The Unification of Law and Religion:

A Return to an Historical Concept

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Recent writings have uncovered a robust interaction between the spheres of law and religion. Law and religion are conceptually related. They embrace closely analogous concepts of sin and crime, covenant and contract, righteousness and justice. Law and religion are formally related. They both have patterns of liturgy and ritual, concepts of tradition and precedent, sources of authority and power. Law and religion are methodologically related. They maintain analogous hermeneutical methods of interpreting texts, casuistic and rhetorical methods of argument and instruction, systematic methods of organizing their doctrines. Law and religion are professionally related. They both have officials charged with the formulation, implementation, and demonstration of the norms and habits of their respective fields. Law and religion are institutionally related, through the multiple relations between political and ecclesiastical officials and institutions.[1]

Our Western legal tradition is in a state of crisis. We are no longer able to confront and control the legal, social, and cultural complications that have arisen in the twentieth century. Our current method for combating the issues that are arising is no longer effective. Harold Berman, a contemporary scholar of law and religion, senses that "we are in the midst of an unprecedented crisis of legal values and of legal thought."[2] This crisis is seen as arising through "social and economic and political transformations."[3] Our legal system is being overly taxed and cannot keep pace with all the changes that are taking place. Berman notes that our legal tradition has experienced mass transformation before, but what is different this time is that the legal tradition as a whole is being challenged, not just individual realms within the complex system of law.

It is a crisis not only of individualism as it has developed since the eighteenth century, or of liberalism as it has developed since the seventeenth century, or of secularism as it has developed since the

[1]John Witte, Jr., and Thomas C. Arthur, "The Three Uses of the Law: A Protestant Source of the Purposes of Criminal Punishment?" The Journal of Law and Religion 10, (1993-94): 433.

[2]Harold J. Berman, Law and Revolution: The Formation of the Western Legal Tradition, (Cambridge and London: Harvard University Press, 1983), 33.

[3]Ibid., 33.

sixteenth century; it is a crisis also of the whole tradition as it has existed since the late eleventh century.[4]

Our legal system was developed through the numerous contributions of many different spectrums throughout the legal world. Our legal system seems to be detouring from an historical approach and is trying to establish a tradition purely through its own means and not allowing other aspects from the environment to influence its continual development.

Not only is the Western legal tradition experiencing a crisis within its own society, "the world today is [growing] suspicious of Western 'legalism.'"[5] Western law is viewed as being individualistic and does not seem to relate with legal systems and societies throughout the world. There is no comparison between Western legal thought and those of other national systems. Western thought deals primarily within its own tradition and will not explore the similarities or differences between each separate system. There seems to be no concern or even idea for a culmination of a worldly order. If there is any common law amongst all nations that has developed, such as International Law that is being used for peace negotiations, it is "approached largely from an American point of view."[6] The Western society is also beginning to doubt the validity and universality of their legal system when enacted concurrently with other cultures. Our legal system does not seem capable of tackling and subduing this crisis.

Legal theorists are not asking for a complete transformation of our legal system, instead a few scholars want a more integrated legal system that can approach and apply many different aspects within it. There is a call for a legal

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[4]Ibid., 37.

[5]Ibid., 33.

[6]Harold J. Berman, Faith and Order: The Reconciliation of Law and Religion, (Atlanta: Scholars Press, 1993), 279.

system that can effectively detour crime, respond positively to legal disputes within the world order, and be more socially active.

Berman believes that law has "been treated less and less as a coherent whole, a body, a *corpus juris*, and more and more as a hodgepodge, a fragmented mass of ad hoc decisions and conflicting rules, united only by common 'techniques.'"[7] Instead of applying new theories to law which might aid in the development of consistency, "a primitive pragmatism is invoked to justify individual rules and decisions."[8] Our law system is concerned primarily with the facts of a given case and how these facts can lead to given consequences. The law is unable to capture the whole realm of possibilities and reasons as to why a certain act was committed. Our present interpretation of law has no room for interpretive reasoning and can only effectively work through empirical reasoning.

Interpretive reasoning would raise ambiguous questions surrounding the many possibilities a particular action holds. When one starts to raise and address questions that have no empirical support, many different beliefs and values are being conglomerated together which could give rise many problems as to which values are the true and correct values to follow. An empirical approach to law can help alleviate the problems that could possibly arise through an interpretive approach. Empirical reasoning can be supported through factual information and when a decision is granted upon a given case, there is actual evidence that can support the decision. This can help to dispel any ambiguities in the law, which will in the long run work effectively for the good of all members of society.

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[7]Berman, <u>Law and Revolution</u>, 38.

[8]Ibid., 38

Those who aided in the development of our legal system did so in such a way so that they would not impose their beliefs and ideals upon anyone else in society because doing so would support an authoritative community. Our society was founded on the principle that everyone is free and has the ability to do what ever one wants, within certain limits. The drafters of our Constitution, our legal system, were very much aware of the need for boundaries to be set within the legal realm. These people developed a system of principles or universal rules which were enacted in order to create compliance within society. Limitations were developed in order to compel individuals to behave a set way within society. People were not allowed to run rampant through communities because doing so would surely impose on someone else's freedom. These principles were enacted in order to generate the most effective response and action out of individuals within a society. These laws were believed to illustrate the desired principles that would regulate human action within society.

The laws allow for an individual to live their life according to their personal judgment. An individual is free to be themselves and do with themselves or their property as they please, however, any deviance from the law will result in punishment or sanctions handed out by the courts within society. This format would allow for the free-will of an individual to coexist comfortably with the free-will of everyone else within a given society. The major concern that is raised regarding this interpretation of law is that it detracts from individuals and society as a whole, developing a common bond or moral interpretation for the sanctity of life. Everyone is concerned with one's own well-being and there is no longer a concern for the whole community.

There is a sense of apathy that is developing within the communities because of the rapid increase of crime. Society can obviously tell that the police force is having an extremely difficult time keeping pace with the increasing rise

of criminal activity. This can help foster the apathetic opinion: if the police force cannot control crime, what possibly can society do? This demoralization is developing within society and needs to be stopped. Roscoe Pound, a sociological theorist of law and author of <u>An Introduction to the Philosophy of Law</u>, states that this individualistic theory of law was effective in the eighteenth and nineteenth centuries when people were first beginning to develop the land and using technology in ways that have never been used before, but:

> until the world became crowded, [law] served well to eliminate friction and to promote the widest discovery and utilization of the natural resources of human existence.[9]

Pound is implying that the drafters of the Constitution and creators of our legal tradition were correct in their development of law during their time period, but now we need to make some adjustments. One could conclude that our society has outgrown our eighteenth century conception of law. This legal system is not plastic enough to meet the demands placed on it by the whole of today's society. Pound believes that society needs to adjust its focus towards law:

> When . . . the development of the idea of law as existing to promote or permit the maximum of free individual self-assertion had been reached, the juristic possibilities of the conception had been exhausted. There were no more continents to be discover. Natural resources had been discovered and exploited and the need was for conservation of what remained available. The forces of nature had been harnessed to human use. Industrial development had reached large proportions, and organization and division of labor in our economic order had gone so far that anyone who would could no longer go forth freely and do anything which . . . [could be seen] as a means of [personal] gain. Although lawyers went on repeating the old formula, the law began to move in another direction. The freedom of the owner of property to do upon it whatever he liked, so he did not overstep his limits or endanger the public health or safety, began to be restricted.[10]

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[9]Roscoe Pound, <u>An Introduction to the Philosophy of Law</u>, (New Haven and London: Yale University Press, 1974), 40.

[10]Ibid., 41.

Our legal system is no longer capable of handling our present day problems. Society has advanced to a new level but the legal system has not followed. The legal theorists of today are either not allowing this transition to take place or do not have the methods or understanding to administer this change. Something must be done which will allow society to have a greater influence in the development of law.

