RELIGION AND AUSTRALIAN SOCIO-LEGAL INTERACTION: A PRELIMINARY ACCOUNT OF THE NEED FOR EMPIRICAL RESEARCH

PAUL BABIE[*]

I INTRODUCTION

We stand witness to a global religious revival.[1] Increasingly, religion has something to say about the issues that face us: from the moral – same-sex marriage,[2] abortion,[3] poverty,[4] homelessness,[5] or the environment[6] – to the political[7] – religious freedom and its protection of that freedom.[8] But do personal beliefs and values enter our public life? There is a great deal of speculation about[9] and anecdotal evidence for[10] the proposition that, in liberal democracies,

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1   William Twining, *General Jurisprudence: Understanding Law from a Global Perspective* (Cambridge University Press, 2009) 6–7, 125; John Micklethwait and Adrian Wooldridge, *God is Back: How the Global Rise of Faith is Changing the World* (Penguin, 2009).

2   See, eg, Paul Babie, 'Synthesis or Separation? Church, State and Marriage in Byzantine Law' (2011) forthcoming *Journal of Law and Religion*.

3   See, eg, Bernadette Richards and Vic Pfitzner (eds), *Issues at the Borders of Life* (ATF Theology, 2010).

4   See, eg, Mary Jo Bane and Lawrence M Mead (eds), *Lifting Up the Poor: A Dialogue on Religion, Poverty & Welfare Reform* (Brookings Institution Press, 2003).

5   See, eg, Pontifical Council for Justice and Peace, *Compendium of the Social Doctrine of the Church* (St Paul's Publications, 2004).

6   See, eg, Roger S Gottlieb, *A Greener Faith: Religious Environmentalism and Our Planet's Future* (Oxford University Press, 2006).

7   See, eg, Darby Kathleen Ray (ed), *Theology That Matters: Ecology, Economy, and God* (Fortress Press, 2006).

8   See, eg, M A Glendon, 'Introduction' in The Pontifical Academy of Social Sciences (ed), *Universal Rights in a World of Diversity: The Case of Religious Freedom* (Pontificia Academia Scientiarvm Socialivm, 2010), 3 <www.vatican.va/roman_curia/pontifical_academies/acdscien/2011/passbooklet40.pdf>; Paul Babie and Neville Rochow (eds), *Religious Freedom Under Bills of Rights* (University of Adelaide Press, 2011) (forthcoming).

9   See, eg, Micklethwait and Wooldridge, above n 1.

10   In the United States, this has a long history: see, eg, Jon Meacham, *American Gospel: God, the Founding Fathers, and the Making of a Nation* (Random House, 2006).

where it is formally denied a place in the public forum,[11] religion nonetheless plays a role in the social interaction ostensibly structured by secular law. Some even argue that religion and religious law, such as Islamic or Sharia law, already governs or controls the lives of adherents even in countries that are ostensibly secular, such as the United States ('US').[12] Examining these developments, some scholars, especially those in the US, suggest two trends: first, while individuals make decisions as part of social interaction founded ostensibly on secular political and legal principles, those decisions are in fact grounded in religious values.[13] Second, the influence of religious values on individual decisions is overlooked by universities, the societal institutions best placed to study that process.[14]

This essay addresses these two trends in the Australian context. To do that, one might ask the extent to which religion is relevant to the public social life of Australians. That, however, would cover a very broad canvas, and one far beyond the scope of this essay. For that reason, a narrower and more modest question provides a manageable focus; given that I am an academic lawyer, therefore, the aim of this essay is the somewhat more modest one of exploring the extent to which religious values play a role in the socio-legal interactions of Australians. Yet, even this more modest question is deceptively simple, for here one confronts the first difficulty in the Australian context, and one which the second theme identified above predicts: there exists very little evidence concerning the place of religion in the lives of Australians generally, let alone in socio-legal interaction.

Moreover, one confronts a somewhat extensive Australian theoretical literature that seems to downplay, or not pay enough attention to the university and – particularly the law school – as the place for the study of religion and its influence on public life. This has the potential to stop the inquiry before it has even begun. Why? The literature provides a simple, yet well-known and well-worn reason for focussing our attention elsewhere:[15] there is no rationality to religious belief,[16] so the argument goes, and therefore it clearly has no role in the

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11   See John Rawls, *Political Liberalism* (Columbia University Press, revised ed, 2005) 458–62; Michael W McConnell, 'Old Liberalism, New Liberalism, and People of Faith' in Michael W McConnell, Robert F Cochran Jr and Angela C Carmella (eds), *Christian Perspectives on Legal Thought* (Yale University Press, 2001) 5.

12   See Rowan Williams, 'Civil and Religious Law in England: A Religious Perspective' (2008) 10 *Ecclesiastical Law Journal* 262. See also 'Sharia in the West: Whose Law Counts Most?', *The Economist* (online), 14 October 2010 <http://www.economist.com/node/17249634>; 'Islamic Law and Democracy: Sense About Sharia', *The Economist* (online), 14 October 2010 <http://www.economist.com/node/17251830>; 'Tennessee: An Uncivil Action', *The Economist* (online), 18 November 2010 <http://www.economist.com/node/17528070>.

13   Steven D Smith, *The Disenchantment of Secular Discourse* (Harvard University Press, 2010).

14   C John Sommerville, *The Decline of the Secular University* (Oxford University Press, 2006); Anthony T Kronman, *Education's End: Why Our Colleges and Universities Have Given Up on the Meaning of Life* (Yale University Press, 2007).

15   See Harold J Berman, 'Foreword' in Michael W McConnell, Robert F Cochran Jr and Angela C Carmella (eds), *Christian Perspectives on Legal Thought* (Yale University Press, 2001) xi.

16   But see Stephen L Carter, 'Liberal Hegemony and Religious Resistance: An Essay on Legal Theory' in Michael W McConnell, Robert F Cochran Jr and Angela C Carmella (eds), *Christian Perspectives on Legal Thought* (Yale University Press, 2001) 25, 49.

make-up of law. As such, its influence on individuals and their decisions as part of socio-legal interaction tends to be overlooked. If it is kept separate, as liberal theory suggests, there is little need to understand it.[17] Yet if the two themes identified above are correct in the Australian context, then our law schools and universities overlook religion at their peril. At best, it leaves impoverished our understanding of contemporary Australian social life and, at worst, leads to serious misinterpretations of the sociology of law. Still, in the face of these empirical and theoretical obstacles, the question must be asked, and answers must be, at the very least, attempted. The question alone carries with it serious implications for the future of law and religious freedom in liberal democracies such as Australia's.[18] And in the answers given 'can be glimpsed … both the promise and the danger of liberal society, both the freedom it offers and the tyranny it portends'.[19]

This essay intends, at the least, to ask the question and to make a preliminary start on an answer. It contains four Parts. Part II elaborates the broad question to be asked, an empirically testable hypothesis which this essay calls the 'Smith-Sommerville hypothesis'. Of course, this essay attempts to narrow the focus of study, even this hypothesis remains a broad one. What is important, though, is that we ask the question about the role of religion in socio-legal interaction – in that sense, this essay is programmatic, setting out a broad outline which, through a stimulation of debate, will narrow over time to produce specific research questions. Thus, while acknowledging that the Smith-Sommerville hypothesis asks as many questions as it answers, it also makes possible a start down the avenues of inquiry which it opens. By its very nature, though, that is all it can do; only the empirical research for which it calls can begin to narrow and sharpen the focus further.

Still, in an attempt at a preliminary answer, Part III explores the available Australian evidence, theoretical and empirical. It begins with the theoretical literature which downplays, or, to put it another way, fails to give enough attention to, the place of law and law schools in determining the extent of importance Australians place on religion in their day-to-day social interaction. While the theoretical literature attempts to maintain the strict liberal separation of religion when it comes to the development of law, it does not reject the study of the way that religion might nonetheless play a role in the ways in which Australians interact with one another through law. And the available empirical evidence – Gary Bouma's ground-breaking *Australian Soul* – supports a

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17   See Denise Meyerson, 'Why Religion Belongs in the Private Sphere, Not the Public Square' in Peter Cane, Carolyn Evans, and Zoë Robinson (eds), *Law and Religion in Theoretical and Historical Context* (Cambridge University Press, 2008) 44.

