In the beginning was the thesis. Fathered by sixteenth- and seventeenth-century Spanish and Dutch theologians, the thesis posited that international law is the product of "Christian civilization" and that international law is derived from immutable natural laws of God. Hugo Grotius put it this way:

"[T]he law of the Gospel ... extends even greater favour to treaties by which those who are strangers to the true religion receive help in a just cause; for the doing of good to all men, whenever there is opportunity, has not only been left free and praiseworthy, but has even been enjoined by precept. By the example of God, who maketh His sun to rise on the good and on the evil, and sendeth rain for both, we are bidden to exclude no class of men from our deeds of kindness. (Janis, 64-65)"  

Centuries passed and an antithesis was born. Fathered by nineteenth-century positivism, the antithesis reasoned that international law is a science that must move beyond its sectarian underpinnings and find ontological and positivist proof for its existence, with religion banished from the realm. As Lassa Oppenheim put it, (Janis, 77-78)

Grotius, as a child of his time, could not help starting from the Law of Nature, since his intention was to find such rules of a Law of Nations as were eternal, unchangeable, and independent of special consent of the single States .... We know nowadays that a Law of Nature does not exist. Just as the so-called Natural Philosophy had to give way to real natural science, so the Law of Nature had to give way to jurisprudence, or the philosophy of positive law. Only a positive Law of Nations can be a branch of

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1. Quoting Hugo Grotius, De Jure Belli Ac Pacis Libri Tres, vol. 2, bk. II, ch. XV, § 10(1), 401 (Kelsey trans., 1646 ed., Carnegie Classics of Intl. L. no. 3, Clarendon Press 1925).
the science of law. (Janis, 77-78)2

Centuries pass and today we feel the birth pangs of a synthesis. Fathered by twentieth-century American idealism, it began with a gnawing sense of unease with the antithesis. True, civilized nations are not—and never were—synonymous with Christian nations. Therefore, a law of nations must move beyond Christendom. But do we truly believe that international law is simply a collection of rules about the is with no concern for the ought? Particularly when international law seeks to promote the highest ideals and greatest aspirations of humanity? Why, the U.N. Charter itself has as its stated purpose "sav[ing] succeeding generations from the scourge of war ... reaffirm[ing] faith in fundamental human rights ... establish[ing] conditions under which justice ... can be maintained, and ... promot[ing] social progress and better standards of life in larger freedom."3 If international law has discarded theology, it remains smitten with teleology. In the minds of many, a synthesis is in order and already is in the offing. Such a synthesis would embrace the prevailing view that international law is a secular discipline that requires positive evidence (broadly defined to include actual practice and aspirational declarations) for its source material, but would also reclaim elements of the Grotian tradition that recognize that in a pluralistic society religion—or at least morality—plays a far more significant and nuanced role in international theory and state practice than is traditionally acknowledged. Indeed, much of the current debate concerning the "new customary international law of human rights" is about this synthesis.

Every two hundred years, it seems, the jurisprudence of customary international law ("CIL") changes. Beginning in the seventeenth century, natural law was said to be the source of CIL. Beginning in the early nineteenth century, positivism was in the ascendency. The positivist view, according to which CIL results from the practice of nations acting out of a sense of legal obligation, was later endorsed by the United States Supreme Court in The Paquete Habana. Approximately two centuries after the rise of the positivist view, a new theory is beginning to take hold in some quarters. This theory derives norms of CIL in a loose way from treaties (ratified or not), U.N. General Assembly resolutions, international commissions, and academic commentary—but all colored by a moralism reminiscent of the natural law view. The Second Circuit's decision in Filartiga v. Pena-Irala is the most

2. Quoting L. Oppenheim, International Law: A Treatise vol. 1, 79, 92 (Longmans 1905).
3. U.N. Charter preamble.
famous United States case to embrace this new understanding of CIL. 4

With the publication of two important books on the role of religion in international law, Mark Janis and his colleagues have provided us with the beginnings of the first real scholarship regarding this emerging synthesis.