Victims of infinite crimes are also feeling cheated by the legal system. Many people see the legal system as punishing the offenders but no retribution is granted to the victims. Instead, the offenders are sent to jail and are confined by the state. The victims receive not retribution for they pain that they were forced to endure. The victims are sometimes ignored during the prosecution of the accused because so much emphasis is placed around the idea that justice must be served, for the sake of the state. The justice system rallies around the state, not individuals. This has lead people to believe that the "[legal system] does not work for victims."[11] The legal system focuses its energy around the punishment of criminals and not encompassing the needs of the victims.

Victims have many needs. They wish to speak their feelings, let it be known that they have been deeply violated. They want their autonomy, their power, their self respect, which had been so crudely destroyed by their attacker, returned to them. These basic fundamental characteristics of a human being have been shattered by the offender and the victims need some outlet which would provide them with the tools to restore their inner being. However, most, if not all, of these needs will not be "met in the criminal justice process."[12] The legal system is seen as working as a separate entity from society. The legal system does not confront all of society's needs, Instead, the legal system works

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[11]Howard Zehr, "Restorative Justice," 6.

[12]Ibid., 6.

around the state and not individuals within the community. There is no longer a feeling of community action. The legal system has taken away any influence that society may have had in the enforcement of justice.

Berman has witnessed society's disenchantment within the legal system and believes that "[human's are] undergoing an integrity crisis."[13] He believes that the crisis that has arisen within society can be attributed not only to the loss of touch with and confidence in the law, but also in religion[14]. Law and religion were developed concurrently and should still be used as such.

> The prevailing concept in contemporary Western societies that law is primarily an instrument for effectuating the policies of those who are in control is, in the long run, self-defeating. By thinking of law solely in terms of its efficiency, we rob it of that very efficiency. By failing to give enough attention to its religious dimensions, we deprive it of its capacity to do justice and possibly even its capacity to survive.[15]

Pound, also aware of the connection that is needed between law and religion, believes that jurists are able to understand the "idea of the right,"[16] or the understanding and application of morals, through history and that this idea of right is related to the realization that religious thought has a strong manifestation in right and law. However, religious thought has been completely discarded from the legal system, yet Pound believes

> that the influence of religious ideas in the formative period of American law was often decisive and that without taking account of [religious

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[13]Harold J. Berman, The Interaction of Law and Religion (Nashville and New York: Abingdon Press, 1974), 11.

[14]When this paper refers to religions, it will not focus on the classical religions, i.e. Christianity, Judaism, Islam, ect. . . even though these religions have influenced our development of ethics and morality profoundly. Religion in this essay will refer to the communal base in which this society was formed, consisting of traditions and respect for human life that has been passed down through generations. Religious ideas will be said to have instilled a sense of righteousness within the society.

[15]Berman, Interaction of Law and Religion, 25-26.

[16]Roscoe Pound, Interpretations of Legal History (Gloucester, Massachusetts: Peter Smith, 1967), 22.

thought] we shall fail to get an adequate picture of American legal history and shall not understand American law as it was in the last century.[17]

Berman and Pound have illustrated how religion has played a formative role within the development of law, yet legal theorists, law schools, and possibly the general public do not understand or will not comprehend the strong influence that religion has on law, yet because of this influence, religious traditions must actively participate in the development of law.

What has lead to this disbarring of religious thought and influence from legal matters? Pound believes the influence of metaphysics and society's fascination with science and rational thought during this period developed this belief in law and that the only concern for the administrators of law is the "individual consciousness."[18] The law no longer shows a concern for the well-being of society, that is all of the members and communities that try to live peacefully and comfortably together. The law assumes society will benefit when everyone respects their individual self and agrees not to harm anyone else. However, our current legal system is an example demonstrating the ineffectiveness of this statement. Again, one just has to look at the dramatic increase of crime and observe society's apathy regarding any influence that it might have being a deterrent of crime.

One major issue that has been plaguing society today is the rapidly decreasing age of murderers. At first, murderers were adults and the legal system did not have too difficult of a time handling the offenses. However, as our society began to grow and became much larger more and more teenagers, as well as children, began to add their names to the ranks of murderers. Our legal system was not developed to effectively control and to be a deterrent of

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[17]Ibid., 24.

[18]Pound, Philosophy of Law, 39.

teenage and children murderers. Society is aware of this flaw in the legal system and has proposed that many changes be administered. Unfortunately, these changes do not seem to be effective deterrents of these horrendous crimes. Instead these changes are just punishments and sanctions.

Our current criminal justice system is in much need of reform. Not only are the needs of victims being ignored, but the offenders have needs that need to be addressed, also. The overwhelmingly high recidivism rates of previous offenders is testament enough to illustrate that any hope of a successful reform has not been effectively administered. The offenders need to acknowledge that they committed a crime that is not acceptable in society and in order to be a productive member in the community they must change they behavior. A prison sentence, however, is not a successful rehabilitation treatment because "the experience of punishment and imprisonment is deeply damaging, often encouraging rather than discouraging criminal behavior."[19] Time and time again, ex-convicts who are being tried for another crime report that their prison experience was not a successful rehabilitation tool. Instead, in prison, these criminals learned "new tricks of the trade" which would allow them to defeat the system more often and get away with committing more crimes. Just going to jail and serving a sentence imposed by the state is not an effective rehabilitation tool for criminals. These deviants of society need to understand that they did something wrong. They need to be active participants in their rehabilitation. They need to consider themselves as members of this society and as members they should acknowledge that their behavior was wrong. The community needs to work together, including the offenders, to develop a system in which everyone can live peacefully together.

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[19]Zehr, "Restorative Justice," 6.

However, the community is no longer the driving force propelling people to act in a certain way; instead, the law is being used for this purpose. Laws were developed in order to set rules and regulations not for enforcing obedience. The obedience comes from the religious background, the belief in morals and the sanctity of life. However, when this religious connection was divorced from law, society had no way of compelling people to respond and observe rules. More rules and regulations were developed in order for sanctions to be developed so that people would be forced to observe the law. Unfortunately, this distracts from the real purpose of law, which is to develop guidelines so that everyone in society may live peacefully and concurrently. With the absence of religion, law cannot focus its energy on the development of rules and must instead concentrate on the enforcement of rules. The only deterrent which prohibits someone from acting illegally is the law system and the punishment it will impose. In order for our legal format to be compatible with society, it needs to include the influence and contributions of religion.

Now that a crisis has been established and some sort of resolution has been proposed, this paper will explore some of the developments and revolutions that have helped to construct our current legal system. Harold Berman and John Witte, Jr., have developed an argument that claims Martin Luther's theology as one of the compelling forces that helped to propel our society into our current legal system. This essay will explore some of their arguments. This paper will then move to analyze a positivist and naturalist view on law and will conclude with an integration of law and religion that will allow for many different aspects and beliefs to work and develop concurrently with each other.

The Historical Influence of Martin Luther's Theology
on Legal Thought

Berman and John Witte, Jr. claim that the "Lutheran theology sparked a political revolution."[20] Luther's doctrine renouncing the church's authority nullified divine jurisdiction. The church and the papacy no longer had any control over the spiritual life of its members and also had no authority to rule over the earthly lives, as well. When Luther posted his Ninety-Five Theses he denounced not only the abuse of the papal authority but also the validity of the canon law. Luther wanted every person to know that God was the sole judge and authority when issues arose around eternal life and damnation. The church had no say or control in the matter. The church, which used to control all facets of life, now controlled none. Luther "delegalized the church."[21] This delegalization not only denounced the church's authority but can also be attributed to the dispelling of a philosophical and subjective view of the world to the now more widely accepted form of empirical and objective views. Philosophical thought really had no place in arguing and developing views and beliefs of the objective and empirical world. Philosophical views should deal with the mystical and unworldly, while objective and empirical thought should control the worldly.

Luther believed that a human's life is subjected between two kingdoms: the earthly and the heavenly. The earthly kingdom is composed of everything that can be attributed to a human's natural or physical life; issues that affect

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[20]Harold J. Berman and John Witte, Jr., "The Transformation of Western Legal Philosophy in Lutheran Germany," Southern California Law Review 62, (September 1989): 1595.