18   This fact is made very clear by the recent report of Gary Bouma et al, Australian Human Rights Commission, *Freedom of Religion and Belief in 21st Century Australia* (2011) 80–3, which demonstrates the level of importance Australians attach to religion in their lives and the need for appropriate governmental responses aimed at protecting the freedom to practice one's religion.

19   Robert Song, *Christianity & Liberal Society* (Oxford University Press, 1997) 213.

conclusion that religion *is* generally important to Australians.[20] If that is true, then, the legal academy is best placed and therefore ought to explore whether religion is also important in the socio-legal interaction of Australians.

As noted, the essay is programmatic, calling for the legal academy to take up the challenge of exploring, empirically, the role played by religion in the socio-legal interaction of Australians. For that reason, the essay cannot provide more than the broadest outlines of the research project or projects that might be employed to study that role. Part IV, however, does two things. First, it offers some observations on methodology, arguing that the available empirical evidence can give nothing more than an indication that religion might play a role in the socio-legal interactions of Australians. Second, it outlines the design of a possible experimental design that might be employed in determining whether, and to what extent, religious values underlie individual socio-legal interaction.

II   THEORY: THE 'SMITH-SOMMERVILLE HYPOTHESIS'

Why is there even a question to be asked about the role of religion in the lives of Australians? In simple terms, the answer lies in contemporary liberalism. Of course, it is difficult to speak of *a* 'liberalism', in the singular; in truth, there is a plurality of 'liberalisms'.[21] Nonetheless, for the purposes of this essay, Robert Song writes that contemporary

> liberalism can be … understood as defining … a pattern of characteristic family resemblances. The most central of these … are a voluntarist conception of the human subject; a constructivist meta-ethics; an abstract, universalist, and individualist mode of thought; and a broadly progressivist philosophy of history. Around these are found other features – characteristic liberal understandings of power and authority, the state, property, democracy, and the supreme values of liberty and equality.[22]

Contemporary liberalism produced the separation of church and state, a view dating back to John Locke's *Letter Concerning Toleration*[23] and finding its fullest expression in Roger Williams' metaphor of the 'garden' (the church) and the 'wilderness' (the world) and the need for a wall between the two.[24] According to this understanding of a wall, religion is something that the individual ought to be free to pursue in the personal sphere while organised religion is kept out of the public arena.[25] This creates, drawing upon Max

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20   Gary Bouma, *Australian Soul: Religion and Spirituality in the Twenty-First Century* (Cambridge University Press, 2006).

21   Song, above n 19, 9.

22   Ibid 9–10; see generally 10–48.

23   John Locke, 'A Letter Concerning Toleration' in Ian Shapiro (ed), *Two Treatises of Government and a Letter Concerning Toleration* (Yale University Press, 2003) 211.

24   Roger Williams, 'Mr Cotton's Letter Lately Printed, Examined and Answered, 1644' in Perry Miller (ed), *The Complete Writings of Roger Williams* (The Baptist Standard Bearer, 2005) vol 1, 41.

25   See John Witte Jr, 'The Theology and Politics of the First Amendment Religion Clauses: A Bicentennial Essay' (1991) 40 *Emory Law Journal* 489.

Weber's 'iron cage' of secularism,[26] Steven D Smith's 'secular cage' of discourse 'in which life is lived and discourse is conducted according to the stern constraints of secular rationalism'.

Arguments might be and are made about whether there is a historical connection between religion, largely Christianity, and the common law,[27] the western legal tradition,[28] the political structure of society,[29] and liberalism itself.[30] Yet, according to contemporary liberalism, while one's personal salvation may be worked out in the personal–private sphere, that, and the organised religion founded upon it, may not attempt to enter the public sphere. There is, then, not merely a wall between organised religion and state, but also between public life and private religious (or any other metaphysical) views.[31] This Part argues that notwithstanding that wall, Australians in fact rely upon and are influenced by religious values in their engagement with secular society.

The testable hypothesis advanced here contains three propositions. First, that law structures the way people engage with one another in contemporary liberal society. This proposition is so well established that it hardly needs be stated, but it nonetheless sets the foundation upon which the remaining two, less axiomatic, propositions rest.[32] Second, notwithstanding the contemporary liberal separation between public life and one's private religious views, religion nonetheless plays a central role in the way that people engage with one another through law. Finally, the legal academy bears a responsibility to study this role played by religion.

There exists a great deal of possible interactions, many seemingly very insignificant, that would fall within the ambit of the sort of socio-legal interaction contemplated by this essay – these might include contractual relationships in a range of possible variants, including corporate business dealings and the buying and selling of property, family relationships, especially marriage and divorce, and considerations about whether and how to undertake activities and actions that may have the potential to harm others. A simple example of the sort of interaction contemplated by this hypothesis assists. Just before Christmas, 1995, an American textile factory owned by Aaron Feuerstein suffered a devastating fire. Assembled the workers the next day, Mr Feuerstein announced that rather than shutting down, the factory would be rebuilt and the workers rehired. While there was no legal obligation to do so, Mr Feuerstein continued to pay the workers for several months, until the money ran out. The factory was rebuilt and

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26   Talcott Parsons and Anthony Giddens (trans), *Max Weber: The Protestant Ethic and the Spirit of Capitalism* (Unwin Hyman, 1930) 52.

27   S F C Milsom, *Historical Foundations of the Common Law* (Butterworths, 2ⁿᵈ ed, 1981) 25, 87–8.

28   Harold J Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Harvard University Press, 1983).

29   Tom Frame, *Church and State: Australia's Imaginary Wall* (UNSW Press, 2006).

30   Song, above n 19, 213–33.

31   See Rawls, above n 11.

32   See William Twining, *General Jurisprudence: Understanding Law from a Global Perspective* (2009) (additional chapter, available online <www.cambridge.org/twining>) 1–7.

almost all of the workers rehired.[33] When questioned, Mr Feuerstein said these steps followed from a personal sense of obligation based upon traditional Jewish teachings about the moral obligations of property owners.[34] In the actions of Mr Feuerstein we find religion invoked as part of one's interaction with others.

Given the programmatic nature of this essay, a fully developed normative definition of socio-legal interaction would follow more from the initial stages of the empirical study than from theory. It would be limiting to attempt such a definition at the outset, other than to highlight the necessity that religion plays a role in whatever interaction one might be examining. The primary question, then, is 'how often and in what way does religion play a role in any social interaction?' The hypothesis outlined above is designed to test that question, and to construct it this essay relies upon the work of Steven D Smith[35] and C John Sommerville;[36] for that reason, it is called the 'Smith-Sommerville hypothesis'. Using their work, the remainder of this part elaborates on propositions two and three.

A   Religion and Socio-Legal Interaction

While contemporary liberalism dictates that whatever role it plays in the private sphere, religion can never enter the public, Steven D Smith argues that it can, and does, through a process known as 'smuggling'. A metaphor used to explain a discursive deficiency, smuggling involves an illicit importation of a premise or assumption into discourse where that premise or assumption is left hidden or unacknowledged. Smith intends 'illicit' in this context to capture primarily those occasions where one imports a premise or assumption where

> the conventions of the discourse you are engaging in purport to exclude it. You are involved in some matter – a hiring decision, perhaps, or a criminal trial – that isn't supposed to turn on race, but you manage obliquely to insinuate race into the discussion.[37]

While it may be unintentional or unconscious, for Smith, it means primarily conscious importation.

Given the nature of contemporary liberalism and the wall between church and state, private and public, if a person's deepest convictions rely on a religious moral discourse, one may have little choice but to smuggle such notions into the dialogue under a secular disguise.[38]

Smith argues that smuggling 'is especially characteristic of our times, and of conversations carried on within the secular cage',[39] both a pervasive and necessary component to the operation of two major normative families of discourse: 'autonomy-liberty-freedom' (the freedom family) and 'equality-

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33   This example is summarised from Joseph William Singer, *The Edges of the Field: Lessons on the Obligations of Ownership* (Beacon Press, 2000) 7–8.