The first book, The Influence of Religion on the Development of International Law (hereinafter “Janis”), published in 1991, is a good start and attempts to address a few of the more salient points concerning this nexus between religion and international law. Many of the essays in are particularly insightful, addressing issues that are long overdue for serious consideration. Although the book is a collection of eleven essays, the heart of the book can be found in two: an historical survey by Mark Janis (Janis, 61) on religion and the literature of international law in classic texts and a second essay by James Nafzinger (Janis, 147) on the function of religion in the international legal system.

Janis’ excellent essay, surveying the classic texts of international law, provides a perfect lens through which to examine the historical role of religion in international law. Comparing the treatment of religion and international law in the writings of Grotius, Vattel, Austin, Wheaton, Oppenheim, and Brownlie, the essay suggests that throughout history international lawyers struggled with the relationship between religion and international law, and arrived at dramatically different conclusions. Whereas Hugo Grotius (1583-1645) sought to utilize religion, and in particular the Bible, as proof of the existence of a law of nations, (Janis, 61-66) Henry Wheaton (1785-1848) sought to limit the universal pretensions of international law by arguing that there was “no universal, immutable law of nations.” (Janis, 74) For Wheaton, international law was enforced through moral sanctions as the law of “civilized, Christian nations,” distinct and wholly unlike the law of “Mohammedan nations.” (Janis, 74) Janis then looks at modern times through the writings of Lassa Oppenheim (1858-1919) and Ian Brownlie (1932-____). Oppenheim treated religion as part of the history of international law, of little value for the modern, positivist “Science of international law.” (Janis, 77) Brownlie completes the picture by mirroring the dismissive attitude of many international lawyers toward religion, focusing instead on the positive evidences of the existence of consensus among states.

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4. Jack L. Goldsmith & Eric A. Posner, Understanding the Resemblance Between Modern and Traditional Customary International Law, 40 Va. J. Int'l L. 639, 640 (2000) (internal citations omitted), citing The Paquette Habana, 175 U.S. 677 (1900); Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980).
The conclusion is that religion and international law necessarily intersect, although writers throughout history have differed on whether religion influences international law as proof, problem, prescription, or precursor.

Nafzinger's essay, "The Functions of Religion in the International Legal System," offers the only systematic typology in the book. Nafzinger argues that religion impacts international law in five ways: creative, aspirational, didactic, custodial, and mediative. Nafzinger's "creative function" of religion posits that international law grew out of Christian civilization, with its modern underpinnings now more ecumenical. He points to Augustinian just war theory as the origin for humanitarian law, Mosaic law of the talion (an "eye for an eye") as the root of modern doctrine reprisal and retorsion, canon law as influencing the doctrine of *pacta sunt servanda*, and a host of religious influences on modern human rights law. The "aspirational function" suggests that international law is more than merely Austinian positivism, and that religion is influential in pulling international law toward teleological and normative ideals. The "didactic function" suggests that international law is inscrutable to the average lay person, and that religious institutions play an important role in socializing the public to international law, with the embrace by the Catholic encyclical *Pacem in Terris* of the Universal Declaration of Human Rights as illustrative. Less importantly, the "custodial function" speaks to religious institutions' influence on political leaders to expound and implement international law, while the "mediative function" concerns the role of religious institutions in keeping the peace and maintaining good order by mediating disputes. Unfortunately, Nafzinger's useful but cryptic essay is undermined by the absence of sufficient detail to truly flesh out his typology.

