann, C. 2004. *Que pense Allah de l'Europe*, Paris: Gallimard.
- Dworkin, R. 1978. *Taking Rights Seriously*, Cambridge (Mass): Harvard University Press.
- Dworkin, R. 1982. Natural' Law Revisited in: *University of Florida Law Review*, 34 (1982), 165–88.
- Dworkin, R. 1985. *A Matter of Principle*, Cambridge (Mass.): Harvard University Press.

- Dworkin, R. 1986. *Law's Empire*, Cambridge (Mass.): The Belknap Press of Harvard University Press.
- D'Souza, D. 2007. *What's so great about Christianity*, Washinton, DC: Regnery Publishing, Inc.
- Eagleton, T. 1983. *Literary Theory. An Introduction*, Cambridge (Mass.)/Oxford: Blackwell.
- Esposito, J.L. 2002. *Unholy War. Terror in the Name of Islam*, New York/Oxford: Oxford University Press.
- Evans, G.R. 2003. *A Brief History of Heresy*. Malden/Oxford: Blackwell.
- Feinberg, J. and H. Gross (eds) 1991. *Philosophy of Law*, Fourth Edition, Belmont, California: Wadsworth Publishing Company.
- Fernández-Armesto, F. 2003. Books of Truth: the idea of infallible Holy Scriptures in: Fernández-Armesto, *Ideas that changed the World*, London and New York: Dorling Kindersley.
- Fuller, Lon L. 1958. Positivism and Fidelity to Law – A Reply to Professor Hart in: *Harvard Law Review*, 71 (1958), 630–72.
- Gadamer, H.G. 1975. *Wahrheit und Methode: Grundzüge einer philosophischen Hermeneutik*, 4. Auflage. Tübingen: J.C.B. Mohr (Paul Siebeck).
- Gellner, E. 1992. *Postmodernism, Reason, and Religion*, London and New York: Routledge.
- Gensler, H.J. 1998. Supernaturalism in: *Ethics*, London & New York: Routledge.
- Glendon, M.A. 1991. *Rights Talk. The Impoverishment of Political Discourse*. New York: The Free Press.
- Gogh, T. van 2003. *Allah weet het beter*, Amsterdam: Xtra Producties.
- Grey, T.C. 1984. The Constitution as Scripture in: *Stanford Law Review*, 37 (1984), 1–25.
- Griffith, L. 2002. *The War on Terrorism and the Terror of God*, Grand Rapids, Michigan/Cambridge, U.K: William B. Eerdmans Publishing Company.
- Hart, H.L.A. 1958. Positivism and the Separation of Law and Morals in: *Harvard Law Review*, 71.
- Hart, H.L.A., 1961. *The Concept of Law*, Oxford: Oxford University Press.
- Hart, H.L.A. 1983. *Essays in Jurisprudence and Philosophy*, Oxford: Clarendon Press.
- Hegener, M. 2005. *Vrijheid van godsdienst*, Amsterdam/Antwerpen: Uitgeverij Contact.
- Hirsi Ali, A. 2007. *Infidel*. London: The Free Press.
- Holden, B. 1993. *Understanding Liberal Democracy*, Second edition, New York: Harvester/Wheatheaf.
- Holmes, O.W. 1963. *The common law*, edited by Mark DeWolfe Howe. Boston, Toronto: Little, Brown and Company.
- Hume, D. 1948. *Dialogues concerning Natural Religion*. Edited with an Introduction by Henry D. Aiken (1776). New York: Hafner Press, London: Collier MacMilland Publishers.