34   Ibid.

35   Smith, above n 13.

36   Sommerville, above n 14.

37   Smith, above n 13, 36.

38   Ibid 35–6.

39   Ibid 38 (emphasis in original).

neutrality-reciprocity' (the equality family). While these families do a good deal of legitimate work, they can also have adverse outcomes[40] and so it is important that we be aware of this process.[41]

Consider as an example the concept of equality. Drawing on Peter Westen's seminal article on the topic,[42] Smith demonstrates that questions about equality can only be answered not by reference to the notion itself, but by 'reflecting on the substantive values or criteria that apply or should apply to a particular issue.'[43] In short,

> the notion of 'equality' cannot carry us far toward any particular resolution. If there is a sincere disagreement about, say, whether same-sex marriage should be legalized, then insisting on 'equality' is merely a distraction (albeit a polemically potent one ...). ... And whenever we observe this strategy in action, we have reason to suspect that the real operative values are being smuggled in – or at least heavily subsidized – under the auspices of the venerable family of 'equality'.[44]

Nonetheless, while it may be illicit, it would take an enormous effort to end smuggling and, in any case, we might not want to, for to do so 'might, under current conditions, have the effect of paralysing normative evaluation and leaving the public square vulnerable to openly cynical politics – or to brute force.'[45] So if smuggling is happening, and if it might cause more harm than good, then what is and what ought to be the response of the university, and specifically the legal academy? The next section addresses both parts of that question.

B   The Religion, the Secular University, and the Legal Academy

Smith's analysis makes it possible, theoretically if not empirically, to conclude that religion is an important part of the private life of many Americans, and that it is smuggled in the public sphere as part of socio-legal interaction. In a broad analysis of American social life, C John Sommerville substantiates this conclusion.[46] Yet, running parallel to this increasing relevance in the general populace, Sommerville claims that the secular university diminishes in relevance, forming a world unto itself, exasperated by the religious views of the populace and unable to provide the political, cultural, scientific and social leadership sought by them.[47] Questions that might be central to a university's mission – including, among others, the status and concept of the human, how to judge between religions, the study of Western civilisation, philosophical justifications for the fact-value dichotomy – become too religious for it to deal with.[48]

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40   Ibid 26–8.
41   Ibid 34.
42   Peter Westen, 'The Empty Idea of Equality' (1982) 95 *Harvard Law Review* 537.
43   Smith, above n 13, 29.
44   Ibid 30–1.
45   Ibid 34.
46   Sommerville, above n 14.
47   Ibid 3.
48   Ibid 4–5.

Sommerville argues that the academy sets secular trends while students live in another, a religious, world: for answers to the life questions that arise in that world, students and the public at large do not look to universities.[49] While some may take different positions on it, if it is the university's mission to attempt to make sense of society and its human meanings and so to foster wisdom, then it ought at least attempt to study the social dynamics taking place in broader society in order to understand the role religion plays in people's lives.[50] Yet that research is not happening.[51] In short, while there are those whose work stands as notable exceptions,[52] it is not too broad a claim to conclude with Sommerville that the secular university is out of phase with American society and increasingly marginal within it.[53]

According to Sommerville, the divergence between academy and society occurred around the turn of the 20th century, when universities moved from overtly religious education to one in which the liberal arts and humanities would dominate, where professors would replace clergy as the official authorities on life's questions. Over time, though, the secular university hollowed out this liberal arts core of the ideal, which itself was a result of fewer students enrolling in the subjects and the conversion of those disciplines into technical specialties. Thus, today, those disciplines 'often [address] questions nobody is asking, and giv[e] answers nobody can understand'.[54]

Yet, as contemporary liberalism, with its focus on individual autonomy, freedom and choice, took hold along with the process of secularism[55] led by science that foments the complete banishment of religion from rational argument, this shift in universities has come at a time when people seek more than anything else answers about how to exercise that choice.[56] Stephen L Carter writes that '[w]hat religion provides, and liberalism by its nature cannot, is a mechanism for selecting among the available choices. The mechanism of choice is morality.'[57] Sommerville, too, identifies this distinct desire on the part of Americans for guidance in exercising the choice afforded them by liberalism, which comes through answers to the bigger life questions – happy to use the science offered by universities, people seem to go elsewhere with those life questions, taking a distinctly casual attitude to the answers universities might be able to offer.[58]

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49 Ibid 6, 8. Recent empirical evidence supports this claim: Frank Newport, 'Americans Split on Desired Influence of Organised Religion: Majority are Satisfied with its Influence', *Gallup*, 2 February 2011 <http://www.gallup.com/poll/145916/Americans-Split-Desired-Influence-Organised-Religion.aspx?>.

50 Sommerville, above n 14, 13–5, 141.

51 Ibid 4–5, 13–5.

52 See, eg, the excellent work of José Casanova, *Public Religions in the Modern World* (University of Chicago Press, 1994); Robert D Putnam and David E Campbell, *American Grace: How Religion Unites and Divides Us* (Simon & Schuster, 2010).

53 Sommerville, above n 14, 4.

54 Ibid 8.

55 See especially Charles Taylor, *A Secular Age* (The Belknap Press of Harvard University Press, 2007) 1–22.

56 Sommerville, above n 14, 10–13.

57 Carter, above n 16, 48–9.

58 Sommerville, above n 14, 14.

While Americans are religious, the secularism of the university means that few answers are being given to the way religion works in people's lives and how life questions might be answered and choice exercised.[59]

Given this analysis of American society and the post-secular university, Sommerville concludes (in a way that Smith might support):

> If all that one saw of religion was what appears on American television, my appeal for religious voices in the academy would surely be puzzling. But the circus atmosphere that surrounds so much of it provides evidence that religion can operate in a decadent marketplace. It cannot be at its healthiest when that is the case. We might even hope that universities will make religion a more serious and intelligent area of our lives. They could find themselves more at the heart of our national life if they fostered an atmosphere of real exploration of concerns that the population has never given up.[60]

Sommerville offers a vision in which we '[i]magine universities that openly acknowledge that humans are the most interesting things in creation, and that make it their goal to explore the implications of this view'.[61]

Sommerville asks universities to explore the meaning of religion in the lives of people, and to respond to the mission of the universities to understand that meaning and to offer wisdom in relation to what is learned there. And in relation to the law specifically, we might identify four reasons to heed Sommerville's call. First, exploring this relationship might allow us better to understand the underlying motivations for and the historical background to the liberal tradition[62] and the Western legal tradition founded upon it.[63] Second, religion and faith influence and form our values and behaviour, which become and are reflected by law.[64] Third, plural and communitarian approaches to understanding human existence tell us that many social inputs construct law, each making a valid contribution. Understanding them allows us to critique the legal order.[65] Finally, by failing to recognise the place of religion in any of these debates, those in the academy and beyond it who study legal, political, and social structures, fail to address and connect with an increasingly important part of contemporary social life.[66]

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59   Ibid.
60   Ibid 143.
61   Ibid. As noted above n 52 and accompanying text, however, there are of course individual scholars who do see humans as the most interesting things in creation and therefore explore the implications of that view. Nonetheless, they by no means represent the majority view within the American academy.
62   Elizabeth Mensch, 'Christianity and the Roots of Liberalism' in Michael W McConnell, Robert F Cochran Jr and Angela C Carmella (eds), *Christian Perspectives on Legal Thought* (Yale University Press, 2001), 54, 54–72.
63   Berman, above n 28, 33–45.
64   David S Caudill, 'Law and Belief: Critical Legal Studies and Philosophy of the Law-Idea' in Michael W McConnell, Robert F Cochran Jr and Angela C Carmella (eds), *Christian Perspectives on Legal Thought* (Yale University Press, 2001), 109; Phillip E Johnson, 'Do You Sincerely Want to Be Radical?' (1984) 36 *Stanford Law Review* 247.
65   Michael W McConnell, Robert F Cochran, Jr, and Angela C Carmella, 'Introduction' in Michael W McConnell, Robert F Cochran Jr and Angela C Carmella (eds), *Christian Perspectives on Legal Thought* (Yale University Press, 2001), xvii–xxii.
66   Sommerville, above n 14, 3–22.