[21]Berman, Interaction Between Law and Religion, 63.

humans now, in the present. The one's that govern over these earthly matters are those that are in authority, rulers of the land. These rulers look at the world in an empirical manner and decide on regulations from what they observe. The heavenly kingdom is ruled by the gospel. God is the sole judge and ruler. Human beings have no control of the heavenly realm. The papacy which was once thought to have controlled both the earthly and spiritual worlds has now lost all authoritarian control. Law reigns in the earthly kingdom while the Gospel controls the heavenly. Religious thought has not only lost control to govern the world but now cannot possibly ever control the heavenly.

This division allows for the separation of human and divine activities. Lutheran reformers are able to compare two forms of justice or righteousness. These two forms are "earthly justice" and "heavenly justice." Earthly justice consists of values and norms that are developed and enforced by society, though ordained by God. Earthly rulers have been granted legal control of the world through God and are permitted to rule objectively and empirically and are allowed to administer rules and regulations that they believe should be followed. Heavenly justice is enacted by God alone. This form of justice is administered through grace. The earthly kingdom is enforced through law and works of human beings, while the heavenly kingdom is empowered through grace and faith.[22]

Luther's two kingdom theory allows for the comparison between truth and knowledge. In the heavenly kingdom God reveals Its truth and knowledge through the Scriptures, "the sole source of moral truth and spiritual knowledge."[23] The Scriptures provide for its readers with the ideal way to live on earth. God's true intentions for the ideal world can be seen underneath

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[22]Berman and Witte, Transformation of Western Legal Philosophy, 1588.

[23]Ibid., 1588.

human being's moral reasoning and temporal knowledge, yet God's objectives are concealed in the earthly realm through the devil who discretely shadows the acts and reasoning of society, to distort the truth that God has implanted.[24]

Luther's dual kingdom theory allowed the Lutheran reformers to compare two governments, "the invisible spiritual regime of the church and the visible political regime of the secular authority."[25] Following Luther's reformation, the church was established as having no control or jurisdiction in all legal matters. This is for the secular authorities to control and develop. The church, however, should not be governed by laws because the sole authority in the church is the Gospel. The Gospel is part of the heavenly kingdom that is controlled and regulated by the grace and faith in God. The secular authorities control with the "temporal sword." They develop rules to keep peace and order among the lands. Law and politics are the sole authority of those who are empowered to run the secular land.[26] Luther believed that God commanded people to follow the laws of the land, yet should know that their true judge is God.

Luther developed these differences between the church and secular authorities in order to illustrate the legal powers of the secular nations and the non-legality of the church. Luther is adamant in his belief that the church had no authority over legal issues. The church's main function was to teach scripture to the masses and instill in them a sense of moralistic duty towards society. The church was the provider of morals and values and did what it could to instill a desire to comply with the rules and regulations that were developed in order to create a sense of order in society. The church provides the "conscience" of the

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[24]Ibid., 1588-9.

[25]Ibid., 1589.

[26]Ibid., 1589.

individuals to create or to follow the laws, while the temporal knowledge or secular control provides the "reasoning" for the laws. However, Luther wants people to become aware that merely observing the rules and regulations of the land will not suffice to develop a strong understanding of the relation of man with society. A spiritual connection with God is important because this is what compels people to do good and to adhere to the rules that are set forth. Following these rules does not necessarily make one good in the eyes of God. God judges people on a completely different basis. God judges people on the faith they have proclaiming God as their Lord and ruler. Luther acknowledges that those who accept God as their creator and leader do not need rules to dictate their behavior because they are inherently good because of the strong convictions they hold towards God. However, they should follow the rules of the land so that they may be a good model for the rest of society to follow. Luther believes rules were developed because of the sinfulness of society. God ordained the Ten Commandments for those people who had fallen from the grace of God and were being sinful.

Berman and Witte, along with Robert E. Fitch[27], believe that Luther's adamant push to rectify the church's control of legal issues helped to develop the foundation of modern legal positivism, "stern hard civil rule is necessary in the world, lest the world be destroyed, peace vanish, and commerce and common interest be destroyed."[28] Luther believed that the ability for order to survive in this world stems from the need for "precise legal rules"[29] to deter citizens from committing crimes and to prevent those in power of exercising their position in

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[27]Fitch has stated in his article, "Can there be Morality without Religion?" Religion Morality and Law, (Dallas: Southern Methodist University Press, 1956), "[positivism's] beginnings can even be discerned in Martin Luther." 7.

[28]Ibid., 1609.

[29]Ibid., 1609.

the community unethically. The will of the state should be stated in rules and enforced by coercive sanctions, which is the foundation of nineteenth-century legal positivism.

However, Luther cannot be viewed as the sole contributor towards the development of our current legal system. Positivism fails to acknowledge Luther's critical view of the importance of the fundamental belief of God in our society. Luther states again and again throughout his writings how God's ideals should be the compelling force that drives our observance of secular law. Luther believes strongly that it is the Scriptures and our powerful belief in God that compels us to be moral and righteous. Luther is well aware of the differences that exist between God's authority and the authority of the earthly kingdom, yet Luther believes that secular authority will not be able to survive without a strong belief and faith towards God.

Examination of Positive and Naturalistic Thought

Positivism

Positivism "lays bare the essential, irremediable contingency of all the properties of nature that are accessible to reason and experience."[30] Humans want answers to many questions and the only answers that will be accepted are the ones that can be proven through empirical means. There must be some factual evidence which can support a given question and its answer, otherwise these observations would have arisen through speculative and intuitive interpretations, which are entirely unscientific.

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[30]Lesek Kolakowski The Alienation of Reason: A History of Positivist Thought, (Garden City, New York: Doubleday & Company, Inc., 1968), 23.

Science has begun to be worshipped like a classical religion: "the worship of science was giving birth to the worship of 'facts.'"[31] The facts and evidence that are being produced can be referred to as the mythical "god" that everyone has been striving to find. With each new development and perplexing question that is solved helps to contribute to the seemingly endless journey that is being encountered for the understanding of the universe and everything that it contains.

Positivism was developed in order to "supply quantitative descriptions of measurable phenomena."[32] Previously, people had explained observable phenomena through "non-empirical natures."[33] Many positivist philosophers argued that this way of thinking had no cognitive value and could not be applied to the empirical world. In order for something to be explained, it must not

> seek to inform us about "the nature of things," but to gain an exact quantitative knowledge of the phenomenal world, a knowledge sufficient for man's practical exploitation of the world.[34]

Assumptions and intuitive speculations will not suffice in this world. These answers have no substance, the only explanations that are provided are merely estimates. Positivists would claim that society needs answers that can only be explained through rational empirical observations.

Positivism shies away from asking and attempting to answer questions that cannot be answered by the means readily available to human beings. To attempt to answer any question that is out of the realm of human cognition would be futile. Positivism "does not disclose infallible truths about the nature of being but schematizes actual experience in a way that makes possible its technical

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[31]Ibid., 30.

[32]Ibid., 19.

[33]Ibid., 19.

[34]Ibid., 20.

exploitation."[35] Positivism does not want to harm its image in any way and the best way to achieve this is to address and answer those questions that it has the ability to do.

Descartes and Leibniz are believed to have shown that science helps the world to alleviate all of the mysterious qualities it possesses and "fills the gaps in our cognition with real knowledge, not mask our ignorance with purely verbal formulas."[36] Positivists believe that a true expression of knowledge will be shown with empirical evidence that helps to support one's claims, not assumptions and attempts which are aimed to convert other people's view of the world.

Positive theorists do not want to reject or denounce the use of philosophy all together, even though they all agree the use of philosophy in science has no substance:

> though philosophy may now and then stimulate an individual scientist (not by supplying hypotheses to be tested, but by engaging his feelings and intellectual interests), it can never hope to define the tasks of science or account for the results of research.[37]

Philosophical statements are meaningless and provide no cognitive content within the interpretation of science and have been referred to as "socially harmful."[38]

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[35]Ibid., 22.