The other essays, while interesting, are minor movements. The essays on Confucianism and Hinduism are tangential, and David Kennedy's essay, "Images of Religion in International Legal History," is inaccessible. John Noyes' essay swims against the current by challenging the traditional notion that the nineteenth century marked the height of logically derived positivist conceptions of international law. In support he raises from obscurity two British theorists, James Lorimer and Robert Phillimore, who maintained theistic natural law theories of international law. William Park's essay, "Spiritual Energy and Secular Power," addresses meta-questions beyond the role of religion in international
law, rhetorically asking what the world would be like if Biblical mandates such as debt forgiveness, keeping the Sabbath, and prohibitions on interest were taken seriously. (Janis, 194-203) His most interesting question is where does a religious person draw the line between what God wants him to do (personal morality) and what God wants him to force others to do (public morality). (Janis, 185-192)

The last two essays focus on the Christian peace movement and its historical and current impact on international law. One, by Mark Janis, discusses the religious impulses that led to the establishment of peace conferences that resulted in the creation of the International Court of Justice and the Permanent Court of Arbitration. (Janis, 223) The other, by Nicholas Grief, outlines recent unsuccessful attempts by religious pacifists to enforce international law obligations on the use of nuclear force to challenge British laws on defense spending. (Janis, 243) In that context, it provides an interesting analysis of the traditional concept of incorporating international obligations into national law, with a religious twist.

Of these minor movements, two essays particularly resonate. David Bederman’s essay, “Religion and the Sources of International Law in Antiquity,” provides original analysis on ancient international law. (Janis, 3) He suggests that the ancient belief system of divine retribution provided a useful mechanism for enforcing international legal obligations, and he provides a number of ancient fragments illustrating how breaking an oath led to divine and human punishment. (Janis, 14-17) The essay concludes with the delicious quote from Coleman Phillipson that “[t]he ancients judged the results by the law [while] the moderns judge the law by the results” and the delightful corollary question of whether we today in the age of pacta sunt servanda place as high a value on the keeping of oaths as was always prized in antiquity. (Janis, 24) His essay leaves one thirsty for more anecdotes from antiquity, which thankfully Bederman now offers in full in his recent book.5

Finally, M.H.A. Reisman’s essay addresses the problem of Islamic fundamentalism for the international legal regime and its universal impulses. (Janis, 107) Reisman correctly notes that “Islam is more than Islamic fundamentalism, but Islamic fundamentalism is one authentic statement of Islam.” (Janis, 128, n. 5) He argues that Islamic fundamentalists will encounter great difficulty with the corpus of international human rights norms as well as modern doctrines on the use

5. David J. Bederman, International Law in Antiquity (Cambridge U. Press 2001).
of force. Reisman suggests that fundamentalists would reject any notion of the equality of Moslems with non-Moslems, or of the equality of the sexes. Individual liberties are permitted only insofar as they are compatible with Islamic principles. (Janis, 123-125) Additionally, Reisman argues that the doctrine of the Islamic jihad leads fundamentalists to feel little restraint in the use of force against a stronger enemy, including the calculated use of terror. (Janis, 125) Islamic fundamentalism poses great difficulties for those attempting to argue that international law is universal, unless, of course, one recognizes that certain countries still are not "civilized," in Oppenheim's sense that their civilization has "not yet reached that condition which is necessary to enable their Government's and their population in every respect to understand and to carry out the command of the rules of International Law." 6 That is certainly true with respect to rogue countries that support international terrorism; but it is more difficult to call certain Islamic countries uncivilized simply because they view civil liberties as subject to the law of Allah. 7

There are a number of glaring omissions in the book. The absence of an essay discussing the influence of Judaism on international law is noteworthy, even if only to underscore the point that international law is animated by Judeo-Christian principles. The contribution of Islam—as opposed to the problem of Islamic fundamentalism—is not addressed in the book. The book also fails to ever really grapple with a definition of religion as distinct from morality or philosophy, although two essays make halting attempts in that direction. 8 Nor are there any authentic theologians or ethicists in the crowd, leaving one with the impression that the book is a collection of essays by international law professors for international lawyers. One is left wondering what an authentic voice from the cloth would say to the question presented.