In the last 30 years, relying on a combination of these four reasons, led by Harold J Berman,[67] some in the American legal academy have begun to study the relationship between law and religion. Their work reveals three positions. First, that law itself exhibits theological dimensions, and may even be a dimension of theology influencing the development, application and operation of 'secular' law.[68] Second, and related, theology might historically and dialectically informing – crossing-over and cross-fertilising[69] – the development of the contemporary Western legal tradition.[70] To take only the case of Christianity, for example, Harold J Berman writes that:

> basic institutions, concepts, and values of Western legal systems have their sources in religious rituals, liturgies, and doctrines of the eleventh and twelfth centuries, reflecting new attitudes toward death, sin, punishment, forgiveness, and salvation, as well as new assumptions concerning the relationship of the divine to the human and of faith to reason. Over the intervening centuries, these religious attitudes and assumptions have changed fundamentally, and today their theological sources seem to be in the process of drying up. Yet the legal institutions, conceptions, and values that have derived from them still survive, often unchanged.[71]

In other words, the history of the Western legal tradition, of the common law itself, is intimately bound up with Christian theology.[72] Finally, some scholarship focuses on religious law,[73] of which each of the monotheistic traditions – Judaism,[74] Christianity,[75] and Islam[76] – having their own variants.

Yet, while the theoretical literature is rich and deep, no empirical study has yet been conducted into the role played by religion in individual socio-legal interaction. The Smith-Sommerville hypothesis is nothing more than a theory, and one that applies only, if at all, to America. This essay asks whether the hypothesis holds in Australia and, while that question cannot be fully answered here, the next Part reflects on whether religion plays a role in Australian socio-legal interaction and concludes that the available evidence provides at least preliminary support for the conclusion that it does.

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67   Berman, above n 28.
68   Ibid 273–519.
69   John Witte Jr, 'Introduction' in John Witte Jr, and Frank S Alexander (eds), *Christianity and Law: An Introduction* (Cambridge University Press, 2008) 1.
70   Berman, above n 28, 1–45, 520–58.
71   Ibid 165.
72   Ibid 33–45.
73   H Patrick Glenn, *Legal Traditions of the World* (Oxford University Press, 4th ed, 2010) 99–132, 133–80, 181–236, 288–318, 319–60.
74   See, eg, NS Hecht et al (eds), *An Introduction to the History and Sources of Jewish Law* (Oxford University Press, 1996).
75   See, eg, Michael A Scaperlanda and Teresa Stanton Collett (eds), *Recovering Self-Evident Truths: Catholic Perspectives on American Law* (Catholic University of America Press, 2007).
76   See, eg, Wael B Hallaq, *An Introduction to Islamic Law* (Cambridge University Press, 2009).

III REFLECTIONS: LAW, RELIGION, AND AUSTRALIA

At a theoretical level, the Australian legal academy exhibits some interest in the relationship between law and religion,[77] although it is largely limited either to support for a strict wall of separation between church and state and the personal and public spheres of life,[78] or to an evasion of the role played by religion in the development of the Western legal tradition within which Australia stands.[79] At the sociological level, however, while considerable evidence demonstrates the importance of religion in the lives of Australians, there is little if any empirical evidence concerning the role played by religion in socio-legal interaction. This Part therefore contains two sections. The first outlines the dominant Australian approach to the relationship between religion and law while the second demonstrates, using a recent comprehensive empirical study,[80] that religion is important to Australians, raising, but not substantiating, the possibility that religion also plays a role in socio-legal interaction.

A   The Australian Legal Academy

In general terms, the Australian legal academy is sceptical about the relationship of law and religion and the role it ought to play in driving legal change.[81] This section briefly considers the work of Ngaire Naffine, a leading Australian legal academic who considers the place of religion in law.[82] While adopting a solidly liberal stance that religion offers little to our understanding of liberal law, and that it ought to be constrained as a source of legal change and development, Naffine nonetheless argues, along sociological lines, that the legal academy ought to study the role of religion in socio-legal interaction.

Take first the solid liberal stance. In *Law's Meaning of Life*, a seminal piece of scholarship exploring the meaning of the legal person, Naffine presents the fullest Australian exposition of scepticism concerning the place of religion as a source of understanding law and driving legal change. For Naffine, the portrayals of the nature of personhood in Western thought can be reduced to three ideal types: those that involve reason, such as law; those that involve the sanctity of life, such as religion; and those that involve value being placed on our species nature, such as biology. These are grouped into five metaphysical approaches:

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77   See, eg, Symposium, 'Law and Religion in Australia: Contemporary Scholarship' (2009) 30 *Adelaide Law Review*.

78   See, eg, Meyerson, above n 17.

79   Paul Babie, 'Breaking the Silence: Law, Theology and Religion in Australia' (2007) 31 *Melbourne University Law Review* 296.

80   Bouma, above n 20.

81   See, eg, Meyerson, above n 17. Still, some who hold expressly religious views nonetheless argue for separation: see, eg, Frame, above n 29.

82   See especially Ngaire Naffine, 'Law's Sacred and Secular Subjects' in Peter Cane, Carolyn Evans, and Zoë Robinson (eds), *Law and Religion in Theoretical and Historical Context* (Cambridge University Press, 2008) 268; Ngaire Naffine, 'How Religion Constrains Law and the Idea of Choice' (2009) 30 *Adelaide Law Review* 15; Ngaire Naffine, *Law's Meaning of Life: Philosophy, Religion, Darwin and the Legal Person* (Hart Publishing, 2009).

legalism, rationalism, religionism, naturalism, and social relational.[83] The first is hived off and the next three are grouped under the banner of 'metaphysical' approaches, within which some are said to take a 'strong metaphysical approach' and in so doing, 'tend to communicate poorly with those of different mentalities'.[84] Presumably that includes those who fall within the fifth category, those of the 'social relational person', apparently favoured by legalists, who insist that '[t]he legal person … is defined by their relations and only by their legal relations'.[85]

Naffine posits that the various ways of understanding personhood demonstrate a range of incommensurable worldviews or mentalities. And the religious is one that clearly has little place in the 'rationalist philosophy of liberal individualism' in 'which any academic necessarily participates'.[86] Thus, '[t]he sceptic can perhaps understand the striving to find meaning in our lives, but faith in a personal God may be entirely alien. The believer and the non-believer have incommensurable positions'.[87]

And while Naffine is quick to point out that each of these worldviews, even the incommensurable ones, influence legal thinking, the analysis offered makes the legalist worldview advocated seem just as rigid and unyielding, in just as 'deep oppositional mode' and therefore 'neglecting something important in their analysis of the person' as the 'metaphysicians', those who hold rationalist, religionist and naturalist mentalities.[88] Naffine concludes that

> although law may have (historically determined) metaphysics, law is not the same as philosophy and it is not a form of natural science and it is not theology. The highly practical and diverse tasks of social regulation and dispute resolution, which are given to law, also give it its own distinctive nature.[89]

In other words, religion should have no formal, public role in the application or the development of law. Naffine 'is critical of [religious] interventions [in law], regarding them as constraining of human choice and against human interests, and tends to be critical of jurists who permit them.'[90] This analysis therefore suggests that incommensurable mentalities ought to be confined to the private sphere; law ought to be left to get on with its work free of such encumbrances, while people live their lives under the law and relying upon their metaphysical worldviews.

