

# THE JOURNAL JURISPRUDENCE

VOLUME FIVE

“RELIGION AND JURISPRUDENCE”

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## ABOUT THE TYPEFACE

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## CALL FOR PAPERS

The field of jurisprudence lies at the nexus of law and politics, the practical and the philosophical. By understanding the theoretical foundations of law, jurisprudence can inform us of the place of legal structures within larger philosophical frameworks. In its inaugural edition, *The Journal Jurisprudence* received many creative and telling answers to the question, “What is Law?” For the second edition, the editors challenged the scholarly and lay communities to inquire into intersection between jurisprudence and economics.

With the backing of our diverse and disparate community, *The Journal Jurisprudence* has now evolved into a more diverse form. We will no longer be setting a question for each issue, but instead designing issues around the articles we received. Therefore, we invite scholars, lawyers, judges, philosophers and lay people tackle the any and all of the great questions of law. Knowing that ideas come in all forms, papers can be of any length, although emphasis is placed on readability by lay audiences.

Papers may engage with case studies, philosophical arguments or any other method that answers philosophical question applicable to the law. Importantly, articles will be selected based upon quality and the readability of works by non-specialists. The intent of the Journal is to involve non-scholars in the important debates of legal philosophy.

The Journal also welcomes and encourages submissions of articles typically not found in law journals, including opinionated or personalised insights into the philosophy of law and its applications to practical situations.

*Jurisprudence* is published four times per year, to coincide with the four terms of the legal year, in an attractive paperback and electronic edition.

All authors who submit to this edition will be provided with a complementary copy of the journal.

**Length:** Any length is acceptable, although readability to non-specialist is key.

**Presentation Style:** Papers must comply with the Australian Guide to Legal Citations, Second Edition published by the Melbourne University Law Review. An electronic edition is available at, [http://mulr.law.unimelb.edu.au/PDFs/aglc\\_dl.pdf](http://mulr.law.unimelb.edu.au/PDFs/aglc_dl.pdf)

**Submission:** You must submit electronically in Microsoft Word format to [editor@jurisprudence.com.au](mailto:editor@jurisprudence.com.au). Extraneous formatting is discouraged.

Correspondence can also be sent to this address. If you are considering submitting an article, you are invited to contact the editor to discuss ideas before authoring a work.

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### SUBSCRIPTION INFORMATION

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- 1) Single issues can be purchased on [amazon.com](http://amazon.com). Our publishers, the Elias Clark Group, set a retail price for each edition, typically AU\$40. However, due to their agreement with [amazon.com](http://amazon.com), the price may vary for retail customers.
- 2) A subscription to the Journal can be purchased for AU\$150 per year, or AU\$280 for two years. This price includes postage throughout the world. Payment can be made by international bank cheque, but not a personal cheque, to:

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Alternatively, the Journal is available online at [www.jurisprudence.com.au](http://www.jurisprudence.com.au) and can be read there free of charge.



**EDITORIAL**

The relationship between jurisprudence and religion is an interesting and challenging area of inquiry. I am pleased to present this sixth issue of *Jurisprudence* on such a topic of contemporary relevance.

Admittedly, I would not have thought of the intersection between these two fields before my editorship of this journal. The law is largely secular and often, begrudgingly, devoid of any moral questions. Religion antithetically is the root of many conceptions of morality, and, to the lay observer, few intersections emerge.

However, as I began editing *Jurisprudence*, I noticed how many submission we would receive from religious-affiliated institutions. To my great surprise, much of the contemporary inquiry into the philosophy of law is from scholars with theological backgrounds.

However, when one dissects this trend further, a clear justification emerges. Canon law is central, in the history of law, to the development of contemporary legal systems. Moral questions, which can be said to be the root of political debates, are often catalysed by one's religious inclinations. These are but two reasons why contemporary jurisprudential scholarship intersects so evidently with the leading edge of theological scholarship.

In this issue, we welcome back two eminent scholars and introduce two more. Associate Professor Adam J. MacLeod of Faulkner University and Associate Professor Nehaluddin Ahmad of the Sultan Sharif Ali Islamic University return to contribute important articles. Assistant Professor Kevin Govern of Ave Maria and Mr Pablo S. Hurtado of the Ruhl Law Group makes their debut in *Jurisprudence* with a jointly authored piece.

Professor MacLeod, who wrote for us on the topic of "The Law as Bard" in the inaugural edition of *Jurisprudence*, elucidates the relationship between autonomy and basic goods. He interrogates important issues such as same-sex marriage and assisted suicide, whilst aspiring to contextualise these debates within a large discussion on choice. It is our pleasure to publish "The (Contingent) Value of Autonomy and the Reflexivity of (Some) Basic Goods."

Religious liberty is a concept taken for granted in the western world. However, in Islamic society this is an area of debate; a debate often misconceived by the outside world. Professor Nehaluddin, who wrote for us in *Jurisprudence* 3 on

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Islamic sovereignty, gives our readers insight into this important jurisprudential debate. He is a welcome contributor to these pages for his insight into non-western, non-Christian viewpoints is informative and valuable to understanding the global nature of law and jurisprudence. Additionally, we would like to congratulate Professor Nehaluddin on his recent appointment to Sultan Sharif Ali Islamic University in Brunei Darussalam. I can be certain that he will be an important asset the development of legal theory within Brunei and the larger Islamic community.

Finally, in a collaboration in the traditional aspiration of this journal, between theory and practice, the academy and the city, Professor Govern and Mr Hurtado introduce an integrated theory of diversity, law and theology. Drawing from the work of Professor Berman, Govern and Hurtado draw a connection between two trinities – that of law (i.e., natural, positive and historical) with the holy trinity found in the Christian tradition. Their article makes important contributions to the study of law as whole; which is how I described the fundamental aim of jurisprudence in my inaugural editorial. I have no doubt that this article will be much studied in future years.

Finally, I am pleased to acknowledge our continued partnership with the Elias Clark Group, our publishers, and, importantly, Cengage Learning. Cengage is one of the largest producers of specialized educational material in the world, as a result of this relationship *Jurisprudence* is now available in the Lexis catalogue. This builds on our existing partnership with HeinOnline, and we look forward to introducing our unique publication to an ever expanding readership.

Aron Ping D'Souza  
Editor  
Oxford, England  
19 January 2010

**THE (CONTINGENT) VALUE OF AUTONOMY  
AND THE REFLEXIVITY OF (SOME) BASIC GOODS**

ADAM J. MACLEOD\*

I INTRODUCTION

Many of the legal and policy issues about which people today get most exercised turn on a little-understood relationship between two fundamental principles. On one hand is the principle of autonomy, which, for reasons explored in this article, is often employed in defence of greater freedom and less government intervention in matters of morals and self-harmful conduct. On the other hand is respect for basic goods, those ends and purposes that constitute ultimate, underived, and intelligible reasons for rational action, and which include knowledge, human life, and community, among others. Basic goods provide *reasons* for human purposing and action (as opposed to desires, emotions, and other sub-rational motivations for action), and are valuable in and of themselves. Thus states act rationally, though not always fully reasonably, when they prohibit injury to basic goods, even by coercive laws and policies.

Renewed debates in the United Kingdom and the United States over decriminalisation of physician assisted suicide have in recent months<sup>1</sup> brought into sharper focus foundational disagreements about the relationship between autonomy and basic goods, such as human life. Careful attention to this relationship might enable productive discussion of this and other issues, such as the nature of marriage, the justness of abortion, and controversial uses of tax revenues. This paper attempts to reconcile respect for autonomy with respect for basic human goods. There exists reason to believe that this is not a futile project. Though consensus is certainly too much to hope for in the near future, recognising and exploring the complexity of the relationship between autonomy and basic goods arguably supplies a way to think about controversial issues while avoiding the polemics that so often attend public debate.

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\* Associate Professor, Faulkner University, Jones School of Law. I am indebted to Andy Olree for his comments and clarifications, and to Rob McFarland and Jeff Hammond for their editorial comments. The errors are all my own.

<sup>1</sup> Legalisation of assisted suicide in Washington State (by popular referendum) and Montana (by judicial decision) has once again drawn attention to a public debate that previously appeared to have been largely resolved, or at least to have reached a stalemate, in the United States. Proponents of assisted suicide have in the last couple of years made a renewed effort at legalisation also in the United Kingdom.

However, if a way forward can be found, its discovery must follow a candid examination of the limits of the principles at play. Arguments in favour of a legal right to assisted suicide and abortion, and for recognising same-sex marriage, share an essential proposition: that by her un-coerced and autonomous choice the individual person determines the value of certain human goods, such as life and marriage.<sup>2</sup> I shall argue that this position is unreasonable, but that one *can* respect the significant value of autonomy without going so far. On the other hand, many who oppose assisted suicide and abortion and defend conjugal marriage invoke traditions about human goods, morals, and human flourishing. Arguments from tradition alone are not productive in dialogues between persons from different traditions, who do not share common assumptions about the good.

This article begins by reviewing the efforts of two legal philosophers, Joseph Raz and Robert George, to reconcile the value of autonomy with the intrinsic value of other human goods. Raz and George provide reason to believe that understanding, at least, is possible. The article next considers some bold claims about the value of autonomous choice by two scholars who favour Legalisation of assisted suicide, Andy Olree and Ronald Dworkin. Though Olree's and Dworkin's treatments of autonomy and basic goods both fail to account for the full value of many basic goods, such as human life, their arguments suggest a reason why the argument over assisted suicide has become intractable. The article concludes by fashioning a framework for thinking about contested legal issues in a productive manner.

## II BEGINNINGS

The course of this argument begins at a helpful exchange between two legal philosophers, which occurred two decades ago. Joseph Raz in his work *The Morality of Freedom*, set out an argument for 'perfectionist liberalism', in which Raz asserted that moral neutrality by government is impossible and attempts to

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<sup>2</sup> It is thus no accident that these arguments often invoke Justice Kennedy's now well-worn claim from *Planned Parenthood of Southeastern Pennsylvania v Casey*, 505 US 833 (1992).

Our law affords constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education. ... These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State: at 851.

remain neutral are undesirable.<sup>3</sup> In other words, governments cannot, and should not attempt to, make laws apart from consideration of the good. Raz nevertheless maintained, consistent with his liberal commitments, that government should not Criminalise ‘victimless’ immoralities, which harm only the actor. Robert George, a natural lawyer, in a thoughtful criticism of Raz’s work affirmed the importance of protecting liberty and autonomy in certain policy areas, such as laws pertaining to speech and religion, but disagreed with Raz about which harms governments may coercively deflect. The work of these two thinkers provides a blueprint for understanding the relationship between autonomy and basic goods that obsolesces much of the trench warfare so prevalent in discussions about controversial issues. I will attempt to set out a very crude summary of their thoughtful contributions in this area.

In rejecting the possibility of moral neutrality by governments, Raz set himself against influential non-perfectionist liberals, such as John Rawls. An individual in Rawls’ hypothetical original position, who is ignorant of the conception of the good that he will adopt once he enters society, is not, as Rawls supposed, capable of endorsing neutral principles of equal liberty.<sup>4</sup> Like Thomas Nagel before him, Raz observed that ‘there is no way of justifying the conditions of choice in the original position except from the point of view of a certain conception of the good.’<sup>5</sup> In other words, Rawls’ argument for neutrality is not neutral but instead biased.<sup>6</sup>

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<sup>3</sup> Loosely, perfectionist theories hold that the law can and should take into consideration human flourishing and moral harms. Raz explains, “‘Perfectionism’ is merely a term used to indicate that there is no fundamental principled inhibition on governments acting for any valid moral reason, though there are many strategic inhibitions on doing so in certain classes of cases.’ Joseph Raz, ‘Facing Up: A Reply’ (1989) 62 *Southern California Law Review* 1153, 1230. Raz contrasts perfectionist liberalism with ‘liberal doctrines of moral neutrality.’ Joseph Raz, ‘Liberalism, Skepticism, and Democracy’ (1989) 74 *Iowa Law Review* 761, 782.

<sup>4</sup> Joseph Raz, *The Morality of Freedom* (1986) 117-18.

<sup>5</sup> *Ibid.* 118.

<sup>6</sup> *Ibid.* 118-20. George offered a similar criticism of Rawls:

Rawls’s use of the original position as a device for choosing principles of justice may be criticized on two related grounds. First, by depriving persons in the original position of any commitments and allegiances beyond the commitment of each to his ‘own ends,’ whatever they turn out to be, Rawls smuggles strong liberal individualist presuppositions into the apparently weak and uncontroversial premises of his argument. Secondly, while Rawls’s construction of the original position succeeds in eliminating bias as between persons, it does not itself escape bias as between competing conceptions of the person, and, thus, between rival conceptions of the good.

Robert George, *Making Men Moral: Civil Liberties and Public Morality* (1993) 133. George observes that persons in the original position would choose Rawls’ liberal principles only if they are persons in the form that Rawls’ liberalism conceives them: at 133. And Rawls’ conception of persons is at least as controversial as those conceptions of persons and the good that Rawls’ neutrality principle would exclude from consideration in political debate: at 133.

Contemporary contests over controversial political questions have confirmed Raz's scepticism of state neutrality. As states have in the last few decades adopted putatively neutral positions on abortion, assisted suicide, the definition of marriage, and other issues that implicate competing conceptions of the good, they have invariably affirmed a partisan, liberal conception of the good and rejected rival conceptions. Rancour and controversy in the United States over abortion (for example) has increased, rather than decreased, since the Supreme Court's decision in *Roe v Wade*,<sup>7</sup> which discerned a constitutional right to abortion. By adopting an ostensibly neutral posture toward the question, the Court in fact injected itself into the inherently partisan debate; to legalize abortion is to adopt the partisan proposition that unborn human lives are not as valuable as other human lives.<sup>8</sup>

Raz lauded liberalism's concern for the 'dignity and integrity of individuals',<sup>9</sup> but he suggested that this concern militates not against moral ideals and reliance upon conceptions of the good, but rather in favour of a form of moral pluralism.<sup>10</sup> Raz's moral pluralism would recognize a wide variety of forms of human flourishing, but would also acknowledge that certain choices are simply bad, lacking in all objective value. Thus, while autonomy in Raz's view is intrinsically valuable, respect for autonomy does not entail that individuals should be free to make immoral choices, that is, choices lacking in all objective value. According to Raz, 'Autonomy is valuable only if exercised in pursuit of the good. The ideal of autonomy requires only the availability of morally acceptable options.'<sup>11</sup>

For Raz then, there is nothing inherently wrong with morals laws, those laws the purpose of which is to promote the moral well-being of, and to prevent serious moral harm to, citizens. The state may, for example, officially sanction

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<sup>7</sup> 410 US 113 (1973).