[36]Ibid., 22.

[37]Ibid., 78.

[38]Ibid., 78.

The Ethics of Positivism

When positivists search for an ethics to apply, they look for one that applies to the whole of society, "a despotism of society over the individual."[39] Positivism does not want to take away any freedom that is granted to individuals but wants to insure that the well-being of the society is being observed. The best way to insure that this happens is to develop a system of rules to govern what is acceptable or not. This would insure the majority of people are being heard regarding the ethics of the land. This type of ethics is called utilitarianism[40].

Utilitarianism is based on the belief that "human behavior is entirely motivated by the desire to gain pleasure and shun pain."[41] Jeremy Bentham is the founding father of utilitarianism. He believes that rational laws will expose the dominant patterns of moral behavior in society. In order for this theory to work one will have to assume that the interests of the creators of the laws are identical with societies. If the norms are similar, then the rules can be applied universally.

> The principle of utility applies universally, without exception, in both private and public relations, and from it we can derive norms regulating every sphere of human life .... The principle of utility has this advantage, that everyone is actually guided by it, as is apparent from the fact that even its critics unconsciously appeal to it .... Similarly those who place the will of God above the principle of utility are actually appealing to [utilitarianism]. For how do they decide what is the will of God? By

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[39]Ibid., 79

[40]I acknowledge that there are numerous other ethical positions that positivists have developed but because of the nature of this paper, dealing with an integration of law and religion, I want my focus to be drawn towards an ethical theory that can be developed using many aspects of society. This is why I am only going to focus on Utilitarian ethics even though there are many more ethics positivists have proposed.

[41]Kolakowski, The Alienation of Reason, 82.

showing that it is just, hence good, hence useful. In short the criterion of utility is applied . . . .[42]

Now that universality is intact, a system of rules needs to be developed in order to insure that the ideal norm for ethics is composed. Again, Bentham believes that the best way to introduce a set of norms is through the application of rules, which would "supply the rational foundations for a perfect moral code in which every human action could be properly evaluated." The cohorts of utilitarianism were hoping to achieve legislation and the establishment of ethics on the same level as the mathematical sciences,[43] in that they both work in a rational, logical way.

The difficulty with this approach is convincing or illustrating to society that this method is not only the best but that it is indeed desired by society. Bentham and others have agreed that a "supreme rule" that governs human behavior cannot be proved.[44] The only proof that can be used is to show that mankind does in fact desire this type of system.

> The ultimate purpose of every kind of valuation and every kind of commandment or prohibition is a life as free of suffering and abounding in as many of the highest pleasures as possible.[45]

When one examines the definition of utility and happiness, given by utilitarian, it is observed that the supreme value is not in respect to the individual but of all human beings.[46] The utilitarian continues with defining morality as the "system of rules that envisages the greatest happiness of all."[47] Utilitarianism is concerned

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[42]Bentham, cited in, ibid., 82-3.

[43]Ibid., 83.

[44]Ibid., 84.

[45]Ibid., 84.

[46]Ibid., 85.

[47]Ibid., 85.

more with the well-being of society as a whole and develops these ethics for society by observing society and deciding what is best.

Positivism and Religion Theory

Positivism agrees that there are questions that cannot be answered by its method and acknowledges that religion can provide a tentative answer to these troublesome questions. There is a realm that cannot be conquered by empirical research and this realm is "the object of faith, and here religious authority is decisive."[48] Religion can help to calm the fear and unknown that can arise through mysterious and often unattainable questions. However, the answers that religion provides should not be taken as factual because there is no empirical evidence to support their findings because "faith cannot be transformed into knowledge."[49] Faith is an assumption, an intuitive statement as to how the world works but can never be used as evidence towards the make-up of the universe.

> Religion and science are compatible, not because their contents are compatible, for religion has no positive contents at all, and science no dogmatic limitations; they are compatible from a functional point of view so long as they do not transgress their boundaries--something religion continually does. Religion is not any knowledge about the world, but awareness of the limits of knowledge, a direct contact, so to speak, with the barrier behind which the Unknowable lurks. Consciousness that this barrier exists is very important.[50]

Religion is compatible with science in that religion is aware of the shortcomings of the human cognition and can thus speculate on this lack of knowledge and use it to further the development of thought and understanding. However, this is were the compatibility ends. Science reacts to these questions and tries to

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[48]Ibid., 20.

[49]Ibid., 21.

[50]Ibid., 95-6.

provide answers in an empirical fashion. Science provides the answers to the questions with factual and observable data, while religion develops the questions.

> We do not say either that the assertions of religion, even though they may contain expressions that do not seem in any way connectable, are, in general, without sense or meaning. They originate, in our view, in the human desire for orientation in one's environment, for the description of complicated interrelations that are difficult to comprehend, *with the special aim* of finding useful rules for the community life of man.[51]

Human beings are constantly asking questions, some which can be answered through the resources that are offered through the intellect of humans but many will baffle society for centuries to come and these questions should be pondered and struggled with but the conclusions that are arrived through this intuition should never be applied to the world as factual answers. These answers just do not provide enough empirical substance to be considered as the truth. Science will examine and work through these questions and hopefully arrive at an answer that can be proven empirically in this world.

This separation that has formed between science and religion is what has allowed positivists to retain the spiritual beliefs that they may hold. They understand the difference in rationale that exists between both fields. They understand that their religious beliefs have nothing to do with their scientific beliefs. In fact, there are scientists who do not object to the Biblical story of creation. They read the sentences in the Bible as though they "were written in a different language."[52] This recognition of the differences is what allows for the connection between religion and science.

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[51]Richard von Mises Positivism: A Study in Human Understanding, (Cambridge: Harvard University Press, 1951), 350-1.

[52]Ibid., 353.

Naturalism

Naturalism is the study of nature leading to ultimate understanding of the truth. Naturalism focuses its thought around the physical, spatial, temporal, human world, all that is in the realm of existence, which would classify it as an empirical philosophy. All of its theories are supported or based upon actual evidence that is collected in our world. Naturalism's only priority is the discovery and understanding of actual truth. To quote Aristotle, "all [human beings] by nature desire knowledge."[53] This knowledge can only arise through the empirical study of the world we live in. However, this knowledge through empirical research can only arise through questions that arise pertaining to the make-up of this world. Once questions are composed, theories and observations can be addressed leading to a better and more rational understanding of this world.

Naturalists compile all the empirically discovered evidence with the questions that have been raised through the generations of research, so that some sort of congruency can be formed between all of the material. Old information is augmented while new evidence is introduced and applied with the known. In order to understand an event in the world, one must be able to decipher all of the relations that exist.[54] Understanding relations in the world is one of the foremost points that naturalists wish to elucidate:

> There is more to nature than matter. Things have characters; they participate, as Plato said, in universals: change, motion, energy, growth, regular development, laws, life, mind--these are not to be explained by any mere congeries of atoms of the simple sort conceived by Leucippus and Democritus.[55]

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[53]Quoted in James Bisset Pratt, Naturalism, (Port Washington, New York and London: Kennikat Press, 1979), 7.

[54]Ibid., 9.

[55]Ibid., 23.

Even though someone might be able to explain what something is through research and evidence that they have gathered, they are still missing the crucial point as to how this relates to other entities. There is more to an object then just its physical characteristics, one must also consider all of the influences and relations that it experiences in the world. Again, questions that are raised help to elucidate many of the relationships and help to decipher similarities as well as differences.