Most fundamentally, the book fails to address one of the most vexing questions of modern human rights law, indeed all of international law: the doctrine of *jus cogens*. 9 If we accept the notion that

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6. Oppenheim, *supra* n. 2, at vol. 1, 33 (Longmans 1905).
7. For the view that Islam is a "civilization" clashing with other civilizations in the world, see Samuel Huntington, *The Clash of Civilizations and the Remaking of the World Order* 109-120, 183-186, 209-218 (Simon & Schuster 1996).
8. Nafzinger defines religion as "a practice of ultimate concern about our nature and obligations as human beings, inspired by experience and typically expressed by members of a group or community sharing myths and doctrines whose authority transcends both individual conscience and the state." (Janis, 150). Park offers various definitions, including "those most deeply held beliefs that provide ultimate commitment." (Janis, 183).
9. Vienna Convention on the Law of Treaties, May 23, 1969, art. 53, 1155 U.N.T.S. 332, 344 (defining a *jus cogens* norm as "a norm accepted and recognized by the international
international law is simply a matter of a positivist consensus between nations, what do we make of a doctrine that says certain international norms are binding even absent consent? If certain human rights are binding absent sovereign consent, which ones? And why? Why do we reject the ancient maxim that in the case of a king nothing is unjust which is expedient? In short, why are certain human rights inviolable? Perhaps international law has not wholly shed its natural law roots.

The second book, Religion and International Law (hereinafter “Janis & Evans”), published in 1999 and edited by Mark Janis and Carolyn Evans, reprints the original eleven essays, with modest revisions, and includes an additional eleven essays. Fortunately, many of the problems with the first book are resolved with the second book. Gamal Badr presents a more balanced essay on the contribution of Islam to the development of international law. (Janis & Evans, 95) William George is an ethicist who makes the case for religious persons concerned about a global ethic to embrace international law. (Janis & Evans, 483) Hilary Charlesworth ably tackles the tension between human rights norms and religious pluralism. (Janis & Evans, 410-413) She is particularly insightful in describing the challenges that human rights law poses for various religious traditions, but unfortunately she does not adequately address the obverse challenge that various religious traditions pose for claims of certain “universal” human rights.

Turn the page, however, and an important essay by Matthew Ritter fills the void. He offers an interesting syllogism to explain why contemporary human rights jurisprudence eschews religious justifications. While human rights are construed as universal, each religion claims particularized and categorical truth. Therefore, universal regard for every human cannot be justified by appeal to any particular religious perspective. (Janis & Evans, 421) Even if one wished to justify the universal based on commonalities among the particular, Ritter is also pessimistic. In contrarian fashion he rejects the notion that the great world religions share common human rights values. (Janis & Evans, 421)

10. Grotius, supra n. 2, at vol. 2, Prolegomena, § 3, 9.
11. There are heated debates concerning the merits and demerits of the jus cogens doctrine. See generally K. Lee Boyd, Are Human Rights Political Questions, 53 Rutgers L. Rev. 277, 312-317 (2001); A. Mark Weisburd, The Emptiness of the Concept of Jus Cogens, as Illustrated by the War in Bosnia-Herzegovina, 17 Mich. J. Intl. L. 1, 24-40 (1995); Kha Q. Nguyen, In Defense of the Child: A Jus Cogens Approach to the Capital Punishment of Juveniles in the United States, 28 G.W. J. Intl. L. & Econ. 401,416-423 (1995); Geoffrey R. Watson, The Death of Treaty, 55 Ohio St. L. J. 781, 814-823 (1994); Jules Lobel, The Limits of Constitutional Power: Conflicts Between Foreign Policy and International Law, 71 Va. L. Rev. 1071, 1138-1142 (1985).
Surveying the major world religions and their treatment of individual rights, Ritter argues that the "emergent universal consonance of rights talk therefore rests upon a submergent multivocal dissonance of its justification." (Janis & Evans, 425) Nor is Ritter satisfied with the traditional role of reason as a jurisprudential solution. For Ritter, reason provides no answer beyond the categorical imperative to be moral or the prudential strategy of mutual expediency. (Janis & Evans, 422-425) Although I do not share Ritter's view that modern human rights law is jurisprudentially bankrupt, I found his piece among the more challenging essays in the book.