<sup>8</sup> Similarly, as I have explained elsewhere, courts creating same-sex marriage have committed themselves to partisan conceptions of the good, despite their claims to neutrality. Adam J MacLeod, 'The Search for Moral Neutrality in Same-Sex Marriage Decisions' (2008) 23 *BYU Journal of Public Law* 1. To create same-sex marriage is not to adopt a position of neutrality but rather to endorse the partisan proposition that same-sex intimacy is equally as valuable (morally and/or socially) as conjugal monogamy and more valuable than other social arrangements, such as polygamy, polyandry, and non-intimate mutually-supportive relationships. The only way for courts to avoid this partisanship is to defer to legislative judgments. And legislatures, which make laws, cannot avoid partisanship at all. In other words, either the courts or the lawmakers (or both) must be partisan between rival conceptions of the good. Neutrality is simply impossible. Even silence on the definition of marriage, as where a state abolishes marriage altogether, entails the state adopting a position about the value of the institution of marriage.

<sup>9</sup> Raz, 'The Morality of Freedom', above n 4, 162.

<sup>10</sup> *Ibid.* 111-33.

<sup>11</sup> Raz, above n 4, 381.

and privilege institutions—marriage, universities—that protect the good and promote human flourishing. However, when government uses coercion to prevent people from harming themselves, it often goes too far, by deflecting autonomous choice.

George agreed with Raz that the value of autonomy is not absolute but rather ‘conditional upon whether or not one uses one’s autonomy for good or ill’.<sup>12</sup> However, George disagreed with Raz’s claim that autonomy is intrinsically valuable. George observed, as Donald Regan did before him, that to claim that autonomy is intrinsically valuable entails concluding ‘either that something intrinsically valuable is realized in autonomous but wicked choices, namely, the intrinsic value of autonomy as such, or that wicked choices are, by definition, never autonomous.’<sup>13</sup> George thought the best resolution of this quandary was to reject the claim that autonomy is intrinsically valuable. Instead, autonomy is *instrumentally* valuable for the realization of certain extrinsic ends.<sup>14</sup>

Among the more fundamental, extrinsic ends for which autonomy is instrumentally valuable are reflexive goods, ‘objects of choice whose value is dependent upon their being freely chosen’.<sup>15</sup> Coerced friendship and religious adherence, for example, lack all intelligible value. Only if autonomously chosen does a friendship (even, or especially, with God) make sense as a reason for action.<sup>16</sup> So if friendship and religion are basic goods, they are reflexive in nature.

One basic good that is reflexive in important respects is the basic good of morally upright choosing, what George, following other natural lawyers (including Thomas Aquinas and John Finnis), called ‘practical reasonableness’.<sup>17</sup> This is the good that one realizes when one chooses well between alternative courses of action, in a morally upright manner and consistent with one’s own integrity. Practical reasonableness might be described as the practice of making moral decisions well. Practical reasonableness is ‘a complex good whose central aspects include personal integrity and authenticity’,<sup>18</sup> which are central concerns of contemporary liberalism.<sup>19</sup> It is a reflexive good because deliberation and

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<sup>12</sup> George, above n 6, 177.

<sup>13</sup> *Ibid.* 175.

<sup>14</sup> *Ibid.* 180. ‘If one’s desire for autonomy is rationally grounded, its ground must be some good other than autonomy itself whose (fuller) realization is made possible or, at least, facilitated, by the possession of a requisite degree of autonomy’: at 180.

<sup>15</sup> *Ibid.* 221 n 15.

<sup>16</sup> *Ibid.* 221.

<sup>17</sup> *Ibid.* 177.

<sup>18</sup> *Ibid.*

<sup>19</sup> Indeed, integrity and authenticity figure prominently in the arguments of Ronald Dworkin, considered *infra*.

choice enter into its very definition;<sup>20</sup> one can choose well only if one has the freedom to choose. As George noted, practical reasonableness ‘can only be realized in choosing and... consequently requires the effective *freedom* to choose’.<sup>21</sup>

Though George defended moral laws in principle and in general, he asserted that any particular moral law might be inadvisable where the good that the state seeks to protect is reflexive. In such a case, any coercive attempt to protect the good (such as a law requiring observance of a particular religion) would necessarily prevent realization of that good; the coercion destroys the very good that the state seeks to promote. On this point, George set himself against any traditionalists who might advocate for an unlimited moral paternalism.

### III AUTONOMY, ASSISTED SUICIDE, AND THE CHRISTIAN TRADITION

One of the most obviously-reflexive human goods is religious adherence. If, as George and others claim, religion is a basic human good, it is good only if autonomously chosen. Therefore, that much, though by no means all, of the thinking about the relationship between autonomy and religion is done by religious people should not surprise us. For the sake of simplicity and brevity (and because I am insufficiently versed in other religious traditions to comment on them with any authority), this part of the article will employ the perspective of the Christian religious tradition. And to give some additional shape to the discussion, it will examine the relationship between the Christian tradition and assisted suicide, an issue in which autonomy-based arguments play a prominent role. Indeed, because arguments over legalisation of suicide often bring autonomy and a basic human good—life—into direct conflict, assisted suicide will be a recurring case study in this article.

Christians have prominently influenced and advanced the opposition to decriminalisation of assisted suicide, but they have not been unanimous. Evangelical legal scholar William Stuntz has suggested that Christians ought to take an ‘agnostic’ posture toward criminalisation of assisted suicide.<sup>22</sup> Another evangelical scholar, Andy Olree, has argued that, though committing or assisting voluntary suicides ‘may be sinful’, Christians ought not to seek to have those acts outlawed.<sup>23</sup> What do these claims teach us about the relationship between autonomy and basic goods, including religion and human life?

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<sup>20</sup> George, above n 6,177.

<sup>21</sup> *Ibid.* 168.

<sup>22</sup> William J Stuntz, ‘Christian Legal Theory’ (2000) 116 *Harvard Law Review* 1707, 1740.

<sup>23</sup> Andy G Olree, *The Choice Principle: The Biblical Case for Legal Toleration* (2006) 206.



### *A Christianity and Suicide*

The orthodox Christian tradition has long condemned suicide.<sup>24</sup> From very early in church history, Christians have understood the Decalogue's prohibition of homicide<sup>25</sup> to include self-killing. Saint Augustine, reasoning that the commandment not to kill does not specify 'your neighbour' as its object, as other commandments do, concluded that suicide was murder.<sup>26</sup> This tradition remains unbroken in most, though not all, Christian denominations.<sup>27</sup>

Other Christians have gone farther, expressly endorsing the practice of assisted suicide. John Shelby Spong, an Episcopal bishop, has endorsed euthanasia and physician assisted suicide as consistent with 'Christian ethics.' John Shelby Spong, 'Death: A Friend to be Welcomed, Not an Enemy to be Defeated' in Timothy E Quill and Margaret P Battin (eds), *Physician-Assisted Dying: The Case for Palliative Care and Patient Choice* (2004) 150, 151. However, the basis for this endorsement is Spong's claim that changes in the times and in our 'developed consciousness,' at 157, particularly scientific and medical knowledge not available to the authors of Scripture, renders Christianity's central text, the Bible, obsolete: at 157-58. Humans in Spong's view have evolved to a point at which we should accept and embrace 'Godlike responsibilities': at 158. This is, to say the least, not a serious attempt to reconcile assisted suicide with the Christian tradition.

<sup>24</sup> The Bible, the central and foundational source of Christian doctrine, teaches that human beings are unique, that unlike the animals humans are created in the image and likeness of God, *Genesis* 1:26, and that taking the life of a human is fundamentally different than the act of killing an animal. When Cain committed the first murder by killing his brother Abel, God told Cain that Abel's blood called out from the ground and He placed Cain under a curse as punishment for his act. *Genesis* 4:10-12. The Bible claims that God alone has authority to give and take human life. *Deuteronomy* 32:39.

<sup>25</sup> *Exodus* 20:13.

<sup>26</sup> Augustine, *The City of God* Book I, Chapter 20.

<sup>27</sup> The National Association of Evangelicals, which speaks for dozens of Protestant denominations, condemns assistance in dying. See *Termination of Medical Treatment* (1994) <<http://www.euthanasia.com/evangel.html>> at 20 January 2009. The Catholic and Anglican churches, two of the three largest communities of Christians in the world, both continue to affirm the intrinsic value of human life and to condemn physician-assisted suicide and euthanasia. In a joint statement released in the fall of 2006, Pope Benedict XVI and Rowan Williams, the Archbishop of Canterbury, called for the promotion 'of respect for life from conception until natural death.' *Joint Declaration of Benedict XVI and Rowan Williams: Many Areas of Witness and Service in Which We Can Stand Together* (23 November 2006) <<http://www.anglicansforlife.org/resources/readarticle.asp?number=221&topic=&display=>>> at 20 January 2009). Williams opposes the Legalisation of assisted suicide on the ground that Legalisation entails the claim 'that certain kinds of human life are not worth living.' John Keown and David Jones, 'Surveying the Foundations of Medical Law: A Reassessment of Glanville Williams's The Sanctity of Life and the Criminal Law' (2008) 16 *Medical Law Review* 85,125 n 229. The Catholic Church teaches that an act or omission that of itself or by intention causes death in order to eliminate suffering constitutes a murder contrary to the dignity of the human person, *Catechism of the Catholic Church* #2277, and that suicide is an offense against self, neighbor, and God. *Ibid.* 2281. And in his encyclical *Evangelium Vitae*, the late Pope John Paul II condemned legal recognition of so-called 'rights' to attack human life, including 'hastening death so that it occurs at the moment considered most suitable.' John Paul II, *The Gospel of Life* (1995) 24-33.

Thomas Aquinas also concluded that it is unlawful to kill oneself.<sup>28</sup> Aquinas and many Christian thinkers since him have reasoned to this conclusion on the foundation of both Christian dogma and secular, Aristotelian practical reasoning. The prohibition against killing is a moral rule which can be derived in practical reasoning from two self-evident principles, recognized by many Christians and non-Christians throughout history. First, human life is a basic good, meaning that it has intrinsic worth and it is categorically a reason in and of itself for action, choice, and decision.<sup>29</sup> Its value does not derive merely from its instrumental usefulness for securing or enjoying other goods, such as health, aesthetic experience, or relationships (though in most cases it does have value for those extrinsic ends), and even where it ceases to be enjoyable or useful, it is ‘fulfilling in its own right’.<sup>30</sup>

Second, one should never intentionally choose to do any act that does nothing but destroy a basic good, such as human life. Though one’s reason for choosing life might be defeated by some other reason, as where a fireman or a soldier risks his own life to save another, knowing that his death might result, but not intending it, one never has a reason deliberately to destroy innocent human life, even one’s own life. On the basis of these two premises and the biblical text that confirms them, Christian tradition affirms the ‘dignity of the human person’ and the teaching that, even where other goods may be considered ‘more precious’, the basic good of human life is ‘fundamental—the condition of all others’.<sup>31</sup>

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<sup>28</sup> Thomas Aquinas, *Summa Theologica* (1271) Part II, Q64, A5.

<sup>29</sup> Neil M Gorsuch, *The Future of Assisted Suicide and Euthanasia* (2006) 157; John Finnis, *Natural Law and Natural Rights* (1980) 85-87.

<sup>30</sup> Gorsuch, above n 29, 157-58. Judge Gorsuch observes:

To claim that human life qualifies as a basic good is to claim that its value is not instrumental, not dependent on any other condition or reason, but something intrinsically good in and of itself. That this is true is suggested in part by the fact that people every day and in countless ways do something to protect human life (one’s own or another’s) without thinking about any good beyond life itself.

*Ibid.* 158.

<sup>31</sup> John M. Breen, ‘Modesty and Moralism: Justice, Prudence, and Abortion – A Reply to Skeel & Stuntz’ (2008) 31 *Harvard Journal of Law & Public Policy* 219, 245. These are not the only principles of practical reasoning that forbid acts of homicide, abortion, and euthanasia. Gerard Bradley has demonstrated that the prohibition against abortion, for example, can be derived from the Golden Rule: do unto others as you would have them do unto you. Gerard V Bradley, ‘When Is It Acceptable for a “Pro-Life” Voter to Vote for a “Pro-Choice” Candidate?’ in *Public Discourse* (October 21, 2008), available at <http://www.thepublicdiscourse.com/viewarticle.php?selectedarticle=2008.10.21.001.pdart>. For obvious reasons, the Golden Rule does not resolve the moral and jurisprudential problems posed by suicide or assisted suicide.

Judge Neil Gorsuch has explored the implications of these principles for the problem of assisted suicide.<sup>32</sup> If human life is a basic good, ‘it follows that we can and should refrain from actions intended to do it harm.’<sup>33</sup> This maxim Gorsuch calls the ‘inviolability-of-life’ principle.<sup>34</sup> ‘To act intentionally against life is to suggest that its value rests only on its transient instrumental usefulness for other ends.’<sup>35</sup> The inviolability-of-life principle thus rules out assisted suicide and euthanasia, though, as explained below, it would not require that measures must always be taken to keep human beings alive.<sup>36</sup>

### B *The Choice Principle*

Andy Olree’s opposition to assisted suicide prohibitions follows from what he calls ‘the Choice Principle’, his ‘attempt to capture the essence of God’s will for governors’.<sup>37</sup> The Choice Principle holds, ‘In the absence of explicit New Testament instruction regarding the type of law being considered, a Christian should favour only those criminal laws which restrict acts directly victimizing others’<sup>38</sup> and which are necessary to increase overall human Choice.’<sup>39</sup> The

<sup>32</sup> Gorsuch, above n 29, 158.