At a sociological level, it is people living their lives that matters. The Smith-Sommerville thesis posits that it is Naffine's incommensurable mentalities in society, broadly speaking, that we, as the legal academy, ought to be studying, for they are the interface between law and social interaction. It is on just those incommensurables that the operation of the law turns. And Naffine recognises

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83   Naffine, *Law's Meaning of Life: Philosophy, Religion, Darwin and the Legal Person*, above n 82, 167–8.
84   Ibid 167.
85   Ibid 168–9.
86   Ibid 173.
87   Ibid.
88   Ibid 175.
89   Ibid.
90   Naffine, 'How Religion Constrains Law and the Idea of Choice', above n 82, 15 (citations omitted).

this. Rather than a complete break of the tie between legal persons and real human beings (perhaps there is smuggling here?),[91] Naffine, in acknowledging the competing myths, mentalities or belief systems that constitute our nature, argues that 'this is not to say that the myths are false or meaningless or ineffectual or without social and moral value. We live our legal lives according to them and they may well be doing very good work for us'.[92] Any attempt to keep the legal strictly closed to metaphysical considerations 'cannot succeed because, one way or another, community and even sectarian beliefs about what makes a person a person find their way into law'.[93]

Thus, although not explicit, Naffine suggests that the legal academy ought to study the work that these metaphysical considerations do in relation to law:

> [p]erhaps the critical task of the reflective judge and scholar is to attend quite openly to the beliefs, religious and otherwise, that enter and shape law, especially those beliefs about our very being which are multiple and often in tension. The burden is to consider the precise nature of those beliefs as well as their logic, their degree of congruence, their contemporary relevance, their representativeness, their practical implications for all the different parties affected and perhaps most importantly their compatibility with justice.[94]

Thus, Naffine, while taking a liberal stand as concerns the place of religion in understanding law and in driving its evolution, supports, in the interests of justice, the legal academy as the place to study the role played by religion in the private, social, sphere. In short, Naffine seems to support at least that much of the Smith-Sommerville hypothesis that says that if religion is important to Australians, and if it does perhaps play a role in the way they interact with law and with each other, then the academy ought to study it. The next section presents empirical evidence to support the call to study religion's role in relation to law.

B   Australian Society

In *Australian Soul*, a recent and comprehensive study of the place of religion in Australian society, sociologist Gary Bouma uses a range of empirical methods, both quantitative and qualitative, to demonstrate that far from declining, religion and spirituality in Australia are thriving.[95] Indeed, Bouma notes that the empirical evidence reveals that

> [t]here has been a resurgence of interest in the role of religious groups, organisations and beliefs in the emergence of this nation ... These histories provide a corrective to those histories of Australia that follow the secular ideologies dominant at many universities, which ignore, or give little place to, the role of religion.[96]

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91   Naffine, *Law's Meaning of Life: Philosophy, Religion, Darwin and the Legal Person*, above n 82, 180.
92   Ibid 181.
93   Naffine, 'Law's Sacred and Secular Subjects', above n 82, 288.
94   Ibid 290.
95   Bouma, above n 20. See also Bouma et al, above n 18, 2–9.
96   Bouma, above 20, 31 (citations omitted).

This section outlines three important empirical conclusions drawn by Bouma. First, because they are difficult to distinguish in Australian society, religion and spirituality must be conjointly considered. Second, it explores what Bouma calls the 'qualities' of Australian religion and spirituality. Third, following from the second, it examines the 'quantities' of that religion and spirituality. This evidence lends at least initial support to a call for further empirical research aimed at testing component (ii) of the Smith-Sommerville hypothesis.

1   *Australian Religion and Spirituality*

Bouma outlines four matters pertinent to understanding Australian religion and spirituality. First, understanding religious devotion and spirituality involves knowing something about the Australian social context, which is postmodern (multicultural and multifaith), secular (not irreligious or antireligious or lacking in spirituality, but referring to how religion enters the private rather than public sphere), and diverse (globally connected to religious and spiritual ideas and traditions from other countries and cultures).[97] Second, once social context is defined, one must also define religion and spirituality. There are, of course, similarities:

> Religion and spirituality both relate to dimensions of human life that intersect with but point beyond the ordinary, the temporal, the material and the physical; hence the use of such prefixes as meta-, trans-, super- and extra- in the description of spiritual and religious phenomena.[98]

But there are also distinguishing features: to be religious refers to 'an experiential journey of encounter and relationship with otherness, with powers, forces and beings beyond the scope of everyday life. To be spiritual is to be open to this "more than" in life, to expect to encounter it and to expect to relate to it'.[99] While being spiritual can be and often is done alone,[100] religion, by contrast, 'refers more to socially organised and structured ways of being spiritual'. There are many such traditions – Judaism, Christianity, Islam, Buddhism, Taoism, Hinduism, among others – which, while possible to practice individually, essentially involve social, group activity.[101] Still, it is difficult to identify to define or demarcate the two with bright lines; the point is that '[h]owever entwined the two are, using both terms sensitises the social analyst to a wider domain of activity than the currently limited word "religion"'.[102]

Moreover, asking whether they are a property of the person, or of a group, is artificial, misleading and unhelpful, because the question itself rests on the 'myth of the autonomous self.'[103] Rather, and importantly for present purposes,

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97   Ibid 1–7.
98   Ibid 10.
99   Ibid 12.
100   Ibid 12–5.
101   Ibid 15.
102   Ibid 16.
103   Ibid.

> Australia's religious and spiritual life is not something separate and apart from the rest of society but is as fully integral to the operation of the society as health, family and economy. ... On the other hand, the changes that have occurred in the religious and spiritual composition of Australia shape the nature of individual religiosity if only by moving from a fairly limited and almost closed market to a free market full of choice and product differentiation.[104]

Finally, Bouma argues that one of the most basic functions of religion and spirituality is to provide hope, to make sense of the past and paint a picture of the future so that action taken now is worth the effort.[105] More significantly in this regard, 'religions [also] work by providing action frames, patterns of interaction and social networks that link people, encourage movement towards hope, enable the hurtful past to be left behind and restore the fabric of human interaction, thus providing an experienced basis for hope.'[106] In other words, around religion and spirituality, in providing 'hope through activities, symbols, meanings and story sharing[,] cluster such relationships as communities, organisations, identities, systems of ethics and media of communication'. Thus, '[a]s these things emerge the boundary between religion and spirituality becomes increasingly difficult to draw.'[107] It is easier, then, in the remainder of this essay, and more appropriate to refer to 'religion/spirituality'.

2   *Qualities*[108]

For Bouma, the quality of Australian religion/spirituality can best be summed up in Manning Clark's phrase 'a shy hope in the heart'.[109] Drawing to some extent on the Aboriginal spirituality that preceded European contact – diverse, respectful of the land, and attuned to the links between here and now and promoting responsibilities extending over generations[110] – Australian religion/spirituality, on the one hand, and unlike America, is 'much less use of neon lights and much less explicit public spirituality'. On the other hand, unlike Europe, there is a 'comparatively high vitality of [Australian] religious and spiritual life ... particularly among people from parts of Europe where religious life has almost disappeared'.[111]

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104   Ibid 17.

105   Ibid 18.

106   Ibid 19, 20–2.

107   Ibid 27.

108   This title is taken from Bouma, above n 20, ch 2.

109   John Thornhill, *Making Australia: Exploring Our National Conversation* (Millennium, 1992) 172, as cited in Bouma, above n 20, 32.

110   Bouma, above n 20, 31. Bouma also notes, however that 'most Australians who identify themselves as Aboriginal also indicate that they are Christians': at 31. James Cowan provides perhaps the most comprehensive account of what Aboriginal spirituality might have been like prior to European contact: James Cowan, *Mysteries of the Dream-Time: The Spiritual Life of Australian Aborigines* (Unity Press, 1992). See also Deborah Bird Rose, *Dingo Makes Us Human: Life and Land in an Australian Aboriginal Culture* (Cambridge University Press, 2000); Ronald M Berndt and Catherine H Berndt, *The World of the First Australians: Aboriginal Traditional Life Past and Present* (Aboriginal Studies Press, 5th ed, 1988).

111   Bouma, above n 20, 33 (citations omitted).

In short, Australian religion/spirituality reveals a unique quality, characterised by twelve themes identified by Bouma: (i) a serious but light touch in dealing with religion; (ii) a wariness of enthusiasm in religion, and especially high demand religion; (iii) a wariness of imported, mass culture religion and spirituality; (iv) serious distancing from authoritarian leaders promoting sacred causes or sacrifice for principle; (v) a serious commitment to living for now, not sacrificing for the future; (vi) an antipathy to empty formality; (vii) a serious mateship grounded in shared experience; (viii) serious tolerance of difference flowing from a commitment to seeking a fair go for everyone and keeping an even keel; (ix) a serious readiness for humour and to laugh at oneself; (x) a serious quiet reverence, a deliberate silence, including comfort with an inarticulate awe and a serious distaste for glib wordiness; (xi) a serious wariness and intolerance of the 'gate-keepers', the 'straighteners' and 'God's police'; (xii) a preference to 'live and let live' tolerance grounded in mutual respect as opposed to enforcing one group's viewpoint on others as a primary mode of acceptable inter-religious group relations.[112]

Bouma's analysis of the qualitative dimension demonstrates that for Australians, while it may be understated and wary of excessive public displays, religion/spirituality is part of life at the personal level of the individual rather than that of the structured organised religion. Indeed, for individuals, there may be a rejection of religious organisations, such as churches, or temples in favour of a blended form of spirituality drawing on a number of otherwise unrelated religious traditions. The principal conclusion to be drawn from the evidence, though, is that religion/spirituality is present in the lives of Australians. In addition to its quality, however, Bouma also examines the quantitative dimension of Australian religion/spirituality. The next section turns to that focus.