- Huxley, H.T. 1992. *Agnosticism and Christianity*. And other Essays, Buffalo, New York: Prometheus Books.
- Idziak, J.M. 1979. Divine Command Morality: A Guide to the Literature in: J.M. Idziak *Divine Command Morality: Historical and Contemporary Readings*, New York and Toronto: The Edwin Mellen Press.
- Jami, E. 2007. *Het recht om ex-moslim te zijn*, Amsterdam: Ten Have.
- Jefferson, T. 1996. *Jefferson's "Bible". The Life and Morals of Jesus of Nazareth*, Foreword by William Murchison and Introduction by Judd W. Patton (1904). Grove City: American Book Distributors.
- Jellinek, G. 1927. *Die Erklärung der Menschen- und Bürgerrechte*, Vierte Auflage, in Dritter Auflage bearbeitet von Walter Jellinek, München und Leipzig: Duncker & Humblot.
- Juergensmeyer, M. 2003. *Terror in the Mind of God*. The Global Rise of Religious Violence, Third Edition, Revised and Updated, Berkeley/Los Angeles/London: University of California Press.
- Kammen, M. 1987. *A Machine that would go of itself*, The Constitution in American Culture, New York: Vintage Books.
- Kant, I. 1956. *Critique of Practical Reason*, trans. L.W. Beck, New York: MacMillan.
- Kant, I. 1981a. *Der Streit der Fakultäten* (1798) in: Immanuel Kant, *Schriften zur Anthropologie, Geschichtsphilosophie, Politik und Pädagogik*, 1, Werkausgabe XI, Frankfurt am Main Suhrkamp, 267–393.
- Kant, I. 1981b. *Die Religion innerhalb der Grenzen der bloßen Vernunft* (1793) in: Immanuel Kant, *Die Metaphysik der Sitten*, Werkausgabe, Band VIII, Frankfurt am Main: Suhrkamp.
- Kant, I. 1981c. *Beantwortung der Frage: Was ist Aufklärung?* (1784) in: *Schriften zur Anthropologie, Geschichtsphilosophie, Politik und Pädagogik*, 1, Frankfurt am Main: Suhrkamp, 53–61.
- Karolides, N.J., M. Bald and D.B. Sova 1999. *100 Banned Books: Censorship Histories of World Literature*. New York: Checkmark Books.
- LaMettrie 1974. *Textes Choisis. L'Homme-Machine*, Histoire Naturelle de l'Ame, e.a., Préface par Marcelle Bottigelli-Tisserand, Paris: Éditions sociales.
- Levy, L.W. 1993. *Blasphemy: Verbal Offense against the Sacred from Moses to Salman Rushdie*, Chapel Hill and London: The University of North Carolina Press.
- Lilla, M. 2007. *The Stillborn God: Religion, Politics, and the Modern West*, New York: Alfred A. Knopf.
- Linker, D. 2006. *The Theocons. Secular America under Siege*, New York: Doubleday.
- McGrath, A.E. 1994. *Christian Theology: An Introduction*. Oxford UK & Cambridge USA: Blackwell.
- Madigan, T. ed. 1999. Introduction in: W.K. Clifford, *The Ethics of Belief and Other Essays*, Amherst, New York: Prometheus Books.

- Madison, J. Alexander Hamilton and John Jay 1987. *The Federalist Papers* (1788) Harmondsworth: Penguin Books.
- Maistre, J. de 2007. *Œuvres, Suivis d'un Dictionnaire Joseph de Maistre, Texte établi, annoté et présenté par Pierre Glaudes*, Paris: Robert Laffont.
- Miles, J. 1995. *God. A Biography*. New York: Alfred A. Knopf.
- Montaigne 1991. *Essays*. Translated and edited with an introduction and notes by M.A. Screech, Allen Lane, London: The Penguin Press.
- Müller, J.W. 2007. *Constitutional Patriotism*. Princeton and Oxford: Princeton University Press.
- Neuhaus, R.J. 1997. *The Naked Public Square: Religion and Democracy in America*, Second Edition, Grand Rapids Michigan: William B. Eerdmans Publishing Company (1984).
- Niebuhr, R. 1964. *The Nature and Destiny of Man*. Human Nature, Vol. I, Gifford Lectures, New York: Charles Scribner's Sons (1941).
- Paine, T. 1995a. *The Age of Reason* (1794) in: Thomas Paine, *Collected Writings*. New York: The Library of America, 665–885
- Paine, T. 1995b. *Rights of Man*. Being an Answer to Mr. Burkes' Attack on the French Revolution (1791/92) in: Thomas Paine, *Collected Writings*, New York: The Library of America, 433–661.
- Pelikan, J. 2004. *Interpreting the Bible and the Constitution*. New Haven and London: Yale University Press.
- Peterson, M., Hasker, W., Reichenbach, B. and Basinger, D. (eds) 1996. *Philosophy of Religion*. Selected Readings, New York/Oxford: Oxford University Press.
- Pyle, A. (ed.) 1995. *Agnosticism*. Contemporary Responses to Spencer and Huxley, Bristol: Thoemmes Press, 1995.
- Rachels, J. 1971. God and Human Attitudes in: *Religious Studies*, 7 (1971), 325–37.
- Rachels, J. 1997. *Can Ethics provide Answers. And other Essays in Moral Philosophy*. Lanham Boulder New York London: Rowman & Littlefield Publishers.
- Rachels, J. 2003. Does Morality Depend on Religion? in: James Rachels, *The Elements of Moral Philosophy*, Fourth edition, New York etc.: McGraw-Hill Inc. (1986).
- Rehnquist, W.H. 1976. The Notion of a Living Constitution in: *Texas Law Review*, 54, 693–706.
- Renan, E. 1887. Le judaïsme comme race et comme religion (1883) in: Ernest Renan, *Discours et Conférences*, Sixième édition, Paris: Calmann-Lévy, 341–74.
- Ruffini, F. and Parker Heyes, J. 1912. *Religious Liberty*, with a preface by J.B. Bury, London, New York: Williams and Norgate.
- Saadawi, N. El 2007. *The Hidden Face of Eve: Women in the Arab World* (1980). London & New York: Zed Books.
- Sapir, G. and Staman, D. 2005. Why Freedom of Religion does not include Freedom from Religion in: *Law and Philosophy* (2005) 24, 467–508.