James B. Pratt illustrates that naturalism is characterized by three things: by its aim, by its method, and by its system.[56] These three characteristics, influential in their own right, are not comparable in terms of importance. Pratt believes that the method is more important than the system because the system is the problem the naturalists are addressing and the method is the way that the problem will be solved. However, the aim is the most influential of all. The aim is of such reverence because of its fundamental importance in the philosophy of naturalism. The aim examines and is critical to the world we live in. It is the aim that is the base of our knowledge of the world. The aim is what leads us to ask questions so that we may develop some sort of explanation, triggering our inquisitive nature. Nothing can be solved without some sort of a leading agent. Once this agent has become an empirical operation, members of society may begin to apply theories and postulates in order to develop a meaning.

A strong claim can be made that ever since human beings have existed on this earth, the naturalist philosophy has also existed. The human intellect has always been experimenting with new postulates and theories as to why something behaves or looks the way it does. Empirical research has always been a reliable source to help with the unraveling of mysterious circumstances.

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[56]Ibid., 16.

Naturalism can attribute its survival over the millenniums do to its empirical style of research, its use of similar as well as conflicting data, which help to stimulate arguments and critical observations so that the most reasonable and reliable explanation will be accepted. This however, does not mean that once a theory is accepted it is true forever. If a new theory comes along to challenge the old one, then both theories will undergo scrupulous examination in order to determine which is relevant. Two conflicting theories can also be intertwined to help merge together one acceptable theory. Naturalists praise their philosophy's ability to adjust to new circumstances and this ability to adjust has allowed for the philosophy to grow.

> The growth of naturalism has necessarily meant the amassing of larger
> and larger collections of facts, a more critical appraisal of the evidence, and
> a constantly changing arrangement of our data into more inclusive and
> more harmonious systems.[57]

The naturalist's work is never done. They must continuously critically examine their theories again and again so that they will not observe a void and outdated theory.

Ethical Implications of Naturalism

Naturalists are striving to find the ideal way, the best way for human beings to live in this world. They hope to achieve this goal through the same methods they use when they explore the meaning and make-up of this world, by looking at empirical behavior and basing this evidence on an acceptable conclusion that can be gathered through the preponderance of evidence. Ethical attributes arise in naturalism through a morality that is gathered through empirical evidence within the world.

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[57]Ibid., 16.

When naturalists address the question regarding the development of
ethics the first issue that they want to elucidate is that they cannot accept any
form of authoritarian ethics, such as those set forth in the "great religions." These
ethics cannot be accepted as the norm for society because the religions "must
show their credentials,"[58] show that what they say to be true is actually true and
because of reasons stated earlier in this essay, these type of ethics cannot and will
not be accepted by a naturalist because of the subjective nature of religions. The
naturalists wants to develop or find a form of morality that can include all
aspects of the world. For this reason, they cannot single out one religion or one
form of morality as the ideal way to live. Naturalists believe that an empirical
study of the world and of all the communities within will greater assist their
efforts in finding a morality that is not universal, but is acceptable for all realms
of society.

A naturalist cannot accept an ethics that is based upon a universal morality
because there are too many different theories on how one should act in society
and there is no possible way that all of society could agree on form of ethics to
follow, "in most cases one intuition can be balanced by an opposing one: and
when intuitions disagree who shall decide?"[59] All types of ethics and moralities
that are developed for a given society are deemed as legitimate because of the
individual standards that a society has proposed which would allow for
acceptable behavior. Each society or community develops a form of ethics that
they believe will best suit their lifestyle. The uniqueness that arises amongst all
nations in their interpretations of morals has made it impossible for one culture
to judge their form of ethics or morality as superior to those of other cultures.
Morality is thus a purely relative matter. However, just because a society accepts

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[58]Ibid., 144.

[59]Ibid., 144.

a form of morality and it is relative to their needs, does not classify that certain type of morality as good. An example of this type can be found in our Western culture regarding capital punishment and abortion. Right now, capital punishment and abortion are legal conducts allowed in our society today. However, both of these issues are under much scrutiny and debate. These issues are fought and struggled with so much because of the many questions that are raised regarding their ethical implications. Right now society deems these practices as legally acceptable but a strong argument could show that these practices are not morally acceptable.

However, naturalists believe that these types of questions and debates are fundamental for the understanding of a construction of morality that can prosper in this world. As stated before, naturalists are trying to achieve the "ideal or wise way to live." This knowledge cannot arise through passive empirical research of the world, members must actively pursue a question and pick it apart in order to form some substantial meaning. Difficult questions that have numerous answers help to illustrate and define society's understanding of morals. It is the actions of how people react to a given question within society for a proposed ethic or morality that helps to illustrate the "ideal way of life" naturalists are trying to achieve.

It is the wise and ideal life that will bring about good in the world and discard evil. But what is good and acceptable? Again, the search for "goodness" will be a futile effort. The term "goodness" is purely relative and can only be applied individually. Through a naturalist's empirical observation of the world, one could deem an object as "good" if it is desired by people. To desire something means that the object is wanted and thus can be considered as good or pleasurable.[60] Naturalists acknowledge that there are numerous opinions as

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[60]Ibid., 158.

to what is "good" and what is "not good." Naturalists are striving to achieve the most "good" and acceptable "good" that can be found in the world.

A naturalist is not looking for a set way to govern ethics in society; instead the naturalist is looking for a criterion, some sort of guide for actual human living. Naturalism believes that this criterion must be unprejudiced and developed with the concerns of everyone in mind.[61] Unfortunately, these criteria do not provide for a sound method or choice to follow as a "universal" conduct of morals would. However, what would these "universal" conducts in fact tell someone to do? There is no clear cut answer that the "universal" method provides for the needs of people and it is precisely these questions that are central in the development of ethics.[62]

Naturalism and Religious Theory

Due to naturalism's empirical nature, naturalists cannot accept any form of a supernatural being. A higher being completely discredits a naturalists view of the world. William M. Shea states that the "naturalists' rejection of the existence of an order of being above or beyond what is even commonsensically designated nature is unequivocal."[63] To believe that a supernatural being is controlling the world would have to require some empirical truth, which is unfounded. There has been no scientific evidence which would allow a naturalist to believe in a god or being that rules the world. Naturalists acknowledge that philosophical questions help to develop answers in the real world, but having a

[61]Ibid., 147.

[62]Ibid., 147.

[63]William M. Shea, The Naturalists and the Supernatural, (Mercer: Mercer University Press, 1984), 63.

belief in a God and trying to relate a supernatural being with all the happenings in the world would cause oneself to disassociate oneself from all of the empirical observations of the world.

There is no logical support of the existence of a god. No one can provide factual evidence claiming that a god is real and is watching over our world. Many religions would argue that their god had implanted in them a sense of morality and respect for human lives, as well as nature. A naturalist would claim that an argument for the existence of a god is futile and that all of the moralistic tendencies that have arisen come, not from a god, but from the religious tradition itself and from many of the natural experiences in the world. A naturalist can illustrate through empirical research how moralistic tendencies were formed. A religious argument would base their assumptions on a god who spoke through prophets, but this is, again, total heresy and they would have no factual evidence supporting their claim.

Religions also inhibit intellectual growth and thought.[64] Religions are very authoritarian and do not allow much leeway towards one's interpretation of the world. A religion claims that their view of the world and its purpose is correct and the right way to live a life. Any deviance from this standard of life will surely result in punishment, not only from the religious community, but also from their god. Religions are not tolerant of science because of research that is designed to prove or disprove a god. This intolerance has lead Shea to believe that:

> . . . belief in the supernatural is noninstrumental, and it precludes the
> "natural" functions of ideas. Supernaturalism blocks action. Human
> problems can only be solved by a vigorous call to active intelligence
> coupled with tolerance, sensitivity, and a concern for social justice.
> Traditional religions are essentially otherworldly and authoritarian, and

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[64]Ibid., 66.

therefore are incapable of supporting and practicing inquiry, tolerance, and sensitivity.[65]

A religion is primarily concerned with its people and their relationship with their god. A religion can be seen as caring only about their members and doing what they can to further enhance their short stay here on earth. Some religions acknowledge an afterlife and thus really see no need to further enhance society as a whole because those who do not believe in their god will not be saved.