3   *Quantities*[113]

Using data compiled in the 1947, 1971, 1996 and 2001 Australian censuses, Bouma identifies four quantitative elements of Australia's religion/spirituality: (i) an increasing diversity; (ii) a movement away from British Protestant groups towards Catholicism and other Christian groups; (iii) a dramatic growth in the number of spiritualities and religious identities; and (iv) mapping the first three trends demographically reveals future trends.[114] This section considers each in turn.

(a) Diversity

The available data indicates that migration and conversion continue to produce greater Australian diversity in the number of religious groups, the number of religions represented and the range of difference between and within

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112   Ibid 45–7.
113   This title is taken from Bouma, above n 20, ch 3.
114   Bouma, above n 20, 49–53 and Table 3.1.

religious groups.[115] Three interesting characteristics emerge from the data. First, while conversion can take a number of forms commonly understood by this word, perhaps the most interesting form involves those who have shifted from a religion to 'no religion', which has grown from 0.3 per cent in the 1947 Australian census to 15.5 per cent in 2001. The degree to which this indicates an increase in secularity or irreligion may be tempered, Bouma argues, by data contained in the 1983 Australian Values Study, which found that of those who indicated 'none' for religion, 21.2 per cent described themselves as 'religious persons' and 37.8 per cent prayed 'occasionally' or more frequently. In other words, these people can be classified as those who 'believe but do not belong'.[116]

Second, there is an increase in those who choose to participate in a Christian religious group on a basis other than denominational loyalties, such as in the case of 'Pentecostal', 'other Christian group', 'other' and 'inadequately described'. While the numbers are still small in overall terms, these 'represent some of the most vigorously developing areas of Australian religion and spirituality'.[117]

Finally, with the decline of British Protestantism, Australian identification with other major world religions continues to grow substantially – there are now more Buddhists than Baptists, more Muslims than Lutherans, more Hindus than Jews, and more than twice as many Sikhs as Quakers.[118] And, because the 2001 Australian census only listed those groups that amounted to more than one per cent in the 1996 census for the purpose of answering the question 'What is the person's religion?', the number of Australians identifying with 'other' increased by 33.33 per cent between 1996 and 2001. This category includes a rich diversity of religious groups comprising 92,000 Australians, or 0.5 per cent of the population,[119] including many major world religions.[120]

(b) Christianity

In relation to Christianity, still the largest religious group in Australia, four interesting trends emerged in the 2001 census. First, while the overall number of Christians grew between the 1996 and 2001, that number as a percentage of the Australian population shrank, due to rapid growth of the population overall and the growth of other religious groups. Second, while there are more Christian groups, there has been a marked decline in Anglicans and other British Protestant groups – Presbyterians, Methodists, Brethren and Congregationalists – and with it 'a decline in the power and influence of those groups that were strong in the twentieth century'.[121] Third, the decline in the Anglican Church is matched by growth in Christian groups with a charismatic worship style and conservative,

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115   Ibid 52.
116   Grace Davie, *Religion in Britain Since 1945: Believing without Belonging* (Blackwell, 1994), as cited in ibid 54.
117   Bouma, above n 20, 55.
118   Ibid 55–6, figures 3.2 and 3.3.
119   Ibid 61.
120   Ibid 58–61 (citations omitted).
121   Ibid 67.

family-oriented ethos.[122] Finally, while all of this was happening, between 1947 and 2001, Australia's Catholics become the largest religious group in Australia,[123] although those actively participating appear to be shrinking.[124]

(c) *Spirituality Increasing, Multiple Religious Identities Multiplying*

The evidence indicates both an increase in spirituality among Australians as well as increasing membership in multiple religious groups. In relation to the former, when asked about religious identity on the 2001 census, 352 000 people, or 1.88 per cent of the population, wrote something about spirituality rather than religious affiliation. That is a number equivalent to the Buddhists and more than Lutherans or Baptists.[125]

In relation to multiple religious identities, census evidence supports a conclusion about the passing of singularity of religious identity in favour of membership of multiple religious groups, adopting beliefs and practices from a range of religions and spiritualities. In short, Australia's religious identity is increasingly plural and diverse.[126]

(d) *Future*

Two interrelated demographic trends emerge from the 2001 census data.[127] First, rather than being characteristic of the poor, Australian religion/spirituality remains the province of the educated middle classes. Second, and related to this, the migration of the 1960s and 1970s brought people to Australia who were more religious than they would have been if they had stayed where they were raised – and while their children and grandchildren may have ceased to practice the religion of their forebears, they have not discarded religion altogether. Rather, those descendants are more likely to join non-denominational, Pentecostal and mega-churches.[128] Thus, far from 'God being dead', a substantial majority of Australians continue to identify with a religious group and spirituality is on the rise. Australia's religious and spiritual life, therefore, is becoming more diverse and less tied to formal organisations,[129] demonstrating that '[r]eligious belief, participation and denomination are far from inconsequential in Australian life'[130] and 'it cannot be ignored, nor can it be privatised, and nor can it be relegated to the margins.'[131] How, then, can we determine whether that role manifests itself in socio-legal interaction?

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122   Ibid.
123   Ibid 67 (citations omitted).
124   Ibid 68.
125   Ibid 61–3.
126   Ibid 63–5.
127   Ibid 68–72.
128   Ibid 73–4 (citations omitted).
129   Ibid 85.
130   Ibid 84.
131   Australian Human Rights Commission, above n 18, 80.

IV OBSERVATONS: EMPIRICAL RESEARCH, LAW AND RELIGION IN AUSTRALIA

This Part contains two sections. The first exhorts the legal academy to move beyond theoretical analysis of the relationship between law and religion to the sociological study of the latter's role in the former at the level of socio-legal interaction, while the second offers brief observations on the types of empirical methodologies the Australian legal academy might employ in embarking upon such studies.

A From Theory to Empirical Research

Historically, legal theory and empirical legal research tend to be 'conducted independently of each other, each asking its own questions, using its own methods, and drawing its own conclusions'.[132] The American Law and Society tradition enjoys a long tradition of 'Empirical Legal Studies'[133] (which encompasses 'Sociolegal Research' and 'New Legal Realism'[134]) with a 'new legal empiricism' perhaps emerging in very recent times,[135] yet even as part of that canon, religion constitutes only a small part of the total research output.[136] And this represents a significant gap: '[r]ecent debates about the role of religious systems of law in secular states, for example Sharia law, are in urgent need of empirical background information'.[137]

In order to avoid 'theoretical speculation or armchair empiricism based on [anecdote]',[138] the role of religion in social life, even in jurisdictions with a

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132   Dennis J Galligan, 'Legal Theory and Empirical Research' in Peter Cane and Herbert M Kritzer (eds), *The Oxford Handbook of Empirical Legal Research* (Oxford University Press, 2011) 976.

133   Peter Cane and Herbert M Kritzer, 'Introduction' in Peter Cane and Herbert M Kritzer (eds), *The Oxford Handbook of Empirical Legal Research* (Oxford University Press, 2011) 1, 2; Herbert M Kritzer, 'The (Nearly) Forgotten Early Empirical Legal Research' in Peter Cane and Herbert M Kritzer (eds), *The Oxford Handbook of Empirical Legal Research* (Oxford University Press, 2011) 875.

134   Laura Beth Nielsen, 'The Need for Multi-Method Approaches in Empirical Legal Research' in Peter Cane and Herbert M Kritzer (eds), *The Oxford Handbook of Empirical Legal Research* (Oxford University Press, 2011) 951, 952.