- Scalia, A. 1997. Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws in: Scalia et al. *A Matter of Interpretation*. Federal Courts and the Law, An Essay by Antonin Scalia with commentary by Amy Gutmann, Gordon S. Wood, Laurence H. Tribe, Mary Ann Glendon, Ronald Dworkin, Princeton NJ: Princeton University Press, 3–47.
- Searle, J.R. 1993. Rationality and Realism, What is at stake? in: *Daedalus, Journal of the American Academy of Arts and Sciences*, Fall 1993, Vol. 122, nr. 4, 55–83.
- Silverstein, M. 1984. *Constitutional Faiths, Felix Frankfurter, Hugo Black, and the Process of Judicial Decision Making*. Ithaca and London: Cornell University Press.
- Selengut, C. 2003. *Sacred Fury. Understanding Religious Violence*. Walnut Creek, Lanham, New York, Toronto, Oxford: Rowman & Littlefield Publishers.
- Selim, N. 2007. *Allah houdt niet van vrouwen*. Antwerpen/Amsterdam: Houtekiet.
- Selim, N. 2007. *Nehmt den Männern den Koran! Für eine weibliche Interpretation des Islam*. München Zürich: Piper.
- Stein, G. (ed.) 1980. *An Anthology of Atheism and Rationalism*. Buffalo, New York: Prometheus Books, 1980.
- Slapper, G. and Kelly, D. 2004. *The English Legal System*. Seventh Edition, London: Cavendish (1994).
- Stein, G. 1985. Agnosticism in: Gordon Stein (ed.), *The Encyclopaedia of Unbelief*, Volume One. Buffalo, New York: Prometheus Books.
- Stephen, L. 1898. *An Agnostic's Apology and Other Essays*. London: Smith, Elder & Co. (Republished 1969).
- Sullivan, K. 1992. Religion and Liberal Democracy in: *University of Chicago Law Review*, 59.
- Taylor, R. 1989. The American Judiciary as a Secular Priesthood in: Taylor, Richard, *Reflective Wisdom. Richard Taylor on Issues That Matter*. Edited by John Donnelly. Buffalo, New York: Prometheus Books, 155–71.
- Voltaire, 1961. Extrait des sentiments de Jean Meslier in: *Voltaire, Mélanges, Préface par Emmanuel Berl, Texte établi et annoté par Jacques van den Heuvel*. Paris: Gallimard, 458–501.
- Warraq, Ibn (ed.) 2003. *Leaving Islam. Apostates Speak Out*. Amherst New York: Prometheus Books.
- Wellman, C. 1999. *The Proliferation of Rights. Moral Progress or Empty Rhetoric?* Boulder, Oxford: Westview Press.
- Wiarda, G.J. 1988. *Drie typen van rechtsvinding*. Derde druk (1963). Zwolle: W.E.J. Tjeenk Willink.
- Wolbert, W. 2005. *Was sollen wir tun? Biblische Weisung und ethische Reflexionen*, Freiburg/Wien: Verlag Herder.
- Wood, G.S. 1969. *The Creation of the American Republic, 1776–1787*. New York/London: W.W. Norton & Company.

- Zoethout, C.M. 1998. Rechten van de mens na vijftig jaar 'thuisgebracht'. Labours voorstel de Europese Conventie te incorporeren in het Britse rechtsstelsel in: *Nederlands Juristenblad*, 12 juni 1998, 1067–72.
- Zoethout, C.M. 2006. A Bill of Rights for Britain? Alweer? Over terrorismebestrijding, mensenrechten en publieke veiligheid in het Verenigd Koninkrijk, *Nederlands Juristenblad*, jrg. 81, no. 44, 2531–5.
- Zwemer, S.M. 1924. *The Law of Apostasy in Islam*. London, Edinburgh & New York: Marshall Brothers.