Naturalism cannot tolerate a belief in a god because there are numerous speculative questions that will never be answered. These questions will only undermine and possibly prohibit the growth and study of this world. Naturalism believes that all answers that society desires can eventually be answered through an empirical study of the world. The only way that this can be achieved is through a concrete study of the world. Thus, a naturalist could conclude that a religious belief and emphasis on a god will conceal and prohibit a natural flowing observation of the world.

Law, Religion, and an Historical Development

Integrative Jurisprudence

Can the positivist and naturalist theories on law survive together or will there always be a battle raging between the two sides? Both theories claims that their theory is superior to the other, which always results in a feuding battle with no compromise in sight. Both sides dwell on their differences and never really closely examine their similarities or ways in how they can combine their theories

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[65]Ibid., 66.

to better produce a legal theory. Berman believes that these theorists are arguing at a very fundamental level: opposition between political will and morality. The positivist school is struggling to achieve a perfect society in which to live through political means, while the naturalist school is trying to achieve the same final goal but believes that the goal can be reached through a morality that develops within the world. However, these schools will never fully achieve this goal working on opposite spectrums. They will also not achieve their goal if they try to combine their two theories to develop one common theory, their differences are just too extreme. Berman believes that some sort of resolution can come about through an "integrated jurisprudence,"[66] achieved through an historical approach to law. Law is more than politics or morality, law is also history. History provides a profound insight through all of the relationships that have existed through time.

An historical approach to law will allow one to view all of the transformations that have occurred through time and the effects that they will have on our legal system and to help us adapt these changes to our present situation. Historicism allows for the positivist and naturalist traditions to survive through an interpretive and integrative means. Positivism would preserve legal rules, naturalism would observe the moral interpretations of these rules, and historicism would illustrate how all the schools relate and exist between a multi-faceted relationship.

If one examines the development of legal thought throughout the centuries, one can observe an underlying force that has always been present, which is the ultimate authority of some transcendent being. This authority is believed to be the regulating force which compels individuals to behave accordingly within society. Pound illustrates this type of authority when he

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[66]Berman, <u>Faith and Order</u>, 289. Berman borrowed this term, as I do now, from Jerome Hall.

examines the Greek thinkers of the fifth century. These Greek philosophers had been struggling with the relation between law and morals. They wanted to combine "the old time explanations that law was the gift of a god"[67] with their advancing society. These theorists wished to develop a social order that can be explained through the observable and comprehensible occurrences of nature.

Pound continues to illustrate how Roman law expanded on Greek thought in order to make "natural right into natural law and sought to discover the content of this natural law and declare it."[68] The Romans wanted to develop a set of regulations that had been developed through the careful recording of natural law experiences that were observable in society. The Middle Ages expounded on Roman thought and placed a theological foundation under their natural law. This system of law enabled an authority to dictate and determine which rules were to be followed. The seventeenth and eighteenth centuries replaced this theological foundation with a "rational foundation"[69] which could be used for the newly developing modern world. These legal theorists had not completely discarded theological thought from their interpretation of law but were beginning to provide for a more rational and observable approach to law. At the end of the eighteenth century the positivist philosopher, Kant, replaced the rational foundation of law with a metaphysical one.[70] This metaphysical approach was the compelling force which provided the positivists with the argument that no foundation was needed between religion and legal thought. The law will be able to survive on its own with a system of regulations that are imposed and enforced by a sovereign. Kant's position is basically where our

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[67] Roscoe Pound, Law and Morals, (New York: Augustus M. Kelley, 1969), 5.

[68] Ibid., 12.

[69] Ibid., 13.

[70] Ibid., 13.

Western legal tradition is now. Through numerous reasons already stated, we need to reform our current legal tradition. An historical approach to law can assist in the fundamental changes.

The experience that the historical approach brings provides for the balance between competing theories. History is not only the study of past social events but of how these past events effect and will effect or current and future lives. History should be used to help interpret and enact our current legal theory because "history without political and moral philosophy is meaningless. Yet those philosophies without history are empty."[71] Positivism and naturalism have attempted to create a legal system that has merit and depth for our current society, yet each has neglected to discover and relate the rich history that each has contributed, jointly, in the production of our current society. This lack of historical content can be seen as contributing to our legal system's inability to effectively control crime and its inability to relate to other legal systems in the world. An "actualization of law"[72] needs to be developed which would illustrate the profound effect that positivism, naturalism, and historicism have on our society's legal system.

Separation Between Law and Religion

Berman believes that the separation that has formed between law and religion can be attributed to both schools of thought. Law and theology schools both "share the responsibility for the narrowness and the rigidity of our thought on these matters."[73] Both schools fail to show and illustrate the similarities that

[71]Berman, Faith and Order, 305.

[72]Ibid., 292.

[73]Berman, Interaction of Law and Religion, 23.

have arisen between these two schools through an historical concept. Too much emphasis has been placed upon their differences, which in turns conceals any similarities that may have been found. Society's emphasis that legal thought should be rational and logical contributes to the exclusion of religious thought within the legal system. Society believes that subjective religious thought should be excluded from the exact and empirical reasoning of the legal system. This belief is what troubles Berman and other legal theorists of today.

There is more to law then rational and logical reasoning. Law has a history. Law has played a pivotal role within our society for centuries. Law needs to be explored and adapted with its relation in history. There is no possible way that anyone can fully understand the legal system without exploring its history. Our legal system has undergone many changes, survived many revolutions, and still has maintained its fundamental character which is to provide some sort of guidance within a given society. To ignore this history would be an horrific undermining of the nature of our legal system. The main point that Berman and other theorists want to stress is that when the religious attributes are ignored within the legal theory an horrendous crime is being committed upon our whole legal system.

Berman notes, along with numerous other legal theorists, that law shares four pivotal characteristics with religion: ritual, tradition, authority, and universality.[74] These four characteristics can be considered as the cornerstones within the legal and religious schools of thought. Society demands that in order for these schools to have an influence upon their lives there must be some development of order and balance within their framework. Society must be able to develop some sort of meaning within each tradition. Both law and religion

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[74]Ibid., 25.

focus on these four aspects and use each one as a point of reference and support for each one of their views.

Law and religion share rituals that have been long-standing within each field. Each have developed certain ceremonies that are used to help symbolize their authority and the procedures that they undertake. These rituals help to induce "deeply felt values . . . an emotional belief [in these values] as a part of the ultimate meaning of life."[75] Both law and religion are striving to reach a concrete understanding of the purpose of life and they do so in seemingly opposite ways but yet very similar. Law relies on legal reasoning for the good of society while religion focuses on the Sacred to lead and develop this meaning in life.

Law and religion both share a rich tradition. One could trace some sort of legal control all the way back to the beginning of man, as well as some sort of a religious belief. This tradition is what allows for both law and religion to hold such an important aspect within society. Not only is the tradition long-standing but it can also adjust to new developments within a community. Berman sees this legal tradition as a binding agent with religion:

> The traditional aspect of law, its sense of ongoingness, cannot be explained in purely secular and rational terms, since it embodies man's concept of time, which itself bound up with the transrational and with religion.[76]

In this view law really has no logical reasoning as to why it should be separated from religion. Both are a tradition within themselves and to discard one from the other is a gross misunderstanding.

Both law and religion each appeal to their authoritarian aspect. Neither one of these traditions would have survived through time without their accepted authority. Whenever a dispute or question is raised, whether it be legal or

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[75]Ibid., 33.

[76]Ibid., 34.

spiritual, those that are acknowledged to hold the power to consult and decide on these matters are approached. Because of the authority that these people hold, their decisions are usually accepted as legitimate and will be followed as such.

Law and religion also a share a universality that is inherent within themselves. Individuals within each field would be able to tell someone what would be considered morally right or morally bad, within their given society. This can be easily achieved because people within a certain community are aware of the boundaries that have been developed between these two extremes. It is not difficult to understand that killing someone is morally wrong. People do not need to consult legal books or the Ten Commandments to understand this reasoning. People are aware of what is right and what is wrong because of the universality that can be applied to their respective fields.