135   Mark C Suchman and Elizabeth Mertz, 'A New Legal Empiricism? Assessing ELS and NLR' (2010) 6 *Annual Review of Law and Social Science* 555; Cane and Kritzer, 'Introduction', above n 133, 2.

136   America leads the way in empirical study of religion's role in relation to law: see, eg, Michael Heise and Gregory C Sisk, 'Ideology "All The Way Down"? An Empirical Study of Establishment Clause Decisions in the Federal Courts' (2012) forthcoming *Michigan Law Review* <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1791214>; Gregory C Sisk, Michael Heise and Andrew P Morriss, 'Searching for the Soul of Judicial Decisionmaking: An Empirical Study of Religious Freedom Decisions' (2004) 65 *Ohio State Law Journal* 491; Carol J Greenhouse, *Praying for Justice: Faith, Order, and Community in an American Town* (Cornell University Press, 1986); Mavis Maclean and John Eekelaar, 'The Obligations and Expectations of Couples within Families' (2004) 26 *Journal of Social Welfare and Family Law* 117. The recent report by Bouma et al, Australian Human Rights Commission, above n 18, is the only Australian empirical study of its kind, although it considers groups rather than individuals.

137   Mavis Maclean, 'Families' in Peter Cane and Herbert M Kritzer (eds), *The Oxford Handbook of Empirical Legal Research* (Oxford University Press, 2011) 285, 303.

138   Nielsen, above n 134, 972.

robust conception of the nature and role of empirical legal research, stands in serious need of empirical background study. And, if nothing else, the American experience suggests that 'a healthy pluralism of empirical approaches'[139] can answer questions about the 'law in action'[140] in ways that the doctrinal and theoretical work that currently typifies the Australian legal academy does not and cannot. In an effort to mitigate the pitfalls of failing to support theory with empirical background, this conclusion offers some brief and general observations about possible empirical methodologies to be used in the Australian study of the Smith-Sommerville hypothesis.

Yet, before we can even begin, the word 'empirical' itself causes confusion, which can in turn limit research and data. Peter Cane and Herbert M Kritzer explain that while empirical work is typically associated with research that employs statistical and other quantitative methods, it need not be limited to quantitative methods. Rather, it can include qualitative techniques and even mix quantitative and qualitative methodologies.[141] Taking account of the breadth of possibilities, Cane and Kritzer write that

> 'empirical' research involves the systematic collection of information … and its analysis according to some generally accepted method. … The information can come from a wide range of sources including surveys[,] [d]ocuments, reporting systems, observation, interviews, experiments, decisions, and events. … The analysis can involve simple counting, sophisticated statistical manipulation, grouping into like sets, identification of sequences … matching of patterns, or simple labelling of themes. Ultimately, the analyst engages in a process of interpreting the results of the analysis in order to link those results to the question motivating the research.[142]

Bouma used a range of the methodologies identified by Cane and Kritzer to examine the place of religion/spirituality in Australian society. In the vernacular of empirical research, this is known as a 'multi-method approach',[143] a combination of elements of quantitative[144] and qualitative methodologies.[145]

A multi-method approach is particularly useful in relation to legal research, because 'the phenomenon of law itself consists of individuals [plaintiffs, defendants, lawyers, judges, etc], organisational settings [workplaces, law firms, schools, etc], institutional fields [race, gender, class, religion, etc], and the interactions among them … As a result, fully understanding law demands research conducted using multiple approaches'.[146] Any research that uses more than one research technique or strategy to study one or several closely related

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139   Cane and Kritzer, above n 133, 1.
140   Ibid.
141   Ibid 3–4.
142   Ibid 4.
143   Nielsen, above n 134, 951.
144   Lee Epstein and Andrew D Martin, 'Quantitative Approaches to Empirical Legal Research' in Peter Cane and Herbert M Kritzer (eds), *The Oxford Handbook of Empirical Legal Research* (Oxford University Press, 2011) 901.
145   Lisa Webley, 'Qualitative Approaches to Empirical Legal Research' in Peter Cane and Herbert M Kritzer (eds), *The Oxford Handbook of Empirical Legal Research* (Oxford University Press, 2011) 926.
146   Nielsen, above n 134, 952.

phenomena, provided the studies are of comparable quality, has the advantage of being more reliable. Pragmatically, the American experience within the Law and Society Tradition suggests that even though they may not always recognise it, and so may not do so systematically, empirically oriented scholars of law and legal institutions are almost always using multiple methods. The reason for this is simple: 'the very process of research necessarily involves gathering information in a variety of ways'.[147]

The next section reflects briefly on a possible experimental design implementing a multi-method approach for use in determining the role of religion/spirituality in Australian socio-legal interaction.

B   Brief Reflections on a Possible Experimental Design

1   *Methodological Background*

Typically, one might use one of three qualitative and quantitative empirical approaches to study the role of religion/spirituality in socio-legal interaction. First, quantitatively, surveys provide snapshots of a system or population at a particular moment in time, compiling comprehensive information about attitudes and demographic characteristics. Yet, while they might fill gaps in knowledge, surveys can fail to explain processes and mechanisms.[148] Where a survey's usefulness ends, qualitative in-depth interviews, the second approach, provide insight into processes and subjectivities, although this too can come at the expense of representativeness.[149] Finally, then, systematic and critical document analysis and historiography (court opinions, court documents, newspaper clippings, council decisions, Hansard, and other primary archival materials) offer important knowledge about formal processes. Still, while useful, these constitute artefacts produced as part of other processes, such as judicial proceedings, and not a neutral lens on the truth.[150] Given that the limitations of each method alone, 'we may wonder what we are missing by employing a single strategy when we seek to understand complex interactions, organizations, and institutions that make up our legal system'.[151]

To overcome this difficulty, researchers often combine qualitative, quantitative, and documentary data in order to achieve a 'synthesising of styles';[152] quantitative data (for the how many and how often questions) and qualitative data (for the why).[153] A multi-method framework of this type might begin with qualitative research – focus groups – which might then lead to 'how

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147   Ibid 952–3.

148   Ibid 953.

149   Ibid.

150   Ibid 953–4.

151   Ibid 954.

152   John Brewer and Albert Hunter, *Foundations of Multimethod Research: Synthesizing Styles* (Sage Publications, 2006).

153   Hazel Genn, 'Hazel Genn and Paths to Justice' in Simon Halliday and Patrick Schmidt (eds), *Conducting Law and Society Research: Reflections on Methods and Practices* (Cambridge University Press, 2009) 227.

much' and 'how often' questions to be used in a second, quantitative, stage of research involving the use of surveys. This may in turn lead to a final stage of systematic qualitative analysis.[154] Staged qualitative-quantitative-qualitative research of this type has been referred to as the 'quant sandwich'; one might also use a 'qual sandwich'. Laura Beth Nielsen argues that

> [e]ither way, the revelations from the different sources are best understood when they are in conversation with one another. The best research uses a variety of methodologies to provide a more nuanced understanding of law, legal institutions, and legal processes than can be provided by any one methodology alone due to the complex nature of the social world in which they operate. And when different methodologies are used together in ways that are interactive and linked, research can have more explanatory power.[155]

For Nielsen, then, a multi-method approach which 'tak[es] into account the various forces – individual (eg identity, consciousness), organizational (eg workplace, social movement groups), and institutional (eg gender, work, race)',[156] is 'likely to [produce] more reliable [results that] contribute more to the theoretical development of our understanding of law and society.'[157]

Notwithstanding the theoretical benefits to be gained from multi-method research, one ought not to be blind to the costs and risks associated with such projects, most significantly the sheer time and financial costs. In relation to the former, such an approach involves exploratory research to develop theory, developing reliable quantitative instruments to measure and count, and the follow-up with a qualitative phase to better understand the processes that produced the outcomes analysed in the quantitative data.[158] In terms of financial costs, while census data of that compiled by other researchers may be used, that does not allow the researcher to ask and answer the precise questions they would like. To get at those questions and answers, original data may be necessary; and that is costly and messy.[159] These difficulties must be kept in mind from the outset, and a sound theoretical account of the relevant relationships must be developed in order to establish a set of methods that can capture and analyse those relationships.[160] With these background principles in mind, we can turn to a brief outline of a proposed research design for testing the Smith-Sommerville hypothesis.