<sup>33</sup> *Ibid.* 164.

<sup>34</sup> *Ibid.* 167.

<sup>35</sup> *Ibid.* 164.

<sup>36</sup> *Ibid.* 218.

<sup>37</sup> Olree, above n 23, 147.

<sup>38</sup> Readers will here recognize in Olree’s Choice Principle a gesture toward the well-known harm principle espoused by John Stuart Mill, Joseph Raz, and others in the liberal tradition. Though a complete examination of Olree’s use of the harm principle is beyond the scope of this article, a few words will serve as a place-holder. From within the orthodox, Christian tradition, the harm principle is arbitrary. Olree concedes that ‘God has ordained governments’ to punish wrongdoers. Olree, above n 23, 107. Harm is thus a legitimate concern of the lawmaker. And Olree provides no reasons to believe that the law ought to disfavor harm to self any less than it disfavors harm to others.

Indeed, Christians have long affirmed that self-harm and harm to others both harm the common good. Olree can make his case only by rejecting the notion of a common good; the good of each individual must be considered independently, in his view. However, neither the Bible nor reason compels this rejection. The assumption that there exists such a thing as a harm not inflicted on others is, in fact, dubious. Steven Calabresi has observed that so-called ‘victimless’ crimes ‘are not, in fact, totally victimless.’ Steven G Calabresi, ‘Render Unto Caesar That Which is Caesar’s and Unto God That Which is God’s’ (2008) 31 *Harvard Journal of Law & Public Policy* 495, 501.

The most common victims of so-called victimless behavior are the children and other family of the perpetrator. When people abuse alcohol, tobacco, or drugs, commit suicide, or behave in other self-destructive ways, they hurt their children, spouse, parents, siblings, and friends. The victimless crime is to some extent a fiction. Self-destructive behavior often harms others: at 501.

This is particularly clear in the context of suicide. Suicide harms those with whom the suicide perpetrator-victim shares community. The child rendered fatherless, the mother rendered childless, the community that loses one of its citizens, friends who are deprived of the suicide’s

Choice Principle permits Christians to support only criminal prohibitions against acts that directly harm others and reduce overall choice.<sup>40</sup> Assisted suicide, Olree asserts, neither harms another nor reduces overall choice.<sup>41</sup> Indeed, prohibiting the practice restricts the choices available to both the suicide victim and the one who would otherwise provide assistance.<sup>42</sup> For these reasons, Christians should not seek to outlaw assistance in suicide.<sup>43</sup>

Olree does not in his analysis take account of jurisprudential justifications for criminalising assisted suicide, such as the claim that human life is a basic good.<sup>44</sup> However, a careful reading of Olree's work uncovers challenging claims about the nature of basic goods and the value of autonomous choice.

### 1 *The Value of Choice*

In Olree's scheme, choice is a necessary but not sufficient condition for morally valuable decisions. On his view, only the choice to commit a righteous act for the right reasons counts as morally valuable; behaving rightly for the wrong reasons has no more moral value than behaving badly, and immoral conduct<sup>45</sup> is no more harmful than good behaviour motivated by bad purposes.<sup>46</sup> Olree adds one more premise, that the positive law cannot be demonstrated to have any affect upon internal motivations.<sup>47</sup> From the combination of these premises, it follows that coercive positive law has no role to play in preventing immoral acts that do not impair overall choice.

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company and cooperation, business and charitable organizations that lose a valuable contributor, all these and others suffer harm as a result of suicide.

<sup>39</sup> Olree, above n 23, 147.

<sup>40</sup> *Ibid.* 206.

<sup>41</sup> *Ibid.*

<sup>42</sup> *Ibid.* 206.

<sup>43</sup> *Ibid.*

<sup>44</sup> Nor does Olree account for considerations that militate against assisted suicide in particular circumstances, such as where there is reason to doubt the victim's desire to die or where the victim is incapable, by reason of youth, incompetence, or trauma, of expressing fully-informed consent. *Ibid.* In these cases one would have reason to doubt that the victim has freely chosen assisted suicide, so perhaps the practice may be prohibited without conflict with the Choice Principle: at 206.

<sup>45</sup> Olree uses the term 'sinful.' Recognizing that some sinful decisions might be rationally underdetermined and thus morally permissible for non-Christians, I nevertheless treat 'sinful' and 'immoral' as synonyms here because I am dealing with the issue of assisted suicide, which if immoral is also sinful, and vice versa.

<sup>46</sup> Olree, above n 23, 136-38.

<sup>47</sup> See, eg, *Ibid.* 132 ('Since law can only regulate outward acts and not the heart, law cannot control that which influences righteousness.')

Olree is careful to claim that autonomous choice is not intrinsically valuable but rather instrumentally valuable.<sup>48</sup> He argues ‘that freedom to choose, even freedom to choose wrongly, is an instrumental good which produces virtue, and since Choice is essential to all virtue, it is an instrumental good that ought to be maximized by law.’<sup>49</sup>

Like Raz, Olree concedes that choice is sometimes exercised for valueless ends.<sup>50</sup> This concession, that choice is not a sufficient condition for morally valuable decision-making, puts him in a bind. If autonomous choice is instrumentally valuable because and insofar as it facilitates virtuous decision-making, and if, as Olree concedes, choice does not always produce virtuous decisions, then the value of choice is not absolute but merely contingent. To the extent that choice facilitates harmful decisions it is not valuable, and thus not a valid basis on which to curtail the reach of positive law. For this reason, the Choice Principle is not a principle of universal application at all, but rather a generalization.

This problem is best illustrated in the context of suicide, the quintessential case of an autonomous human choice that is completely devoid of moral value. Not only does suicide consist of a deliberate destruction of a basic human good (life) for the realization of no other intelligible good,<sup>51</sup> it also prevents the perpetrator-victim from making any future pursuits of human goods. By its very operation, the act of suicide ensures that the actor will not choose the good, will not act virtuously or pursue any valuable ends.<sup>52</sup>

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<sup>48</sup> Ibid

<sup>49</sup> *Ibid.* 187.

<sup>50</sup> *Ibid.* 136.

<sup>51</sup> Some claim that a suicide performed to avoid extreme suffering does serve an intelligible end, namely the avoidance of suffering. However, avoidance of suffering is not intelligible as a *reason* for action, though it is certainly understandable as a sub-rational motivation. A moment’s reflection reveals that avoiding some suffering actually causes harm, as where one refuses to go to the dentist to have a rotten tooth removed. Indeed, the realization of many good ends entails suffering. I cannot remain healthy without exercising, which is usually uncomfortable. I cannot establish a friendship without taking an interest in another person, which entails setting aside my own vanity and self-importance, disciplines that I, a particularly vain and self-important person, naturally experience as sacrifices.

On the other hand, suffering is not an intelligible end; one who chooses suffering for its own sake acts irrationally. Suffering and avoidance of suffering, then, are morally neutral. One cannot discern whether the sub-rational desire to avoid this or that particular instance of suffering is consistent with reason until one considers whether the suffering in this or that particular case will accrue to the sufferer’s benefit or harm. In order to answer *that* question, one must look beyond suffering for intelligible reasons for action. And because a reason for action, such as human life, can never be defeated by a sub-rational motivation, such as the desire to avoid suffering, one’s reason for choosing life can never be defeated by a desire to avoid pain or suffering.

<sup>52</sup> Olree might respond that he is claiming a far less ambitious role for choice, that though commitment to the Choice Principle will not serve the common good in every case, it will on

What then is Olree claiming? One interpretation of Olree's claim is that freedom of choice creates the possibility of pursuing a valuable end where that possibility would not exist in the absence of choice. In other words, in Olree's conception of virtue and the good, nothing valuable comes of pursuing an otherwise-good end unless that end is freely chosen for the right reasons. If, as Olree assumes, a coerced decision to pursue a good end has no value whatsoever, then nothing valuable comes of coercing a suicidal woman (for example) to continue living. The options are either (1) giving her the freedom to choose, which might or might not produce a valuable decision, or (2) coercing her to live, which can never have any intelligible value. If this dichotomy is true, it resolves itself.

However, I will argue that this dichotomy is false. Olree's premise here is that all human goods are reflexive, that is, that they are valuable only insofar as they are freely chosen for their own sake. This premise is much more controversial than Olree acknowledges. This article turns now to examine it.

## *2 Religion and Human Life as Reflexive Goods*

Olree joins Robert George and many other Christians (including me) in affirming that religious adherence<sup>53</sup> (Olree uses the term 'righteousness'<sup>54</sup>) is a

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balance facilitate virtuous decision-making more often than not, and on this ground ought to be obeyed. The claim that maximization of choice will maximize virtue, if this indeed is Olree's claim, is at least as questionable as the claim of Olree's interlocutors, especially Robert George, that positive laws prohibiting immoral conduct promote a moral ecology conducive to the common good and hostile to vice. Olree has not attempted a proof for this claim in his book, and it would be surprising, to say the least, to discover that laws permitting immoral acts tend to make citizens *less* likely to engage in those acts.

Regardless, such a generalization cannot serve as an adequate ground on which to oppose prohibitions of assisted suicide. Even if maximization of choice generally promotes virtue and the pursuit of valuable ends, it never serves this purpose when the choice is to end one's own life. Indeed, maximization of the choice to commit suicide does nothing but harm, thereby undermining the very purpose for increasing overall choice.

<sup>53</sup> A better term might be 'relationship with God.' Though this term perhaps fails to account for those persons who do not acknowledge the existence of an uncaused Cause, it has the virtue of describing the internal perspective of the religious practitioner, who sees herself not as being religious but rather as cultivating a relationship with the Supreme Being. However, as I intend to compare and contrast Olree's treatment of the human goods with natural lawyers' treatment of them, I will use the terms those persons use. Natural law thinker John Finnis uses the term 'religion' to refer to 'the establishment and maintenance of proper relationships between oneself (and the orders one can create and maintain) and the divine.' Finnis, above n 29, 89. See also George, above n 6, 219-28.

<sup>54</sup> See, eg, Olree, above n 23, 132-33. Olree's term, 'righteousness,' tends to obscure more than it clarifies. It captures one aspect of religious practice, that is, seeking to do God's will for the

reflexive good.<sup>55</sup> Though Olree does not expressly state it, a substantial portion of his book is devoted to the demonstration of the thesis that religious practice is a reflexive good and that positive laws that impair the freedom to pursue righteousness damage that good.<sup>56</sup> For this reason, freedom from laws coercing religious belief and practice has appreciable instrumental value.<sup>57</sup>

This is not an insignificant insight. If religion (or righteousness) is a human good, its value is contingent on its being freely pursued. Just as friendship with another person cannot be coerced, genuine relationship with God is of no value unless it is voluntary.<sup>58</sup> It follows that laws coercing religious adherence serve no intelligible end. Olree states, ‘No one is made righteous by observing behavioural rules, and thus no Christian should feel bound by any in order to please God. And certainly no Christian should try to bind such rules on anyone else to bring those others closer to God.’<sup>59</sup>

However, Olree goes on to claim that all other human goods are valuable only if they promote religious righteousness. Olree disparages the notion that an action could be valuable in itself, ‘regardless of individual motives’.<sup>60</sup> He suggests that marriage (used as an example) is not good ‘in itself’.<sup>61</sup> Indeed, he asserts, ‘No act is good, no thought is good, unless freely chosen.’<sup>62</sup> This treatment of all human goods as reflexive seems to be closely tied to Olree’s astonishing claim, ‘A legal change is only desirable to the extent that it advances real spiritual ends, like personal conversion or spiritual growth.’<sup>63</sup> Olree appears to believe that religious exercise is the only principled purpose of law and that all other human purposes are subsumed within this end. What counts as good is only the accomplishment of God’s will.<sup>64</sup> No realization of a human good—no enjoyment of a symphony, no keeping of marriage vows, no acquisition of knowledge—is valuable unless and insofar as it leads the actor toward conversion to Christianity and/or spiritual growth.

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right reasons. However, Olree seems to use the term at times to refer to a basic good other than religion, namely, choosing uprightly, or what natural lawyers call ‘practical reasonableness.’ See Finnis, above n 29, 88-89. As discussed supra, practical reasonableness is in one important sense also a reflexive good. George, above n 6, 25-26. Thus Olree’s elision is not fatal to our discussion here.

<sup>55</sup> George, above n 6, 221-22.

<sup>56</sup> Olree, above n 23, 130-47.

<sup>57</sup> *Ibid.* 133-37; George, above n 6, 221-26.

<sup>58</sup> George, above n 6, 220-21.

<sup>59</sup> Olree, above n 23, 133.

<sup>60</sup> *Ibid.* 147.

<sup>61</sup> *Ibid.* 136.

<sup>62</sup> *Ibid.* 138.

<sup>63</sup> *Ibid.* 35.

<sup>64</sup> *Ibid.* 138.

On this account, one who participates in a seemingly good act or experience without freely choosing that act or experience is not in fact participating in anything good. Arranged marriages, family sing-alongs, chores, compulsory education and homework assignments are accorded exactly no moral value. Furthermore, goods must not merely be freely chosen, they must be freely chosen for righteous reasons. One who chooses well for the wrong reason suffers the same harm, if any, as one who chooses badly.<sup>65</sup> This claim creates significant problems.<sup>66</sup>

For one thing, to treat all human goods like religion, or to treat religion as if it were the only basic human good, is to miss the variety and richness of human experience.<sup>67</sup> There are valid reasons to believe that the basic goods are numerous and varied, that people act uprightly and for the common good when they study algebra or theology, practise hitting a curveball, and perform Bach's Mass in B Minor, even when they do so for non-religious reasons. One can reasonably recognize that basic goods such as life, health, and knowledge are not derivatives of religious exercise but rather reasons for action independent of any religious commitment; that is, a person who does not understand herself to be cultivating a relationship with the Supreme Being still chooses rationally and well when she pursues basic goods such as life, health, and knowledge.<sup>68</sup>

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<sup>65</sup> For example, Olree disputes that there is any moral difference between one who sleeps with a prostitute and one who merely desires to do so. *Ibid.* 182. He does not identify the grounds for this doubt, but claims that the putative negative effect upon one's character of following through on the desire to copulate with a prostitute, instead of abstaining, is 'an empirical question whose answer is not immediately obvious': at 182.