However, a point that needs to be addressed is that, even though law and religion share these four characteristics, this does not confirm their similarities. The main idea that draws these two traditions together is their ability to appeal to and develop the emotions of those that observe each system. Legal emotions differ from the sense of the excitement and joy that one can feel with the acknowledgment of the Sacred, yet they both share the "same sense of 'givenness,' the same reverence, the same urgency."[77] Both strive to connect and reach out to all members of a community so that some sort of order and sense of belonging will apply.

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[77]Ibid., 35-6.

Law and Religion: Compelling Factors within Law

What is the compelling force behind law that drives so many people to follow it? Some modern legal theorists would state that the fear of punishment and sanctions are what instill in people the desire to observe rules and regulations that have been developed. However, this answer is incomplete and unsatisfactory. There is a lot more than just the decision to avoid punishment. This would definitely be one factor but the human mind is enormously more complex then just following orders. There must be some sort of thought process that transpires within the minds of individuals right before they decide to commit a rule violation or not. I would argue, as well as numerous other theorists, that there is some sort of morality, a trust, a common affiliation within the system, that has been instilled in these individuals so that they observe these laws and deem them correct.[78]

> It is precisely when law is trusted and therefore does not require coercive sanctions that it is efficient; one who rules by law is not compelled to be present everywhere with his police force.[79]

It is a wide known fact that the police or some sort of law enforcement cannot cover the entire realm of society at any given time which allows millions of people the freedom to make decisions on their own. These individuals would be safe to assume that their actions are not being governed at any certain time and yet they still are observant of the law. Society is not acting strictly on a punishment and sanctioned filled society, there is some sort of other morality

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[78]Berman's writings primarily deal with this issue. Pound believes that morality has a great influence upon legal matters, along with other theorists, i.e., Lisa Newton, "Divine Sanction and Legal Authority: Religion and the Infrastructure of Law," Religion, Morality, and the Law: NOMOS XXX, (New York and London: New York University Press, 1988), and Robert E. Fitch, "Can there be Morality without Religion?" Religion, Morality, and Law, (Dallas: Southern Methodist University Press, 1956).

[79]Berman, Interaction of Law and Religion, 28-9.

that is enforcing judgment upon these people. This morality and trust that is prevalent within society will be argued to have developed from the religious tradition. However, the legal system is doing all that it can to divorce itself from the religious tradition and this is a action that cannot continue.

Law strives to achieve the most meaningful life that is possible through the rules that it has adopted. However, these rules do not seem to be an effective deterrent of crime. One just has to look at the inner cities and the massive increase in crime. Our police force, even through increased numbers, is unable to control this rise in crime. Our the rules no longer effective? Does a new set of standards need to be developed with stiffer penalties and fines? These questions will not help to alleviate the crimes that are rapidly rising and spreading. Berman believes that a new "vitality" needs to be developed in law:

> ... for law as it presents itself, shorn of its mystique and its authority and its role in the grand design of the universe, is too weak a reed to support the demands we place upon it.[80]

Law as a single deterrent to crime is no longer effective. Society needs to partake in an active role with the development and enforcement of law. Society's understanding and enactment of law can only arise through a religious interpretation of the legal system.

> We must find ways of hearing [criminal] cases and treating [criminals] humanely and creatively while at the same time expressing society's condemnation, not of them as persons, but of their conduct and of the conditions underlying their conduct. This, indeed, is in our religious tradition; and it makes sense.[81]

Religion can help to foster the sense of doing good and allowing law to work and at the same time condemn or show displeasure when someone breaks a given code. Berman states eloquently and compassionately that "all trials should

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[80]Ibid., 40.

[81]Ibid., 42.

be educational, not vindictive."[82] The law's purpose is to inform the public as to why certain actions are acceptable and others are not.

The education that can be gained through law that Berman believes is so important can already be seen in some reforms that our criminal justice system has undertaken. These reforms have been recently applied in the past few years. The justice system is hoping that these reforms will further involve the community in judicial enforcement. The reforms that will be discussed are: Victim impact statements, jury nullification, and restorative justice. Each of these reforms are purely experimental, but they are a testament that shows the efforts of society and the legal system working together to develop a better understanding and a more communal base for law.

Victim impact statements give the victims their opportunity to have their voice heard in a court of law. The way our current legal system is set up now, much of the emphasis is placed around the prosecutions burden of proving the accuser's responsibility in a given crime. The victim or the victim's family (if the victim was murdered) is rarely given the opportunity to make a statement during the trial, thus many of the victims feel that they cannot contribute any pertinent evidence in the case, even though the crime was committed against them. This can help to foster a sense of resentment and remorse within the victims regarding the criminal action.

The victim impact statement grants the victims the release that they are in much need of. The victims are allowed to make statements, with the entire court present, along with the offender, prior to the sentencing that the judge will issue.[83] During this time the victims can offer their opinion as to what the

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[82]Ibid., 42.

[83]Lawrence S. Wrightsman, Michael T. Nietzel, and William H. Fortune, Psychology and the Legal System, 3d ed. (Pacific Grove, Ca.: Brooks/Cole Publishing Company, 1994), 202.

sentence should be, illustrate their anger and frustration towards the offender, and in some cases even forgive the criminal for the horrendous crime. This is a period of release for the victims. They had to be silent during the whole trial, but now they are allowed to let their feelings flow, on their own terms. These victims might not have had a pivotal role in the whole legal process, but the victim impact statement allows for the victims to provide their own statement, on their own terms, without having to follow any set standard for legal process.

A radical change that is being implemented in three states, Indiana, Maryland, and Georgia[84], is the concept of jury nullification.

> jury nullification is a mechanism, and a defense, which allows the jury, as representatives of the community, to disregard both the law and the evidence and acquit defendants who have violated the letter, but not the spirit, of the law.[85]

Jury nullification is an adaptation that has been developed through an historical approach of the legal system. A few centuries ago juries were given the duty of resolving the facts of a case and applying the law, but were also used in order to insure that the community had a substantial role in the process of criminal procedures. Unfortunately, through time, many of the jurors' powers began to be restricted by rules developed by the courts. Juries had to follow the letter of the law and could not use their knowledge of society to help determine the verdict of a case. The instead, had to listen to the "facts" of the case and base their verdict on what was said in the court room. Jurors began to feel powerless in their decisions of legal matters. The juries that existed a few centuries ago, were used so that a "community perspective [could be applied to judicial decisions], even if [the jury] ignores or violates the law."[86] Unfortunately, the jury system

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[84]Ibid., 281.

[85]Ibid., 281.

[86]Ibid., 282.

has lost this opportunity to apply a community oriented approach to the law. However, in a 1968 Supreme Court decision (Duncan v. Louisiana) the Court recognized:

> . . . the jury's power to displace the law by appeal to conscience as a characteristic so 'fundamental to the American scheme of government that a state violates due process of law in eliminating a jury trial.[87]

Juries are now given the opportunity, in these three states, to ignore the letter of the law and grant a verdict, as a sample from the community, as what they view as right.

An example of jury nullification happening in our legal system today, involves the murder trial of Lester Zygmanik.[88] Zygmanik was brought to trial for the murder of his brother George. Zygmanik killed his brother because George was paralyzed from the neck down and was suffering in agonizing pain. George had made his brother promise that Lester would not allow for George to continue suffering. Zygmanik shot his brother in the head and minutes later turned himself in to authorities, claiming that the killing was done out of act of love for his brother.

The prosecution wanted to charge Zygmanik with the most severe penalty they could, which was first degree murder. Zygmanik had repeatedly confessed his guilt in the case. He acknowledged that the murder was pre-meditated and by all accounts of the letter of the law, Zygmanik was guilty of the crime committed and should be punished according to what the sanctions stated. However, after only three hours of deliberation, the jury came back with a verdict of "not-guilty." The jury must have concluded that Zygmanik was demonstrating altruistic behavior and that he was overcome with grief, love, and sadness because of the condition his brother was in and thus, could not stand to

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[87]Ibid., 282.