2 *A Proposed Study*

While the Smith-Sommerville hypothesis contains three components,[161] the need for empirical research lies in the second, the proposition that religion plays a central role in Australian socio-legal interaction. The research project

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154 Nielsen, above n 134, 955.
155 Ibid 952–5 (citations omitted).
156 Ibid 967.
157 Ibid 971.
158 Ibid 970.
159 Ibid 970–1.
160 Ibid.
161 See above pt II.

advocated by this essay, then, aims at exploring views expressed by Australians about how important their religion/spirituality is to socio-legal interactions with others, how often is it sued as part of such interaction, and why. Approaching the Smith-Sommerville hypothesis in this way, using a multi-method empirical approach in order to achieve a 'synthesising of styles', will produce quantitative data offering insight into the how many and how often questions, with qualitative data providing not only further information about how many and how often, but also, and more importantly, unpacking the 'why'. How, then, to implement such a study? As Nielsen suggests, multi-method approaches of this type may take one of two forms: a 'quant' or a 'qual' sandwich. The former, in three stages, offers a useful approach to exploring the Smith-Sommerville hypothesis. The remainder of this section offers brief reflections on the proposed three-stage study.

(a) Stage One: Consultations

The first stage involves the identification of and consultation with focus groups in conjunction with a systematic and critical analysis of documents relevant to those groups. The principal Australian empirical studies examining the importance of religion/spirituality in the lives of Australians, specifically Bouma's *Australian Soul* and the Australian Human Rights Commission's ('AHRC') report *Freedom of Religion and Belief in 21ˢᵗ Century Australia*, provide means of identifying the relevant consultation groups, typically religious and community leaders, and government officials and NGO representatives.[162] Use of the existing Bouma and AHRC studies also provides the background to those areas of Australian life in which religion/spirituality seems most important to individuals: the environment, corporate/business and finance issues (broadly, the 'marketplace'), family issues, such as marriage, divorce and childcare, and education.[163] These areas of Australian social life would provide the focus of the consultations in the first stage of the proposed study.

Consultations achieve two objectives. First, they provide data to fill the gaps identified earlier in Bouma's work in relation to the role of religion/spirituality in socio-legal interaction, and they will assist in focussing the design and administration of questionnaires to be used in the second stage of the project. Specifically, using the Bouma and AHRC studies as guides to the analysis of the qualitative data obtained in the consultations, the results can be used to identify

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162   Bouma et al, Australian Human Rights Commission, above n 18, 9–13 (For reasons of clarity, this report is referred to as the AHRC study here, although it was prepared by Bouma et al).

163   See ibid 22–83; Bouma, above n 20, 86–212. Recent scholarship indicates that these are the most significant areas of social life where religion plays a role: see, eg, John Witte Jr and Joel A Nichols, 'Faith-Based Family Laws in Western Democracies?' (2010) *Fides et Libertas: The Journal of the International Religious Liberty Association* 119; Kristen Stilt and Swathi Gandhavadi, 'The Strategies of Muslim Family Law Reform' (Research Paper No 11–42, Northwestern Public Law, April 2011) <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1802757>; Sayd Zubair Farook and Mohammad Omar Farooq, 'Incentive Based Regulation for Islamic Banks' (2011) 2 *Journal of Islamic Accounting and Business Research* 8; Michael J T McMillen, 'Trends in Islamic Project and Infrastructure Finance in the Middle East: Re-Emergence of the Murabaha' (Working Paper, February 2011) <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1753252>.

the religious attachments of people and how often those attachments play a role in socio-legal interactions. Second, the data obtained in consultations can begin to answer questions in relation to why religion/spirituality is important in social interaction. We might expect that the outcome of the consultations will provide support for a correlation between level of religious attachment and the use of religion/spirituality in socio-legal interaction, and specifically why it is important in that interaction. What it would not provide, however, are focussed answers in relation to how many Australians throughout the country consider religion/spirituality important in their socio-legal interactions, and how much and how often. In short, consultations fail to provide representativeness in relation to the Australian society as a whole. That requires the use of quantitative methods, the focus of stage two.

(b) Stage Two: Surveys

Using the data available from Bouma and the AHRC in conjunction with the data compiled in the first stage of the proposed study – expected to identify the correlations between religion/spirituality and the use of those attachments in socio-legal interactions involving the environment, the marketplace, the family, and education – the second stage would involve the design of survey questionnaires for administration to a random sample of Australians. The precise questions that would comprise the survey questionnaires can only be determined following the results of stage one, but clearly these would involve the areas already explored in that stage: the environment, the marketplace, the family, and education.

Depending on the available financial resources, of course, surveys would ideally be conducted at the national level. However, if that were not possible from a financial perspective, then specific regions, or states or territories would be selected. Given their cultural, ethnic, religious and economic diversity, New South Wales and Victoria present the most obvious candidates for the administration of questionnaires if a national survey is not possible.

This stage overcomes two related difficulties – the first, already noted, is the lack of representativeness in relation to the how many and how often questions. The second difficulty is the potential for reticence in discussing the use of religious values in socio-legal interaction. This is a difficulty in the case of consultations where the respondents are easily identifiable and group pressure may be exerted to answer in specific ways that conform to group understandings of religion/spirituality. This difficulty can be remedied to some extent in using double-blind questionnaires.

Again, one expects, consistent with the findings of Bouma and the AHRC, and using available American quantitative studies of judicial approaches to freedom of religion,[164] the proposed surveys will provide a snapshot of the Australian population at the time of the study, providing comprehensive information about the role of religion/spirituality in socio-legal interaction. As

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164   See Heise and Sisk, above n 136; Sisk, Heise, and Morriss, above n 136.

we know, Bouma's research failed – because it was not its aim – to provide answers concerning the role of religion/spirituality in socio-legal interaction, and these surveys would fill that gap. The snapshot, then, would confirm the correlation found in stage one between religion/spirituality and the use of those attachments in socio-legal interaction involving the environment, the marketplace, the family, and education.

Still, stage two may yet fail to explain processes and mechanisms, even when used in conjunction with the results of stage one. Data gathered in stage two may indicate that religion/spirituality is important in socio-legal interaction without explaining the ways in which its use affects the outcomes of such interactions. Again, this may open 'why' questions, to which only further qualitative testing may provide answers. Stage three would turn to that task.

(c) Stage Three: Follow-Up Consultations

Stage two of the proposed study might also identify other aspects of the relationship between religion/spirituality and socio-legal interaction not anticipated by the researchers and not revealed in stage one. As such, the final stage would involve further, and more closely focussed consultations with the original religious and community groups, and government officials and NGO representatives in order to answer any remaining why questions. This may also necessitate some consultations with groups not originally interviewed. The project would need to be open to the possibility of these further consultations; indeed, it will be incomplete without them.

As with the first two stages of the project, however, this final qualitative stage would be expected to confirm the results of the first two stages and the correlation between religious/spiritual attachments and the use of those values in socio-legal interactions involving the environment, the marketplace, the family, and education.

V   CONCLUSION

What is necessary in Australia is not further theorising about whether or not religion/spirituality should play a role in the development of law, but rather, concrete, explanatory data that demonstrates that it already *does* play a role in the lives of individuals and their socio-legal interactions. Empirical evidence supporting this claim will allow informed and focussed decisions, both individual and collective, to be taken in relation to many areas of social life where religion/spirituality may play a role: political questions such as the protection of religious freedom; social issues, including, among others, the environment, homelessness, poverty, and food shortages; and economic concerns, including matters such as the underlying causes of the Global Financial Crisis of 2008.

Clearly, empirical research of the type proposed in this essay cannot resolve those political or social issues, but it can tell us something about the way that Australians understand the relationship between their religion/spirituality and law, and it can offer valuable insight into the how and why people use

religion/spirituality in structuring their socio-legal interactions. And that, in turn, can assist the Australian legal academy to direct its focus away from the tired and well-worn liberal debate about religion and legal change and to a more fruitful normative theorising that takes better or greater account of religion/spirituality as part of the solutions sought by Australians to ongoing social, political and economic concerns.