<sup>66</sup> In addition to the general problems with it, this position poses special problems for Olree, who purports to be operating within the *Christian* tradition. Olree's view is at home in a particular strain of evangelical, Christian thought, which affirms the Enlightenment view that humans are naturally free and independent from community, law, and obligation. Indeed, Olree draws heavily on Enlightenment thought in his exposition of his biblical case for the Choice Principle. *Ibid.* 128-30. His argument for 'Freedom From Law' begins with a discussion of Hobbes and Locke: at 128-30.

The claims of those two thinkers about man and law in the state of nature are, to say the least, in tension with the Christian tradition and the Bible, which in its opening chapter describes man in his natural state as being in community with the Creator, and in its second chapter as being in community with woman. While still in this natural, pre-fall state, man receives from God the first limitation upon his freedom: 'You are free to eat from any tree in the garden; but you must not eat from the tree of the knowledge of good and evil, for when you eat of it you will surely die.' *Genesis* 2:16-17 (New International Version 1984). The state of nature on the Christian conception thus turns out not to be nearly as free-wheeling as Locke, (especially) Hobbes, and Olree have envisioned.

<sup>67</sup> This is especially true of the Christian experience, in which one understands God's delight in the pursuit of those good ends that He has appointed for us to pursue.

<sup>68</sup> John Finnis' insights on the relationship between religious practice and the other basic goods are helpful. Finnis, above n 29, 92-95, 100-27.



Furthermore, there are good reasons to believe that coerced pursuit of some basic goods has intelligible value. Olree must of course deny that coerced pursuit of knowledge is an intelligible reason for action and public policy judgments. In order to be consistent he must therefore oppose compulsory education laws. This he does not do, but he makes no satisfactory explanation for his inconsistency. It is no answer to say that children are different than adults. Some relevant difference between children and adults might be a reason for not coercing adults to attend school, but it cannot justify coercing children to attend school. If knowledge is not a basic good, or if it is reflexive and its value is contingent on its being freely chosen for righteous reasons, there exists no intelligible reason to force children to acquire it.

Olree's view entails denying the value of, among other actions, remaining in an arranged marriage and exercising for the sake of looking good on the beach. The husband in the marriage arranged by his parents did not freely choose his wife, and he might not stay in the marriage for reasons that evangelicals such as Olree would consider pure. He might stay in the marriage for the sake of his children, or in order to obtain tax benefits or social prestige. And the gym rat did not choose health for health's sake. His motives are mixed, at best, perhaps wholly tainted by vanity.

However, the ends pursued and attained in these cases are intelligible reasons for action, apart from the intelligibility of the extrinsic ends that the actors intended to pursue, such as tax benefits and personal appearance, precisely because marriage and health are non-reflexive, intrinsic goods.<sup>69</sup> The husband would realize a human good simply by choosing to remain married, even if he received no tax benefits. The gym rat realizes the basic good of health, simply because his workouts improve his health, even though he did not choose health for health's sake, and even if he never has the opportunity to strut on the beach.

Similarly, and contra Olree, the suicidal woman deterred from destroying herself realizes a basic good simply because she lives. Indeed, the treatment of life as a reflexive good fails spectacularly in the case of suicide. The freedom to commit suicide enables the irrational destruction of human life, which causes demonstrable harm. The individual who takes her own life suffers irreparable harm. The community also suffers the loss of life. And because the community

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<sup>69</sup> Robert George does not share Olree's assumptions on this point, as Olree supposes. Olree, at 182-86. George claims that morality—practical reasonableness, or what Olree calls 'righteousness' or 'doing God's will'—is a reflexive good but that other goods, such as knowledge and beauty, are not. George at 25. And George affirms that basic goods remain reasons for action 'even when people are deflected (as all of us sometimes are) from appreciating fully their value.' George at 106.

understands this loss to be the loss of something valuable, it rationally prohibits third parties from assisting in the suicide.

Furthermore, one acts rationally when one overcomes the will of a suicidal person, and most states recognize in law a privilege to intervene in a suicide attempt.<sup>70</sup> Significantly, these laws do not make any provision for weighing the instrumental value to the community of the life saved by the coercive interference. The privilege covers any interference in self-destruction or self-injury. This reflects the recognition that suicide harms the community simply because it causes the loss of a human life, apart from the value of any extrinsic ends that a particular life might serve.

Olree might respond that the community's sense that it has suffered a loss is nothing more than mere sentiment or emotion. It does not indicate real damage to the common good and does not provide a reason to deter the suicide. However, one might more reasonably infer that it is the sentiment of the suicidal woman that fails to reflect reality. Is not one who is despondent or discouraged likely to undervalue both the intrinsic value of her own life and the extrinsic ends that her life serves? And if the community recognizes some value in her life, and for that reason chooses to deter coercively those who would otherwise assist her self-destruction, is that collective judgment not entitled to some deference?

Olree might also protest that, whether or not the community correctly discerns value in the suicide's continued life, to coerce the suicidal woman to continue living destroys any possibility of her becoming righteous because it denies to her the freedom to choose good ends for the right reasons. However, imagine a suicidal person whose will to destroy herself is overcome, for example by fear of public humiliation or shaming her family, where crowds and television media have gathered at the scene. By refraining she chooses well in an intelligible sense even though she does not at the time of her decision recognize the value of her life or ground her choice on that value. She and her community benefit from her continued existence, and that benefit can be grasped by rational minds.

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<sup>70</sup> See Gorsuch, above n 29, 32. New York's statute is illustrative.

The use of physical force upon another person which would otherwise constitute an offense is justifiable and not criminal under any of the following circumstances:... A person acting under a reasonable belief that another person is about to commit suicide or to inflict serious physical injury upon himself may use physical force upon such person to the extent that he reasonably believes it necessary to thwart such result.

NY PENAL LAW §35.10 (2009).

So, one may agree with the premise that no Christian should try to bind others to behavioural rules in order to please God and disagree with the conclusion that Christians should support the Legalisation of assisted suicide and all other self-regarding harms. Though relationship with God cannot be coerced, because true relationship with God does not consist of mere obedience to rules, persons do nevertheless act rationally when they obey rules that are effective to prevent moral harm, especially the destruction of basic human goods such as life.

Olree faces additional, particular difficulties because he purports to be operating within the Christian tradition. Imagine a Christian doctor practicing in a rural area in Oregon, whose patient comes to her seeking assistance in suicide. Under Oregon law the patient must obtain the fatal prescription from an attending physician, with the assent of a second, consulting physician.<sup>71</sup> Let us suppose that the patient is destitute and does not have the means to travel great distances, that the Christian doctor is one of only two licensed physicians in the region, and that the other physician is qualified to serve as a consulting physician but not as the attending physician. Further suppose that the patient is mentally competent, suffers from a debilitating terminal illness, and in every other way meets the requirements of Oregon's assisted suicide statute.<sup>72</sup>

On Olree's account, the Christian physician has no reason not to assist in the suicide. The patient's life is not a reason in itself to refuse assistance. The patient's life can provide a reason to refuse only if either: (1) the life instrumentally serves the extrinsic end of the patient's righteousness (defined in Olree's paradigm as freely choosing good ends for the right reasons) or (2) the patient chooses to continue living. Neither condition is met here. Olree thus leaves the Christian doctor with no option but to perform an act—assisting a suicide—that the Christian tradition forbids.

Or consider a young adolescent being raised by wealthy, racist, isolationist, neo-Nazis, who excel at indoctrination. Imagine that this adolescent, who is certain to mature into the very opposite of Olree's conception of a righteous person, finds himself drowning in a retention pond. A would-be rescuer who knows the adolescent, knows the adolescent's parents, and knows that the adolescent will grow up to be a racist neo-Nazi and energetic oppressor of minorities, has no reason, on Olree's account, to rescue the adolescent. If the adolescent's life were to have any value, it would be contingent upon the realization of

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<sup>71</sup> OR REV STAT §§ 127.805, 127.815, 127.820 (2003).

<sup>72</sup> OR REV STAT § 127.805 (2003).

something that the adolescent's life will never realize, namely righteousness. The adolescent's life provides no reason for choice and action.<sup>73</sup>

Olree might respond that one should abstain from assisting in suicide and should rescue the adolescent because God commands us to do so. However, this is to claim that God tells us to do things for no reason, that God is irrational. If one is to avoid fundamentalism, that is, insisting on religious dogmas against all reason, as Olree and I both desire to do, this answer is not available to us. Clearly, one cannot adhere both to Olree's claim that the value of human life is contingent<sup>74</sup> and to the orthodox Christian teaching about human life. And Olree's claim that all basic goods are reflexive is simply untenable.

### C RESPECTING BOTH CHOICE AND LIFE

Nevertheless, one need not ignore or reject Olree's important observations about the instrumental value of autonomous choice. Indeed, Judge Gorsuch's inviolability-of-life principle reconciles a respect for human life with Olree's concern for choice and autonomy. Gorsuch observes, 'While laws against assisted suicide plainly restrict *some* choice, consistent with the inviolability-of-life principle, they restrict only a limited arena of human actions—those *intended* to kill.'<sup>75</sup> The inviolability-of-life principle does not entail that the government should prohibit or prosecute every act by which human life is foreseeably taken. The principle preserves 'significant liberty to patient and doctor alike to discontinue or apply palliative treatment even in circumstances where death is foreseen as a certainty'.<sup>76</sup> In these cases, and in other cases where death is a foreseeable but unintended, secondary consequence of reasonable actions, the state should not trample upon autonomous choices.

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<sup>73</sup> Note that the question here, unlike in consequentialist philosopher Peter Singer's famous drowning-child hypothetical, is not whether one has a duty to rescue a drowning child but rather, and merely, whether one has a *reason* to do so. Cf Peter Singer, 'Famine, Affluence, and Morality' (1972) 1 *Philosophy & Public Affairs* 229, 231. Nevertheless, it is illuminating to observe that Olree's account of the instrumental value of human life invites—indeed requires—a consequentialist inquiry into the extrinsic ends that the adolescent's life is likely to serve. If the adolescent's life will not serve the extrinsic end of righteousness then the adolescent's life does not provide a reason for action.

<sup>74</sup> As noted above, Olree is not alone in contesting the intrinsic, unconditional value of human life. Many jurisprudence scholars have posited that human life is valuable only when accompanied by certain instrumental capacities. Judge Gorsuch reviews several such arguments. Gorsuch, above n 29, 86-101, 143-156, 160-63. Gorsuch notes that these scholars 'differ markedly' on which lives qualify for protection: at 161-62. However, in all of their paradigms, 'some persons' lives are simply worth more than others': at 162.

<sup>75</sup> *Ibid.* 167 (emphasis in original).

<sup>76</sup> *Ibid.* 168.

To see why this is so, let us consider three end-of-life cases. First, imagine a newborn infant afflicted with spina bifida, who is likely to lead a life of considerable suffering, and might, but is not certain to, die before reaching adulthood. Doctors in the Netherlands are currently immune from prosecution for killing such children, on the condition that they follow a procedure called the Groningen Protocol.<sup>77</sup> Is this practice just? Let us answer this question, no.

Second, imagine a man in his late 60's, diagnosed with cancer. The only treatment available is painful and not likely to cure the cancer, but might prolong his life by a few months. Should the government coerce this man to submit to the treatment? Let us answer this question, no.

Finally, imagine another man in his late 60's who is diagnosed with Alzheimer's Disease and who lives in Oregon. While still in his right mind, dreading the dementia that is sure to overtake him, he asks his physician to assist in his suicide. The State of Oregon permits this assistance. Should it? Let us reserve judgment on this question for the moment.

Olree is unlikely to object to our resolution of the first two cases in conformity with Judge Gorsuch's inviolability of life principle. Indeed, I suspect that the first and second questions are easy questions for most people who are informed by the liberal and natural law traditions, and for those people (probably the vast majority of Westerners) who are, in varying degrees and without being aware of it, influenced by both of those traditions. Most of us object to infanticide, and we also find distasteful government interference in the autonomous decision-making of competent adults concerning whether to submit to medical treatment.

Opposition both to legalized infanticide and to coerced cancer treatment can be squared with respect for the instrumental value of autonomy and the intrinsic value of human life. Far from infringing the autonomy of newborn humans, criminal prohibitions against infanticide actually respect the infant as a human being, who will, if enabled and allowed to mature, become an agent of practical reasonableness. And the state does not disrespect the life of the adult cancer patient by permitting him to decline treatment; the man is not deliberately destroying his life, though he refuses to prolong it.

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<sup>77</sup> For some details on this practice, the jurisprudential justifications offered for it, particularly those offered by Peter Singer, and why I think those justifications fail on their own terms, see Adam MacLeod, 'The Groningen Protocol: Legalized Infanticide in the Netherlands and Why It Should Not Be Done in the United States' (2006) 10 Michigan State Journal of Medicine and Law 557.

The disagreement over legalisation of assisted suicide results from the apparent collision between autonomy, a condition of practical reasonableness, and human life, an ultimate reason for choice and action. I suggest that this apparent conflict is illusory, for two reasons. First, prohibitions against assisted suicide often actually serve the instrumental value of autonomous choice.<sup>78</sup> Just as autonomous choice is a precondition of meaningful moral deliberation, human life is a precondition of autonomous choice. To recognize that human life has intrinsic worth is not to deny that it also often has instrumental worth as a means to recognising extrinsic ends, such as free and meaningful moral deliberation, religious adherence, and righteousness. Protecting human life for its own sake also serves to protect those extrinsic ends, including autonomy.