[88]Ibid., 279-81.

see him live and suffer an excruciating pain any longer. The jury was using the privilege that is granted to them because they are members of society. They deemed Zygmanik's behavior as not harmful and detrimental to society, but in all actuality, as a behavior that should be accepted and followed. This system, though entirely experimental, is another example in which society is allowed greater influence in the outcome of legal trials.

Restorative justice can be viewed as a paradigm shift.[89] This shift can be viewed as moving from our current retributive justice system, to a more reconstructed, rejuvenated form of justice. Retributive justice is concerned primarily with administering punishments and sanctions, by the state. This view observes the state as the victim of the crime, not the individual victim. The state is punishing the offender for an act that was committed upon the state, not the individual realms of society. Retributive justice has separated the criminal and legal matters from the masses of society. Instead of the community becoming active in criminal procedures, the state has taken control and is disassociating the crime from society.

Restorative justice views the crime as a "conflict between persons."[90] This view allows for the individuals of the crime, perpetrator and victim, to interact with one another, showing how the crime had affected both parties involved. The victims would converse with the actual offenders and develop some sort of solution, in which both parties would contribute. The victim would be allowed to voice their opinion as to how the perpetrator should be punished, whether the offender spends time in jail, provides some type of monetary or concrete payment, or both parties come to terms on some compromise that they feel justifies the crime.

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[89]Zehr, Restorative Justice, 8.

[90]Ibid., 6.

The victim is allowed to play a decisive role in the outcome of the case, through restorative justice. The victim would be able to contribute with the sanctions that are enforced so that the punishment fits the crime. The offender also benefits in restorative justice by rectifying the problem in a concrete way. The offender might have to pay a fine, return what they stole or broke, spend numerous hours providing productive work for the community, or spending time in jail writing letters and statements that pertain to the crime that they committed. The offender would no longer serve a punishment locked-up in jail waiting for the day when they are released back into society. Instead, the offenders would be active participants in their rehabilitation. They would participate in programs which would help them to acknowledge their responsibility in the crime and that their actions are not acceptable. The perpetrators would hopefully learn a new behavior that society could accept and allow back into society. This would help to instill in the offender, a sense of responsibility and participation in society. The offender would no longer be locked away in a secluded jail, but would have the opportunity to redeem oneself and learn what is socially acceptable.

These three reforms are examples of how society and the legal system can work together to restore a communal base within the criminal process. All of these reforms allow for societal members to partake actively in the decisions that relate towards legal matters, yet there are still discrepancies and weaknesses that can be found in each one. For example, the victim impact statements might not have an effect on the actual sentence the offender will receive. The victims are releasing some of their anger, yet their "voice" still might not be heard in the court of law. Jury nullification has the potential to have an adverse affect on the outcome of a verdict. One such example is the Rodney King verdict. The jury that acquitted all four police officers of their charges, consisted of all white

members. A claim had been raised that the police officers were doing their civic duties as police officers and King was engaged in some activity that deserved the treatment he was subjected to.[91] This is purely a hypothetical statement, but it does illustrate some of the weaknesses evident in jury nullification. However, despite some of their defects, these reforms are a positive step towards an integrative jurisprudence, but a lot more effort needs to be exerted to insure total community involvement.

Breaking the Boundaries and Unifying a System

Our Western society was founded on the principle of diversity. This diversity has allowed our country to grow and expand at an enormously large rate. Many different types of beliefs and traditions have found their new home in the United States. All of these communities are trying to live together as a whole, but also trying to allow their diversity to thrive. As there are many different traditions trying to live and survive in this country, an extraordinarily amount of traditions also exist in this world. This extremely large sum of traditions has made it exceptionally difficult to form an ethics or morality that can be applied to all realms of life. How can the world overcome this pluralism in order to develop a form of morality that applies to everyone and every tradition? In order for society to flourish in a communal setting, we, as a universal community must confront this issue of pluralism, in the hope of reaching some conclusion that is acceptable for everyone.

There are an infinite number of ethical and moralistic practices throughout the world, ranging from positivism to the Far East cultures of Buddhism. Yet, most, if not all, of these ethical and moralistic cultures believe in the value of

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[91] Wrightsman et al., Psychology and the Legal System, 283.

human life and doing "good" to better an individual and society. In order to achieve some sort of unity within the legal system, society must demonstrate how law can relate to the community as a whole, so that everyone may understand and work through law. The only way this can be achieved is through a destruction of the barriers that have been constructed by the legal system and all other disciplines within society.
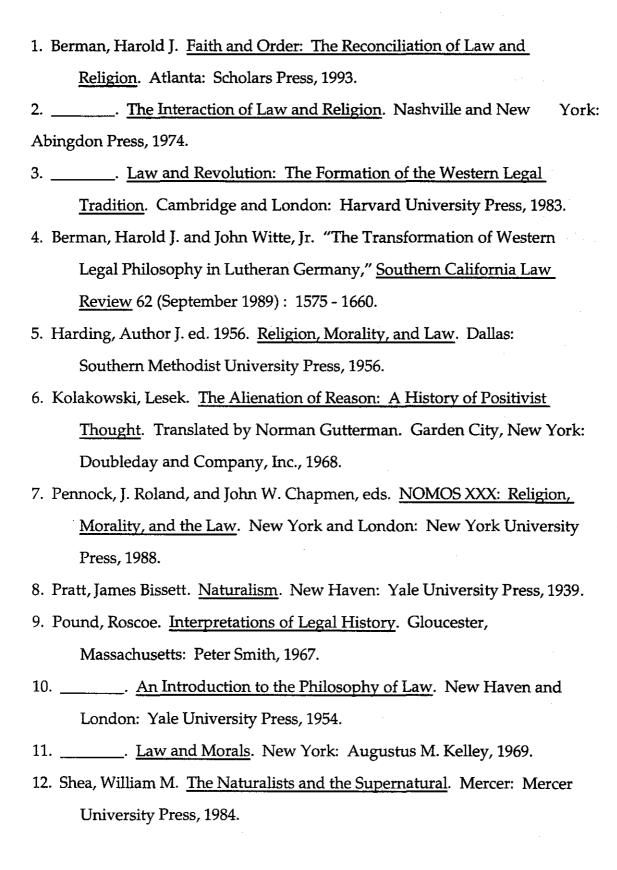
Society must understand law, or else law will not work. The central issue for law to work in society is that all of the members understand and respect the law. If law becomes a separate entity of society, law will lose its effectiveness. Right now the legal jargon is complex and almost incomprehensible for the average lay person. Law needs to reform its vocabulary so that it will no longer be viewed as a separate entity that only legal experts are able to decipher. Society needs to believe that law is as important to their survival as housing, transportation, and food. Law is a necessity that can not be ignored. However, other scholarly disciplines are also struggling with these same issues. Many fields of study have developed their own vocabulary, in which only those members of that field are able to understand. Many different disciplines have excluded themselves from each other, so that, they too, may develop an identity and a sense of coherence among their colleagues. Scholars need to reevaluate their systems so that all fields of study may interact. Society will not form a unified group with many different scholarly, religious, and communal traditions all living together as separate entities. These separate groups must find some way to incorporate each field of study, each religious tradition, and each communal base together, so that society can live together as a whole, functional group.

I am not asking for all the diversity to cease existing. This would definitely ruin the great complexity of our society, which makes it so interesting. I am, instead, asking for all of the traditions to acknowledge the diversity that society has to offer and to compare with one another their similarities, as well as their differences. If all the communities and traditions can discover the rich history and the benefits that each tradition has to offer to society, similarities may be found regarding legal practice, moralistic tendencies, and an understanding that society can flourish with the participation of everyone and every community. This participation is what is needed for a truly integrative jurisprudence.

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