The concern for a lack of a Jewish voice is resolved with an essay by the eminent authority, Shabtai Rosenne. (Janis & Evans, 63) Rosenne's essay assesses the influence of Judaism on international law and concludes that the "patristic" literature on international law—including the writings of Hugo Grotius, John Seldon, and Samuel Pufendorf—made frequent use of biblical resources. (Janis & Evans, 67-73) He notes that there is biblical support for rules on the conduct of war, immunity of diplomatic envoys, and entering into treaties. (Janis & Evans, 78) Rosenne also suggests that principles of innocent passage and elements of international arbitration are of Jewish origin, although Bederman may take issue with the later point. (Janis & Evans, 81-82) Most fundamental, Rosenne suggests that "the happy combination of law and morality which gives all Jewish law its peculiar quality" suffuses the Jewish conception of international morality, subjecting the "conduct of States to a higher rule implicit in the law of God." (Janis & Evans, 82, 84)

Hilaire McCoubrey makes a good case for the natural law underpinnings in modern international law, noting that "naturalism and positivism are not mutually exclusive options ... but rather elements within a spectrum of analyses all of which have their proper role to play in an adequately holistic appreciation of legal phenomena." (Janis & Evans, 185) He suggests that the aspirations of international law expressed in the U.N. Charter are undoubtedly naturalist, whereas the formal functioning of international law is positivistic—much like the view that the U.S. Constitution is a naturalist document that informs a positivist government and legal system. (Janis & Evans, 184-187)

The new collection of essays is not without its problems. David Kennedy's essay, "Losing Faith in the Secular: Law, Religion, and the Culture of International Governance," is a Cubist collage chock full of self-satisfied metaphors (religion as puzzling and different as a "cliterodectomy") and facile alliterations (liberalism as the "cant" of
“Kant”). (Janis & Evans, 313, 315) This undoubtedly is the first and hopefully the last international law essay that references love beyond libido, ubiquitous Pope-mobiles, snowboarding to Nirvana, Chutes and Ladders, golden oldies, clunky boots, sagging bellbottoms, cool friendships with Catholics, and tempting little legal Lolitas. (Janis & Evans, 309-310, 312, 316-317) International law may be sexy, but it is not that exotic. Moreover, his central thesis—that law is a secular type of religion—has been expressed more eloquently elsewhere, with Vaughn Lowe recently noting that the religious motifs of narrative, prophecy, canonization, and secularization have parallels in the normative development of international law.\(^{12}\)

Scott Thomas offers an international relations essay that asks the question how an international society (a group of states conscious of common interests and common values, with international law as one of the evidences) grapples with modern religious and cultural pluralism. (Janis & Evans, 324-334) Interesting question, but his answer of religious and cultural diplomacy hardly addresses the legal side of the equation, particularly whether such pluralism undermines international law assertions of universal norms.

Carolyn Evans’ essay, “Religious Freedom in European Human Rights Law,” goes further than any other author in attempting to wrestle with a definition of religion. She does so through the lens of Article 9 of the European Convention on European Rights. (Janis & Evans, 386) This poses two problems. First, it focuses solely on protecting religious freedom as a human right. Second, by embracing both “religion” or “belief,” the definition is so broad (including pacifism, atheism, druidism, communism, etc.) it is “almost meaningless.” (Janis & Evans, 391) For the purposes of determining the role of religion in the development of international law, a far more meaningful definition is in order and unfortunately is not forthcoming in this book.

In sum, The Influence of Religion on the Development of International Law was a good but modest start down the road toward greater understanding of this important nexus between religion and international law. However, with the second book, Religion and International Law, we see emerging a truly seminal publication that will provide fodder for significant additional reflection. A synthetic discourse about the multi-faceted relationship between religion and international law has begun in earnest. Whether it will lead us toward

\(^{12}\) See Vaughan Lowe, The Politics of Law-Making: Are the Method and Character of Norm Creation Changing, in The Role of Law in International Politics: Essays in International Relations and International Law 207, 221-226 (Michael Byers, ed., Oxford U. Press 2000).
equilibrium remains unclear.

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