Second, Olree's objection to coercive deterrence of assisted suicide insufficiently accounts for the value of human life because he treats human life as a reflexive good. But this is not how most common law nations treat human life in their positive laws, and it is not consistent with common sense judgments about the value of actual human lives, both our own lives and the lives of others. Therefore, we have insufficient reason to resist the implication of Gorsuch's principle in the context of the assisted suicide debate, namely that the practice should be coercively prohibited.

#### IV LIFE'S DOMINION

At this point in the article, the sceptic is unlikely to be much impressed. After all, Olree and I both identify ourselves as Christians, so reconciling our concerns and views (if, in fact, I have accomplished that) is no great feat. If our mutual commitment to orthodox Christianity is to mean anything, it must mean at least that none of us can wander too deeply into the woods of either liberalism or fundamentalism. There are, of course, many formidable defenders of autonomy, on one side, and moral paternalism, on the other, who are unconstrained by such fetters. To one of these thinkers this article now turns.

#### *A Ronald Dworkin's Account of the Value of Human Life*

Ronald Dworkin is among the legal philosophers who have most influenced the arguments for de-criminalising self-regarding harms. One often hears in contemporary debates arguments that Dworkin first articulated. It is thus helpful to reconsider some of those arguments.

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<sup>78</sup>This is especially clear in cases where some doubt persists about the autonomous nature of the choice to commit suicide. '[T]he prohibition against the intentional taking of human life also serves to protect against the coercive, mistaken, and abusive taking of human life and thus serves as a guardian of human liberty and equality.' Gorsuch, above n 29, 168.

Because Dworkin's central work on life issues, *Life's Dominion*, is an argument for legalising abortion, assisted suicide, and euthanasia, it is an unlikely place to find recognition of the intrinsic value of human life. But Dworkin makes that recognition early and often in the book, and not merely about life. Dworkin defends the idea that there really are objectively valuable, good ends, which humans do and *should* choose and pursue. He in some places calls these ends intrinsic values, at other places 'critical interests'.<sup>79</sup> Dworkin perceives that some human goods, such as life, are valuable for their own sake and not merely instrumentally valuable for the realization of extrinsic ends.<sup>80</sup> Furthermore, he concedes that government can legitimately use coercion to protect some of these basic goods, as where it taxes its citizens to subsidize museums, or limits property rights to conserve endangered species.<sup>81</sup>

Despite these promising acknowledgements, Dworkin ultimately reduces all claims about the value of some human ends, like life, to the status of subjective sentiments, what he calls 'quasi-religious' convictions.<sup>82</sup> This, in the end, renders his observations less edifying than they might otherwise be. He observes the widespread consensus that 'it is a terrible form of tyranny, destructive of moral responsibility, for the community to impose tenets of spiritual faith or conviction on individuals.'<sup>83</sup> So, though Dworkin assents to the claim of natural lawyers that 'it is intrinsically wrong deliberately to end a human life,'<sup>84</sup> he further claims,

[i]t is perfectly consistent to hold that view, even in an extreme form, and yet believe that a decision whether to end human life in early pregnancy [for example] must nevertheless be left to the pregnant woman, the person whose conscience is most directly connected to the choice and who has the greatest stake in it.<sup>85</sup>

This conception of the value of life leaves Dworkin defending the following puzzling argument: one ought not to deliberately destroy intrinsically-valuable

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<sup>79</sup> Ronald Dworkin, *Life's Dominion: An Argument About Abortion, Euthanasia, and Individual Freedom* (1993) 201-03.

<sup>80</sup> *Ibid.* 71-72. Dworkin observes that some people, at the moment of their death, feel regret that they did not pursue more meaningful ends during their lives. 'They want, suddenly, to have made something, or contributed to something, or helped someone, or been closer to more people, not just because these were missed opportunities for more pleasure but because they are *important in themselves*.' *Ibid.* 204 (emphasis added).

<sup>81</sup> *Ibid.* 154. Curiously, punishing murder to protect innocent human life did not make his list.

<sup>82</sup> *Ibid.* 15.

<sup>83</sup> *Ibid.*

<sup>84</sup> *Ibid.*

<sup>85</sup> *Ibid.*

ends; human life is an intrinsically-valuable end;<sup>86</sup> but one may nevertheless deliberately destroy human lives in voluntary acts, such as assisted suicide, and sometimes in involuntary acts, such as abortion and euthanasia. In Dworkin's view, because the state should tolerate religious differences, the value of human life is not fixed, but rather is relative and contingent. It is contingent upon its subjective valuation by relevant choosers, whoever they may be: the terminally ill patient, the mother of the unborn baby, the family of the patient in the persistent vegetative or minimally conscious state.

In attempting to solve this puzzle, one receives no assistance from Dworkin's ostensible distinction between 'incremental' goods—goods that we should always hope will increase in quantity and instantiations—and 'sacred' goods—goods that we seek to protect only once they have been instantiated in a particular being or object.<sup>87</sup> Dworkin has not here identified a distinction between goods but rather has conflated two very different moral questions: (1) whether and in what circumstances one might choose not to pursue the creation or realization of an otherwise-intelligible basic human good and (2) whether it is permissible deliberately to destroy a basic human good. Either or both of these questions can be asked about any basic good. Depending upon which question is asked, any basic good can be made to appear to be either incremental or sacred on Dworkin's criteria.

For example, according to Dworkin, knowledge is an 'incremental' good because no matter how much of it we have, we always want more.<sup>88</sup> However, knowledge also meets Dworkin's definition of a 'sacred' good, both because it is often morally permissible (fully reasonable) not to create more knowledge, even when given the opportunity, and because it is always wrong deliberately to destroy knowledge. A college graduate considering a career in scientific research might very reasonably pursue a career in finance instead. The graduate acts reasonably (that is, consistent with practical reason) even though he has not chosen to devote his professional career to creating more scientific knowledge.<sup>89</sup> And one can discern the irrationality, and thus immorality, of intentionally destroying scientific knowledge, as where a scientist intentionally misleads his colleagues, or where someone destroys data from scientific experiments. So the same basic good—scientific knowledge—can be classified as either an 'incremental' or 'sacred' good, depending upon *what moral question is at issue*.

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<sup>86</sup> *Ibid.* 81-84.

<sup>87</sup> *Ibid.* 73-74.

<sup>88</sup> *Ibid.* 73.

<sup>89</sup> Of course, the graduate could also have been said to have acted reasonably if he had chosen a career in research over a career in finance. The decision was rationally under-determined.



What can be said of knowledge can be said of any basic good, including the subject of Dworkin's book: human life. Often the choice to create new instantiations of a basic good—a new human baby, an additional work of art—will be rationally under-determined, meaning that it is often equally reasonable, and therefore equally morally upright, to choose to have another child or not, to create an additional painting or not. In any given circumstance there may be more than one right answer to the question, *Should we pursue more instantiations of this basic good?*, because it might be equally or more reasonable to pursue an instantiation of a *different* basic good. However, if Dworkin's interlocutors are right, there is only one right answer, a negative, to the question, *Is it reasonable deliberately to destroy this basic good?* It is only this second question that bears upon the contested policy issues that Dworkin discusses.

So, to understand Dworkin's claim, one must look more deeply into his statements about the value of basic goods. Dworkin asserts that our shared understanding of the intrinsic value of human life 'also deeply and consistently divides us, because each person[] [has his] own conception of what that idea means.'<sup>90</sup> He asserts that people judge the relative value of sacred, intrinsically-valuable goods, such as human lives, according to how much investment has been made in those lives (by the liver and by others, such as parents) and whether the investment has been compensated in realized potential.<sup>91</sup> This, he claims, explains why people feel a greater sense of frustration or loss when a teenager dies than when a foetus or an old person dies. Human lives are intrinsically valuable only insofar as value has been created in them by human efforts: 'personal choice, training, commitment, and decision'.<sup>92</sup> Thus, 'the value of human life to Dworkin turns on the ability of persons to express themselves autonomously.'<sup>93</sup>

There occur to the thoughtful reader two reasonable interpretations of Dworkin's claim about the value of life. If Dworkin means to say that this is what people subjectively believe when and if they claim that human life has intrinsic value, then his description is simply incomplete, at best. Many who affirm the intrinsic value of human life do not mean anything like this at all. Furthermore, if Dworkin means to make only a description of the internal beliefs of those who affirm the intrinsic value of human life then he offers nothing but confusion to the person who asks the very question Dworkin begs, namely, *Is my life valuable qua human life, regardless of its instrumental worth or its*

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<sup>90</sup> Dworkin, above n 79, 28.

<sup>91</sup> *Ibid.* 84-94.

<sup>92</sup> *Ibid.* 93.

<sup>93</sup> Gorsuch, above n 29, 160.

*subjective worth to me, and is that a sufficient reason for the state to prevent me from deliberately destroying it?*

If, on the other hand, Dworkin is attempting to provide an objective, *external* account of the value of human life<sup>94</sup> then his account is nonsensical. If the ‘intrinsic’ value of a human life is contingent upon some quality or characteristic of the liver of the life, then its value is not intrinsic but rather extrinsic to the life itself. Intrinsically-valuable goods are reasons for choice and action in and of themselves and regardless of any extrinsic considerations, such as the degree of investment made in them. And all this confusion appears before one gets to more difficult jurisprudential questions, such as whether the state should protect the life of a suicidal person by force of law.

### B *An Argument for Autonomy*

Dworkin’s argument for autonomy in decision-making provides some clues to understanding what he has gotten right and where his theory stands in need of improvement. Dworkin states, ‘If we aim at responsibility, we must leave citizens free, in the end, to decide as they think right, because that is what moral responsibility entails.’<sup>95</sup> Here Dworkin echoes Raz’s and George’s important observations about practical reasoning, what Dworkin calls moral responsibility. If one is to act reasonably or responsibly—that is, consistent with practical reasonableness—then one must be to some extent free to act unreasonably or irresponsibly.<sup>96</sup>

This is a fairly uncontroversial premise.<sup>97</sup> However, Dworkin believes that this premise entails the rather controversial conclusion that states should have no

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<sup>94</sup> This seems to be the better interpretation, as Dworkin expressly distinguishes his account of the value of life from subjectively-valued goods. Dworkin, above n 79, 73-74.

<sup>95</sup> Dworkin, above n 79, 150.

<sup>96</sup> See George, above n 6, 226-27. Finnis observes that negatively, practical reasonableness ‘involves that one has a measure of effective freedom.’ Finnis, above n 29, 88.

<sup>97</sup> Indeed, this premise enjoys much broader support than Dworkin appears to appreciate. Dworkin can fairly be said to pound a straw man on occasion; he frequently acts as though those who support criminalising abortion and assisted suicide want to force their own moral convictions on others. No serious thinker believes that brainwashing or indoctrinating citizens to take pro-life views is justifiable. However, that the state cannot and should not force people to believe that murder (for example) is gravely immoral does not entail that the state cannot and should not act to prohibit murder, even (or especially) by coercive means. In other words, that morally responsible choosing entails some freedom to choose poorly does not resolve the question *how much* freedom to choose poorly people should possess.

power to coerce decisions about important life issues, such as abortion and assisted suicide.<sup>98</sup> He offers two paths to this conclusion.

### 1 *Valuing Life as a Religious Exercise*

First, Dworkin asserts that ‘our opinions about how and why our *own* lives have intrinsic value influence every major decision we make about how we live.’<sup>99</sup> Thus convictions about the intrinsic value of human life are ‘*essentially* religious beliefs’.<sup>100</sup> How does Dworkin classify a belief as religious? He asks ‘whether it is sufficiently similar in content to plainly religious beliefs’,<sup>101</sup> such as the orthodox Christian view that it is for God alone deliberately to end human life. On this test, Dworkin maintains, ‘the belief that the value of human life transcends its value for the creature whose life it is—that human life is impersonally and objectively valuable—is a religious belief, even when it is held by people who do not believe in God.’<sup>102</sup>

Dworkin goes on to distinguish this religious belief from ‘more secular convictions about morality, fairness, and justice’.<sup>103</sup> These secular beliefs are essentially about adjusting and compromising competing interests of persons and they ‘rarely reflect a distinctive view about why human interests have objective intrinsic importance, or even whether they do.’<sup>104</sup> This simply is not true, of course. Secular moral and legal philosophies make claims about the objective value of human goods, apart from subjective individual interests and apart from religious convictions. Indeed, Dworkin himself makes several such claims in the course of his putatively-secular philosophical reasoning.

Putting all that aside, at this point in Dworkin’s argument the reader meets a less sophisticated adumbration of Olree’s argument about the relationship between religious practice and the human ends about which religions and moral philosophies discourse and opine. Dworkin, like Olree, would subsume at least some basic goods within the ostensibly more foundational good of religion and would on that ground treat those goods as reflexive. For the reasons stated in Part III.B above, there exist good reasons to contest this account.

### 2 *Valuing Life as an Exercise in Integrity*

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<sup>98</sup> Dworkin, above n 79, 153.

<sup>99</sup> *Ibid.* 155.

<sup>100</sup> *Ibid.*

<sup>101</sup> *Ibid.*

<sup>102</sup> *Ibid.* 155-56.

<sup>103</sup> *Ibid.* 156.

<sup>104</sup> *Ibid.*

Second, Dworkin asserts that decisions about when and how to die are intimately tied up in the reflexive practice of discerning the good life, of developing one's own character and moral identity. Each of us, he observes, thinks that integrity is important, that 'someone who acts out of character, for gain or to avoid trouble, has insufficient respect for himself.'<sup>105</sup>

This 'independent importance of integrity' explains a tension in moral reasoning, asserts Dworkin.<sup>106</sup> On one hand, one's commitment to a particular conception of virtue and the good is part of what makes that commitment valuable for that individual person.<sup>107</sup> On the other hand is our 'even more fundamental conviction' that some conceptions of virtue and the good are mistaken, 'that a person's thinking a given choice right for him does not make it so'.<sup>108</sup> Moral reasoning is thus a process of both choice and judgment.<sup>109</sup> This tension between choice and judgment poses for Dworkin a dichotomy. The significance of autonomous choice, and the integrity it safeguards, pulls Dworkin toward 'the annihilating idea that critical interests are only subjective, only matters of how we feel.'<sup>110</sup> The belief that some choices are wrong pulls 'us toward the equally unacceptable idea that everyone's critical interests are the same, over all history, that there is only one truly best way for anyone to live.'<sup>111</sup>

Perhaps unsurprisingly, Dworkin resolves this putative tension by rejecting the 'discovery of a timeless formula, good for all times and places,' and embracing autonomous choice.<sup>112</sup> Because people treat the time and manner of their deaths as expressions of their value systems, the state should leave individual persons free to resolve these matters for themselves.<sup>113</sup> Each person who respects the intrinsic value of his or her own life will want his or her own life to go well, to not be wasted, to be lived (and ended) with integrity.<sup>114</sup> Dworkin concludes:

Someone who thinks his own life would go worse if he lingered near death on a dozen machines for weeks or stayed biologically alive for years as a vegetable believes that he is showing more respect for the human contribution to the sanctity of his life if he makes arrangements

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<sup>105</sup> *Ibid.* 205.

<sup>106</sup> *Ibid.* 206.

<sup>107</sup> *Ibid.*

<sup>108</sup> *Ibid.*

<sup>109</sup> *Ibid.*

<sup>110</sup> *Ibid.*

<sup>111</sup> *Ibid.*

<sup>112</sup> *Ibid.*

<sup>113</sup> *Ibid.* 208-13.

<sup>114</sup> *Ibid.* 215-16.

in advance to avoid that, and that others show more respect for his life if they avoid it for him. We cannot sensibly argue that he must sacrifice his own interests out of respect for the inviolability of human life.<sup>115</sup>

The value of human life is thus in an important sense reflexive (though Dworkin does not use this term) in Dworkin's view.

### *C Avoiding Dworkin's False Dichotomy*

Dworkin's resolution of the putative dichotomy between integrity and judgment in end-of-life decisions raises for him many difficulties, which Judge Gorsuch has explored.<sup>116</sup> Leaving those aside, there is good reason to believe that Dworkin's dichotomy is false in the first instance. Many of those who affirm the intrinsic, unconditional value of some basic goods do not, as Dworkin supposes, maintain that there is only one truly best way for anyone to live. Here, as elsewhere, Dworkin could benefit much from the exchange between Raz and George, who both recognize 'many forms of the good which are admitted to be so many valuable expressions of people's nature', while also affirming 'that certain conceptions of the good are worthless and demeaning, and that political action may and should be taken to eradicate or at least curtail them.'<sup>117</sup>

In other words, there are many different ways for people to live well, but there are some ways of living that are simply not valuable. The choice between pursuing a life of marital communion or a life of celibacy devoted to religious or charitable causes is a choice between mutually-exclusive good ends.<sup>118</sup> One might reasonably choose either course of action (and one can choose only one of them) without disparaging or denying the self-evident value of the other and without acting immorally.<sup>119</sup> By contrast, the decision whether or not to destroy oneself in an act of suicide has no intelligible value, even when autonomously made. If human life is intrinsically and unconditionally valuable, its deliberate destruction can never be rationally grounded. One can thus affirm the objective, intrinsic value of human life without claiming that there exists only one best way to live.

In other words, perfectionist jurisprudence need not be at odds with pluralism, as Dworkin supposes. The question is not whether the government should leave people uncoerced, free to make autonomous choices. The question is

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<sup>115</sup> *Ibid.* 216.

<sup>116</sup> Gorsuch, above n 29, 40-41, 130-32, 160-63.

<sup>117</sup> George, above n 6, 164, note 7 (quoting Raz, above n 4, 133).

<sup>118</sup> George, above n 6, 164, note 7.

<sup>119</sup> In the words of moral philosophy, the choice is 'rationally grounded,' and therefore not arbitrary but also 'rationally underdetermined.' *Ibid.*

which autonomous choices have some intelligible basis, such that governments ought not to interfere in their selection, and which autonomous choices have no intelligible value, such that governments might deflect citizens from them.

#### V A WAY FORWARD

The way forward on many controversial issues, I humbly suggest, lies in the path of recognising both the limited but important, instrumental value of autonomy in moral decision-making and the non-reflexive, intrinsic value of certain basic goods other than religion and practical reasonableness. As we have seen, this recognition produces rather straightforward resolution of two sets of issues. First, because religious adherence is a reflexive basic good the state should not coerce its citizens to adhere to any particular religious tradition. Second, because human life is a non-reflexive basic good, the state can coercively prohibit assistance in suicide, even in cases where the suicidal person suffers from some painful affliction. Yet this proposition does not entail the additional conclusion that the state should interfere where an autonomous person does not *deliberately* kill himself.

Of course, not everyone will agree with me that these are easy cases. So, in order better to understand the implications of the contingent value of autonomy and the reflexivity of some basic goods, let us take a case that fewer people think is easy: criminalisation of marijuana use and possession. Careful reflection on the relationship between autonomy and the basic goods of health and practical reasonableness will provide at least a starting point for intelligently answering the question whether such laws are just.

The argument for criminalisation proceeds from the observation that recreational marijuana use injures a basic human good, namely health, in service of no other rational end. (The pleasure that the user experiences is a sub-rational motivation, not a reason for using.) Furthermore, many marijuana users become addicted to marijuana and more destructive substances. These addictions often injure the user's relationships with other people, causing harm to the basic good of community. Health and community are non-reflexive basic goods; they retain their intelligible value even when they are not freely chosen. To deter injury to these goods, the state reasonably prohibits marijuana use and possession.

However, it is easy to overstate this case. Some chemical substances have greater deleterious effects than others. Alcohol is more or less destructive than marijuana, and both are arguably less destructive than heroin. And we permit the consumption of alcohol, in moderation and with certain restrictions, so why

not marijuana? Once we frankly acknowledge that we are engaged in line-drawing, how do we avoid being arbitrary about it?

The argument for legalisation proceeds from the observation that criminalisation will also harm the drug user in an important way, by deflecting the user from realizing the basic good of practical reasonableness. One does not act uprightly when one chooses well only out of fear of punishment. However, it is easy to overstate this case, as well. It is particularly easy to underestimate the harm to users and their friends and family that results from much use and abuse of narcotics.

Moreover, Legalisation itself might deflect marijuana users from exercising practical reasonableness. Robert George is helpful on this point. He observes, 'Obviously, great good is accomplished when the victims of crime and other wrongs are spared the effects of the actions which their victimizers would otherwise have committed.'<sup>120</sup> George continues:

Moreover, the immoral actors themselves are benefited, whether the acts from which they were deterred would have harmed others or only themselves. For, by deterring such acts, the law may prevent people from habituating themselves to corrupting vices which will more or less gradually erode their character and will to resist.<sup>121</sup>

Drug addiction, of course, is the paradigmatic instance of habituation to a corrupting vice, which erodes the character and will of the user.

Furthermore, George observes that sound morals laws do not always deflect people from realizing the good of practical reasonableness, because the threat of the law's coercive effect does not necessarily supervene reasoned choice of the good, but rather merely countervails what often amounts to an otherwise-overwhelming temptation to vice.<sup>122</sup> In this way, according to George, morals laws actually support morally upright choosing, that is, choosing goods ends for the right reasons.

So it might reasonably be argued that the degree of harm from either criminalisation or legalisation is less than immediately clear. Even when confined to jurisprudential considerations, this is a complicated issue. It becomes even more complicated once one includes prudential considerations. Will Legalisation or criminalization more dramatically incentivize a criminal

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<sup>120</sup> *Ibid.* 226. See also Calabresi, above n 38, 499-500.

<sup>121</sup> George, above n 6, 226-27.

<sup>122</sup> *Ibid.* 227.

black market in narcotics? Does criminalisation actually deter potential users?  
Does it deter addicts?

I make no attempt to answer any of these questions. The point here is to identify a productive way of thinking about the problem, which avoids much of the polemics that currently engulf the debate. Productive discussion depends upon a prior, candid acknowledgement that the value of autonomy is contingent upon the end autonomously chosen and that some, though not all, basic goods are reflexive in nature, and therefore require autonomy as a precondition to their realization.

Many other issues implicate complex relationships between autonomy and respect for basic goods—whether the state should recognize and endorse conjugal monogamy, polygamy, polyandry, or same-sex marriage; coercive taxation to subsidize art museums, climatology studies, or embryo-destructive stem-cell research; the extent and nature of compulsory education. Perhaps careful attention to the multi-faceted relationship between autonomy and basic human goods will shed more light than heat on those important policy deliberations.



**A STUDY OF INDIVIDUAL FREEDOM AND RELIGIOUS LIBERALISM IN  
ISLAMIC JURISPRUDENCE**

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**Abstract**

In the matter of religious liberalism and Islam, the world is misinformed and misguided. Most of the people who engage in these discussions do not have a clear idea of the Islamic way of life. Islam and its laws are pluralistic and also the coexistence of other religions with their religious freedom even when they are not associated with the external manifestation of the state agencies. Islamic scholars usually take great steps to prove that Islamic Doctrine contains all types of contemporary social and political thoughts such as the nature of social justice, individual freedom, religious liberalism and equality of human being. We must analyze to what extent there is truth of incompatibility between Islam and pluralism. Are Islam and pluralism really incompatible? These are important questions and we must search for answers. To resolve the existing confusion on this issue, elaborate study on the subject must be addressed.

This article will, therefore, critically analysis the concept of individual freedom, religious liberalism and equality. It will also try to make a comparative study of other legal systems in order to draw the conclusions as how the word religious liberalism is holding true in the modern Islamic world, whether directly or indirectly.

**Introduction**

‘Individual freedom’, as a legal concept has always been the most complex subject for the jurists and philosophers. The reason being that there have been given as many meanings to the whole concept of ‘individual freedom’ as have been the writers. However, one thing is almost clear, i.e. firstly it is used in the

context of the state which has the inherent power to regulate the behaviour of individuals in a given society and, in the process of doing so, some restrictive measures in the form of constraints on individual freedom might be imposed, and secondly it is interpreted with reference to the liberty and discretion that an individual may enjoy within the specified legal framework. Right from the beginning of the emergence of state as an organised institution with sovereign powers, almost all the legal theories have been revolving around the question as to what must be the extent of individual freedom in various fields of social life. The restrictions on individual freedom may vary from society to society and may be categorized as reasonable or arbitrary but they are always there. Harold Laski writes:

‘Man is not, in fact born free, and it is the price he pays for his past that he should be everywhere in chains. The illusion of an assured release from captivity will deceive few who have the patience to examine his situation. He comes into a society the institutions of which are in large part beyond his individual control.’<sup>1</sup>

Harold J. Laski, while writing about the fundamental aspects of constraints on human freedom, writes:

‘To exhaust the associations to which a man belongs is not to exhaust the man himself.’<sup>2</sup>

‘Invite (all) to the Way of thy Lord with wisdom and beautiful preaching and argue with them in ways that are best and most gracious. For thy Lord knoweth best who have strayed from His path, and who receive guidance.’<sup>3</sup>

‘And if ye punish, let your punishment be proportionate to the wrong that has been done to you. But if ye show patience, that is indeed the best (course) for those who are patient.’<sup>4</sup>

Josef Raz observes: ‘Humanism leads to the ideal of individual autonomy and this to pluralism. These in turn provide much guidance to the general purpose and features of the law and among other consequences they provide a firm foundation for the claim that the law should not coerce a person to do that

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<sup>1</sup> Harold J. Laski- George Allen A Grammar Of Politics, Unwin Ltd. Seventh Impression, 1982- First published in 1925- p-I8

<sup>2</sup> *Ibid.* p.67

<sup>3</sup> Quran, translation Surah, 16, Al-Nahl, Ayat, 125

<sup>4</sup> *Ibid.*, 126

which he holds to be ( however misguidedly) morally wrong. But here again the argument outlined agrees in principle with the utilitarian approach the right not to have one's conscience coerced which is thus established is merely a prima facie right.<sup>5</sup>

Norman Anderson comments on the notions of freedom and their primary requirements: 'Release from slavery or bondage, in the primary sense of those terms, is the most fundamental form of freedom followed closely by release from imprisonment or physical detention. Yet the word 'freedom' has a far wider meaning and application. It includes freedom from a despotic system of government that is, 'civil liberty', freedom from foreign domination that is 'independence' and freedom of thought, religion, speech, association, movement and residence - that is what is termed 'human rights'. It includes the more subtle concept of freedom from fate, circumstances, undue influence or fear of some malign supernatural control any one of which may undermine freedom of choice or action. And it includes freedom from debt, destitution, sickness, psychological defects or any other form of constraint.'<sup>6</sup>

### **Individual freedom and religious liberalism**

'But verily thy Lord, to those who do wrong in ignorance, but who thereafter repent and make amends. Thy Lord after all this is Forgiving, Most-Merciful.'<sup>7</sup>

Some kind of methodological individualism is required for political science because no empirical sense can be attached to concepts relating to social 'wholes' such as 'state', 'community', 'nation', 'polity' unless these concepts can be used in sets of statements which refer only to the empirically detectable behaviour of individuals.<sup>8</sup>

'Religious liberalism', when used in the broad sense, treating religion as an integrated concept, signifies the limits of religious influence in a person's life. This brings us to the question whether the limits of the religion may be restricted to what is known as the 'personal affairs' or they can conveniently be stretched to the spheres which are included in the category of public or political fields. This aspect assumes great significance, especially in the wake of the contemporary debate regarding the role of religion in the matters which are not strictly called 'personal'. If the religion is exclusively the personal affair, the very idea of 'religious liberalism' loses all its force, but if it is equally applicable to

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<sup>5</sup> Joseph Raz, *The Authority Of Law — Essays On Law And Morality*, Clarendon Press-Oxford, 1979, p.281

<sup>6</sup> Norman Anderson, *Freedom Under Law*, Kingsway Publications, Eastbourne, 1988, p.7

<sup>7</sup> Quran, translation Surah 16. Al- Nahl, Ayat, 119

<sup>8</sup> Raymond Plant, *Modern Political Thought*, Basil Blackwell, 1991, p.14

public fields and the state policy in the countries which are Islamic theocracies, its concomitant aspect that has to be discussed is as to what extent the state demonstrates tolerance towards and accommodates other religious beliefs that happen to exist within the jurisdiction of those states. At the core of such tolerance is the respect for the individuality of a person which is integrally associated with human dignity. Harold Laski observes on this aspect:

‘There is never likely to be an enlightened state until there is respect for individuality; but, also, there will not be respect for individuality until there is enlightened state. It is only the emphasis upon equality which will break this vicious circle. When the source of power is found outside of property, authority is balanced upon a principle which bases prestige on service. At that stage, the effort of statesmanship is the elevation of common man. A society which seeks to protect acquisition is replaced by a society which seeks to protect the spiritual heritage of the race. We cannot assure ourselves of an entrance to that heritage, but at least we can discover the pathway to the goal.’<sup>9</sup>

Writing about the right to property, Harold J. Laski observes, ‘I have the right to property if what I own is, broadly speaking, important for the service I perform. I have the right to own if what I own can be shown to be related to the common welfare as a condition of its maintenance. I can never justly own directly as a result of the effort of others. I can never justly own if the result of my ownership is a power over the life of others. For if the personality of other men is directly subject to the changes of my will, if their rights as citizens, in other words, became the creatures of this single right of mine, obviously they will soon cease to have any personality at all. No man, in such a background, has the right to own property beyond that extent which enables the decent satisfaction of impulse. After that point, it is not his personality that he contributes to the community but the personality of his property. He will be guided not by his interests but by its interests. He will act not to be his best self, but to win through his possession the influence which maximizes their safety. Exceptions, of course, there are; and the value of that munificence which Aristotle commended deserves more scrutiny than it has received.’<sup>10</sup>

Closely linked with the idea of respect for the individuality is the notion of ‘free will’ which in other words may be termed as the circle of individual discretion, i.e. the extent to which one is the judge of one’s destiny and the master of one’s

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<sup>9</sup> Harold J. Laski & George Allen, *A Grammar Of Politics*, Unwin Ltd. Seventh Impression. 1982-( First published in 1925)- p.172

<sup>10</sup> *Ibid*,p.130

actions. The real implication of free will has been clarified by Ian Stewart and Jack Cohen as follows:

‘A true human being has free will - in the only sense that matters the relation of an individual to their culture and is in control of its own destiny. A man who knows he gets aggressive when drunk, and kills while drunk, can try to excuse the murder but he has no excuse for the drunkenness that he himself claims caused him to kill, because when he chose to get drunk he was sober. People who cannot control their tempers when drunk should consider themselves as being under a greater social obligation not to drink than those who can far from being a defense, drunkenness should compound the crime.’<sup>11</sup>

Harold J. Laski has stressed the importance of the ‘social value of each citizen’, because according to him in the ultimate analysis it is the individual which constitutes the whole society. ‘It seems clear, therefore, that unless we can assume an *a priori* knowledge of the social value of each citizen, the state must be democratic. We shall, of course, differ as to what is implied in the notion of democracy.’<sup>12</sup> He further said: ‘I am a part of the state, but I am not one with it. An adequate theory of social organisation must always begin by recognising that the individual is finite, if he is a member of the herd, he is also outside it and passing judgment upon its actions.’<sup>13</sup> The claim of authority upon myself is, firstly legitimate proportionately to the moral urgency of its appeal ; and it is secondly, important to make its decisions as closely woven from and into my own experience in order that its claim may be at a maximum.<sup>14</sup>

As regards the position in Islam, it expressly recognizes the ‘individuality’ and the ‘individual social value’. The responsibilities that an individual is to bear in a society or towards the state are depending upon the limitations, social, economic, political or physical, by which he is surrounded. The burden of such responsibilities and obligations must be proportionate to the extent to which he can exercise his powers and discretion. Thus the following verse of Quran proclaims;

‘No blame is there on the blind, nor is there blame on the lame, not on one ill (if he joins not the war): But he that obeys Allah and His Messenger,- (Allah)

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<sup>11</sup> Ian Stewart and Jack Cohen, *Figment of Reality — the Evolution of the Curious Mind*, Cambridge University Press. 1997.p229

<sup>12</sup> Harold J. Laski & George Allen, *A Grammar of Politics*, Unwin Ltd. Seventh Impression, 1982- (First published in 1925)- p.27

<sup>13</sup> *Ibid.* p.29

<sup>14</sup> *Ibid.* pp249-50

will admit him to Gardens beneath which rivers flow; and he who turns 'back, (Allah) will punish him with a grievous Chastisement.'<sup>15</sup>

Liberalism is basically a concept that has always been changing its definition according to the political and social circumstances. It is the reason that different writers have tried to define the term in different manners. Some have confined its definition to the absence of arbitrary restrictions on individual freedom while some have broadened its sphere to include the questions like religious tolerance and mature social behaviour. While tracing its history F.A. Hayek observes:

'In the intellectual sphere during the second half of the Nineteenth century the basic principles of liberalism were intensively discussed. In the philosopher Herbert Spencer an extreme advocacy of an individualist minimum state, similar to the position of Humboldt, found an effective expounder. But John Stuart Mill, in his Book 'On Liberty' [1859] directed his criticism chiefly against the tyranny of opinion, rather than actions of government, and by his advocacy of distributive justice and a general sympathetic attitude towards socialist aspirations in some of his other works, prepared the gradual transition of a large part of liberal intellectuals to a moderate socialism. The tendency was noticeably strengthened by the influence of the philosopher T.H. Green who stressed the positive functions of the state against the predominantly negative conception of liberty of the older liberals.'<sup>16</sup>

A society is nothing but the collection of individuals, and as such its welfare, composition and other problems cannot be treated in the light of moral abstractions. If the individual is facing difficulties or is devoid of moral values, the society as a whole can never have a prosperous existence. Laski opine 'we build rights upon individual personality because; ultimately the welfare of the community is built upon the happiness of the individual.'<sup>17</sup>

Robin Archer, writes on the individuality of the individuals:

'While individuals presumably have varying capacities.... this is not a reason for depriving those with a lesser capacity.... once a certain minimum is met, a person is entitled to equal liberty on a par with everyone else.' (Rawls,

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<sup>15</sup> Quran, translation Surah 48, Al-Fatah, Ayat, 17

<sup>16</sup> F.A. Hayek — New Studies in Philosophy, Politics, Economics and the History of Ideas, Routledge -1990 (first published in 1978).pp. 129-30

<sup>17</sup> Harold J. Laski- George Allen, A Grammar of Politics, Unwin Ltd. Seventh Impression, 1982- (First published in 1925)- p.95

1972,506)<sup>18</sup> He continues, ‘The idea of the individual as chooser is at the heart of the concept of autonomy. Individuals are autonomous if their actions are regulated by self-determined decisions and choice.’<sup>19</sup>

When we talk of social values, it signifies the collectivity of the individuals, who through their combined behaviour, represents a culture which, while taken as a whole, projects the social behaviour in such a manner that it is treated as a single whole. In the word of Tom Kitwood, ‘Each person occupies a distinctive position and acts individually. Yet the actions all articulate together to produce the completed acts that form the continuing pattern of the culture.’<sup>20</sup> He further says, ‘An individual can only survive, psychologically, within the collective by accepting its shared representation.’<sup>21</sup>

The problem of mutual social liberalism and tolerance is a very complex one, because if it is pursued through prejudices, likes and dislikes, it can never lead to a just and equitable composition of society. To achieve the higher social values that are founded on the deep sense of justice, each and every individual must be above the considerations of race, caste or religion. Harold J. Laski referring to the famous observation of Edmund Burke, while participating in the indictment of Warren Hastings, observes; (About Edmund Burke) ‘There is a politics of power which denies the idea of right in the relation between states ; and it is elementary , as Burke insisted in his indictment of Warren Hastings , that the denial of right abroad means, sooner or later, the denial of right at home. Men cannot discipline themselves in injustice to strangers without ultimately denying the duty of justice to their brothers.’<sup>22</sup>

At this stage the most important question that arises for perusal and that has always confronted the organized society, no matter on which philosophy its sovereign structure is based, is when the state is constrained and is within the legitimate limits of its sovereign authority to abandon liberal attitudes and demonstrate harsh measures towards its subjects?’ By the unanimous opinion of the writers, it is the stage when the state as a sovereign body is facing a threat to its survival or integrity because of the treacherous and subversive activities of some of its groups. This situation, in general parlance is known as rebellion,

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<sup>18</sup> Robin Archer ,Economic Democracy- The Politics of Feasible Socialism,Clarendon Press-Oxford, 1995,p.23

<sup>19</sup> *Ibid.* p.18

<sup>20</sup> Tom Kitwood, Concern For Others - A New Psychology Of Conscience and Morality, Routledge, London and New York. First published in 1990,p.55

<sup>21</sup> *Ibid.* p.163

<sup>22</sup> Harold J. Laski- George Allen ,A Grammar of Politics, Unwin Ltd. Seventh Impression,1982- ( First published in 1925)- p.226

sedition or civil disorder. Every state is not only within its authority but is also under moral and legal obligation to forsake liberal values for preserving its sovereignty and restoring civil order.

Stipulating such a situation, Harold J. Laski says, ‘No one can doubt that there is a point in the suppression of disorder where it becomes a matter of duty on the part of the executive to take all necessary means for its suppression, and those means will involve the use of military force and the punitive measures, such a force will adapt to secure the end for which it is used.’<sup>23</sup>

Whether it is the punishment for an individual offence within the legal system or for the organized crimes posing a threat to the state, some writers have contested the legal basis of the criminal law. Many legal abstractions have been put forward on this point, but it is an established fact that no state can survive without penal provisions, no matter what may be the authority to back them. The most comprehensible argument that may be put forth is that to suppress those human instincts which may imperil the security of other citizens, the guilty must be punished.

Norman Lewis elaborates on this point; ‘The operation of criminal law, however is more complex.....It suffices to suggest that although the legitimate source of the criminal law has always been contested, the classical explanation of the sources of legitimate authority has been the notion of social contract. The social contract doctrine derives the authority of the law from an implied contract between all citizens and the government. The authority of the law rests on the notional, consent of the parties. Criminal law is set on the same footing as civil law by this device As moral agents offenders are responsible for their decision to break the law, just as they would be responsible if they were to break the terms of a contract. The possibility of punishment, as opposed to mere repression, derives from the recognition of the autonomy of the offender.’<sup>24</sup>

He further says: ‘The derivation of the law from the will of the offenders as expressed in the social contract is problematic precisely because the contract remains wholly notional. However, in the transition from criminal law to constitutional law, it can be seen how the notional social contract is given

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<sup>23</sup>*Ibid.* 554

<sup>24</sup> Norman Lewis ,Human Rights , Law and Democracy in an Unfree World, in ‘ HUMAN RIGHTS FIFTY YEARS ON — A Reappraisal — Edited by Tony Evans, Manchester University press, 1998, p.82



consent, and , indeed , how this becomes the basis for the state to be regarded as a legitimate legal subject in its own right.<sup>25</sup>

As Rousseau wrote; ‘Forced to combat nature or the social institutions, we must choose between making a man or a citizen, for we cannot make both at the same time.’(cited in Malik 1996,69) In entering into contracts and other relations with a subject, that subject is recognized as a person in his or her own right. The element of social recognition is as important as the individual capacity. That social recognition is what is formalized in law.<sup>26</sup>

Coming to Islamic notion, the following verses command to quell the rebellion of those who do not recognize the authority of the state. These verses have created much confusion in the minds of those who understand them in the context of the belief and not the state structure.

‘Will ye not fight people who violated their oaths, plotted to expel the Messenger and attacked you first? Do ye fear them? Nay, it is Allah who ye should more justly fear, if ye believe.’<sup>27</sup>

‘Fight in the Cause of Allah those who fight you, but do not transgress limits for Allah loveth not transgressors.’<sup>28</sup>

As every right is based on a corresponding duty, so in the relations between the state and its subjects, the right of the former in extracting obedience from the latter cannot be treated as absolute. The citizens, no doubt, must obey the authority of the state and in the normal circumstances, are not within their right to evaluate the legitimacy of the state and the propriety of its every action. If it were so, no state could ever acquire stability because the subjects will neither have the power to oust the state authority and nor will they have specific and combined criterion to assess the performance of the state.

However, contrary to that, there are some circumstances in which it is generally believed that the actions of the state are based on atrocities, oppression and injustice and to throw out such a regime by force is the sacred moral obligation of every citizen, at whatever the cost and sacrifice it might be.

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<sup>25</sup> *Ibid.* p.83

<sup>26</sup> *Ibid.* pp.82-84

<sup>27</sup> Quran, translation Surah 9At- Tauba.ayat 13

<sup>28</sup> Quran, translation Surah 2, Al-Baqarah, Ayat, 190

Joseph Raz specifies such circumstances; <sup>29</sup>‘It is convenient to follow the traditional classification of morally and politically motivated disobedience into three categories.

1. Revolutionary disobedience - is a politically motivated breach of law designed to change or to contribute directly to a change of government or of the constitutional arrangements (the system of government)
2. Civil Disobedience — is a politically motivated breach of law designed either to contribute directly to a change of a law or of a public policy or to express one’s protest against, and dissociation from, a law or a public policy.
3. Conscientious objection — is a breach of law for the reason that the agent is morally prohibited to obey it, either because of its general character (e.g. as with pacifists and conscription) or because it extends to certain cases which should not be covered by it (e.g. conscription and selective objectors and murder and euthanasia)’

Stressing the significance of the right of the citizens to assess the rational basis of the state, M.R. Griffiths and J.R.Lucas say; ‘In deteriorating what our responsibilities to the state are , we need to have a clearer idea of what the rationale of the state is, and why its edicts should be obeyed.’<sup>30</sup>

The Qur’an is quite specific on all the three points, firstly, it emphasizes mutual tolerance and respect towards all the religions, secondly, it enjoins on the citizens to obey only such directives of the sovereign that are in conformity with the commandments of Allah and His Messenger and thirdly, one must neither show injustice and nor should tolerate it at any cost, if it is within one’s power to repulse unjust actions of others. The following verses declare; ‘Allah forbids you not with regard to those who fight you not for (your) Faith nor drive you out of your homes, from dealing kindly and justly with them; For Allah loveth those who are just.’<sup>31</sup>

‘Allah only forbids you, with regard to those who fight you for (your) Faith, and drive you out of your homes, and support (others) in driving you out, from turning to them (for friendship and protection). It is such as turn to them (in these circumstances) that do wrong.’<sup>32</sup>

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<sup>29</sup> Joseph Raz, *The Authority Of Law Essays On Law And Morality*, Clarendon Press- Oxford, 1979- p.263

<sup>30</sup> M.R. Griffiths and J.R.Lucas ,*Ethical Economics*, Macmillan Press Ltd,1996,p.139

<sup>31</sup> Quran, translation Surah 60, Al- Muntahana, Ayat, 8

<sup>32</sup> *Ibid.*, 9

Say: We believe in Allah, and in what has been revealed to us and what was revealed to Abraham, Ismail; Isac, Jacob, and the Tribes, and in (the Book5) given to Moses, Jesus and the Prophets, from their Lord. We make no distinction between one and another among them, and to Allah do we bow our will (in Islam).<sup>33</sup>

This tolerant and liberal spirit of Islam is not only found in the text of Qur'an, but its practical dimensions are discernible in the practices of the Muslim society by and large and has been acknowledged by the writers from all folds.

According to Peter Boxhall, the majority of Arabs are Muslim and Islam represents their religion and their way of life, as well as their guidance for moral and social behaviour. "In the same sense that Muslims are exhorted (in the Quran) to be compassionate towards the non-believer (and to widows, orphans and the sick), so too should we respect the 'faithful'. Sometimes one may meet religious fanatics, openly hostile, but it is rare to do so and I can only recall, in my many years in Arab countries, one such occasion."<sup>34</sup>

One of the integral parts of religious and social liberalism is the right to speak according to the conscience and once that right is denied it means that people have lost touch with reality. As April Carter has put it, 'Havel argues that the failure to speak concretely means that people lose touch with reality, and so lose the ability to influence reality.'<sup>35</sup>

### **Islam and Religious Liberalism**

Many people feel that Islam is quite incompatible with pluralism or secularism. This is further reinforced by the propaganda by some Muslim countries that pluralism or secularism is haram<sup>36</sup> and that all secular and pluralistic nations are enemies of Islam. We must analyze to what extent there is truth of incompatibility between Islam and pluralism. Are Islam and pluralism really incompatible? These are important questions and we must search for answers. We must bear in mind that in every religion there are different intellectual trends, both liberal as well as conservative. Both factions quote scriptures in

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<sup>33</sup> Quran, translation Surah 3, Ale-Imran, Ayat,84

<sup>34</sup> Peter Boxhall, 'How To Be In Islam' in 'The Traveller's Handbook, Edited by Caroline Brandenburger, published by Wexas Ltd.45-49, Brompton Road, London p.469

<sup>35</sup> Vaclav Havel, Civil society , Citizenship And Democracy, by April Carter in 'Liberal Democracy And Its Critics - Perspectives in Contemporary Political Thought', Edited by April Carter and Geoffrey Stokes, Polity Press, 1998, p64

<sup>36</sup> Haram is an Arabic term meaning "forbidden". In Islam it is used to refer to anything that is prohibited by the faith ,Wikipedia <http://en.wikipedia.org/wiki/Haram> visited on 9/04/09.

support of their respective positions.<sup>37</sup> Since a scripture or religious tradition for that matter has to deal with complex social situation, one finds differing or even contradictory statements responding to the differing or contradictory situations.<sup>38</sup>

The problem really arose when the subsequent generations treated the understanding of the Qur'anic verses by the companions of the Prophet or the early commentators who drew their own understanding heavily from the pronouncements of these companions and their followers. The companions were thought to be, and rightly so, as great authorities because the Qur'an was revealed during their life time and in their presence. Most of the subsequent commentators simply referred to these companions and their followers' pronouncements became the only source of understanding the Qur'anic verses.<sup>39</sup> Until today the commentators of the Qur'an are repeating those very ideas and these ideas have become sacred and any deviation is considered heresy by most of the orthodox commentators of the Qur'an.<sup>40</sup>

After Islam appeared on the social horizon of Mecca, the scenario began to change. In Medina the Prophet (PBUH) laid the framework of governance through what is known as Mithaq-e-Medina (Covenant of Medina). This Covenant also basically respects tribal customs to which adherents of Judaism, Islam and pre-Islamic idol worshippers belonged.<sup>41</sup> Each tribe, along with the religious tradition it belonged to, was treated as an autonomous unit in the Covenant, which has been described in full details by Ibn Ishaque, the first biographer of the Holy Prophet. Thus the Covenant of Medina respected both the tribal as well as religious autonomy of the inhabitants of the town.<sup>42</sup> It can also be said to be the first constitution of the state in making. The Covenant laid down certain principles which are valid even today in a secular state. When the covenant was drawn up by the Prophet of Islam, Shariah as a body of law had not evolved. In this important Medinan document what is most important

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<sup>37</sup> Ghassan F. Abdullah , (1999), *New Secularism in the Arab World*. Birzeit University press.p.66..

<sup>38</sup> Ronald A. LUKENS-BULL: "Between Text and Practice: Considerations in the Anthropological Study of Islam" (1999) *Marburg Journal of Religion* 42.

<sup>39</sup> Joseph Schacht, (1950) *Origins of Muhammadan Jurisprudence* (reprinted 2008), ACLS Humanities E-Book. p 237.

<sup>40</sup> *Ibid.* p.238.

<sup>41</sup> Asghar Ali Engineer, ( Sept.2002) *Islam and Modern Age: Intellectual approach to Islam* ,Centre for Study of Society and Secularism, Mumbai p20.

<sup>42</sup> Ameer Ali : (1980) *The Spirit Of Islam* – Low Price Publications -A Division of DK Publishers Distributors(P) Ltd., Delhi, p.241.

is that the Prophet did not compel the different tribes of Jews and idol worshippers to follow the Islamic law.

Writing about the Covenant, Michael Cook observes, “.....One of Muhammad’s first tasks in Medina was to create a political order –one which would give him and his followers the protection they needed, and rid Medina of its domestic strife. The arrangements which Muhammad made are embodied in a document which has come to be known as the ‘Constitution of Medina’. This document declares the existence of a community or people ( umma ) made up of Muhammad’s followers, both those of Quraysh and those of Yathrib. To this community also belong the Jews, subject to the qualification that they follow their own religion. Just as important, the document establishes an authority within the community: any serious dispute between the parties to the document must be referred to God and Muhammad. From the mass of stipulations making up the rest of the document, two themes are worth picking out. One is a concern to clarify the relationship between the new community and the existing tribal structure; this is particularly apparent in the regulations regarding the payment of blood wit and the ransoming of captives. The other is the fact that a major interest of the parties of the document is the waging of war. There are stipulations regarding the initiation and termination of hostilities, contribution to their cost, and so forth. Jews contribute, and fight alongside the believers.”<sup>43</sup>

A state structure began to evolve only after the death of the Holy Prophet when vast areas of other territories were conquered and new problems began to arise. During the Prophet's time the governance was limited to almost a city, Medina.<sup>44</sup> He did not live long after the conquest of Mecca.<sup>45</sup> But after his death the jurisdiction of the state expanded much beyond the frontiers of Arabia<sup>46</sup>. During the Prophet's time people were more concerned with day to-day problems of marriage, divorce, inheritance etc. on one hand, and those of problems like theft, robbery, murder and some similar problems for which the Qur'an and the Prophet were inerrant source of guidance. The people asked the Prophet for guidance and followed his pronouncements or the Qur'anic injunctions voluntarily.<sup>47</sup> There was no state machinery to enforce it. There was neither any police force nor any regular military. There was no separate judiciary. As far as the Prophet was concerned he was legislator an enforcer of

<sup>43</sup> Michael Cook : *Muhammad* (1983)Oxford University Press, p.311.

<sup>44</sup> City refers here Medina – is township in W Saudi Arabia .

<sup>45</sup> Abdullahi Ahmed AN-NA'IM (1990): *Toward an Islamic Reformation: Civil Liberties, Human Rights and International Law*. Syracuse: Syracuse University Press.p34.

<sup>46</sup> *Ibid.* 34 also see Lynn H. Nelson, (1988) *Global Perspective Source Readings from World Civilization* Volume I (Perspectives, 3000 B.C. to 1600 A.D.) p 320-22.

<sup>47</sup> Shahina Siddiqui,( 2004 )“*A Question of Religious Freedom*,”*Winnipeg Free Press*,7 January, p. A11.  
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laws (executive)<sup>48</sup>, and also a judge (representing judiciary). He combined all three functions.<sup>49</sup>

The Islamic state which came into existence after the death of the Prophet, as pointed out above, also became a model for the subsequent generation though this model was hardly followed even in early period of Islamic history.<sup>50</sup> The Umayyad and the Abbasid empires which came into existence after what is called khilafat-e-rashidah (i.e. the rightly guided period of khilafat or Islamic state)<sup>51</sup> never followed this religious model. Both the empires were based on personal and authoritarian rule and were Islamic only in name.<sup>52</sup> The Umayyad and the Abbasid Caliphs followed their own personal desires rather than the Qur'anic injunctions or the Shariah rules. They just symbolically made their obeisance to religion and followed what was in their personal interest. Thus theirs were what we can call 'semi-secular' states.<sup>53</sup>

Though the khilafat-e-rashidun (i.e. the rightly guided period of khilafat i.e. Islamic state, the period of Abu-Bakr, Umar, Uthman and Ali) model was never repeated in the history of Islam, in theory, it remained the objective of all the Islamic theologians to establish the state on the model of early Khilafat and it was a 'golden period of Islamic democracy. Khilafat was ultimately replaced by monarchy and dynastic rule. This was totally against the spirit of the Qur'an. Once the institution of Khilafat was replaced by dynastic rule, it could never be restored throughout Islamic history.

### Islamic Secular Values

We have already said above that religion and pluralism can coexist or not within the same state depending on the interpretation of both religion as well as pluralism. If religion is interpreted in keeping with very conservative traditions, it may be difficult for it to go along with secularism which demands more liberal disposition and not only tolerance but also promotion of pluralism.<sup>54</sup> On

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<sup>48</sup> Philip K. Hitti (1970) *History of The Arabs* – Tenth Edition - Macmillan Education Ltd, London. P.120.

<sup>49</sup> G.A. Parwez, (1986) *Islam: A Challenge to Religion*, Lahore: Idara-e-Tulu'-e-Islam, p. 346.

<sup>50</sup> Asghar Ali, *Islam and Secularism* edited Abu-Rabi', Ibrahim M., The Blackwell Companion to Contemporary Islamic Thought, Blackwell Publishing, 2006p.144-45.

<sup>51</sup> *Ibid.* 146.

<sup>52</sup> *Ibid.* p147.

<sup>53</sup> *Ibid.* 147 .

<sup>54</sup> Abdullah, Najih Ibrahim Bin, (1988) *The Ordinances of the People of the Covenant and the Minorities in an Islamic State*, Balagh Magazine, Cairo, Egypt, Volume 944, May 29; p.126.

the other hand, if secularism is interpreted too rigidly i.e. if it is equated with atheism, as many rationalists do, then also the two (i.e. religion and pluralism) will find it difficult to exist within the same state.<sup>55</sup>

Islam too, as pointed out above, can be interpreted rigidly, or liberally. If both Islam and pluralism are interpreted liberally there should not be any problem with Islam in a secular set up.<sup>56</sup> In fact if one studies the Qur'an holistically one can find strong support for 'liberal or non-atheistic secularism'. No religion will support atheistic secularism for that matter. If we talk of liberal secularism what do we mean by it?<sup>57</sup> We must clearly define it. Liberal secularism does not insist on belief in atheism. Secondly, it promotes pluralism and respect for all faiths and thirdly it guarantees full freedom of religion for all citizens. Also, secularism guarantees equal rights for all citizens irrespective of one's caste, creed, race, language or faith.<sup>58</sup>

Islam can hardly clash with this liberal secularism. The Qur'an, in fact, directly encourages pluralism vide its verse 5:48.<sup>59</sup> Its verse clearly states that every people have their own law and a way, i.e. every nation is unique in its way of life, its rules etc. It also says that if Allah had pleased He would have created all human beings a single people but He did not do so in order to test them (whether they can live in harmony with each other despite their differences in laws and way of life). Thus it is clear assertion of pluralism. One must respect the other's faith and live in harmony with him/her.

The Qur'an also asserts that every people have their own way of worshipping God (see 2:148).<sup>60</sup> One should not quarrel about this. Instead one should try to excel each other in good deeds. In the verses 60:7-8 we find that Allah will bring about friendship between Muslims and those whom you hold as enemies. And Allah does not forbid you from respecting those who fight you not for religion, nor drive you forth from your homes and deal with them justly. Allah loves doers of justice.<sup>61</sup>

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<sup>55</sup> *Ibid.* p.126-27.

<sup>56</sup> Syed Ameer Ali; (1997) "*The Spirit of Islam-A history of the Evolution and Ideals of Islam With a Life of the Prophet*," Delhi (First published in 1923).p107.

<sup>57</sup> *Supra* 54, Abdullah, Najih Ibrahim Bin p.126-27

<sup>58</sup> *Supra* 54, Abdullah, Najih Ibrahim Bin p.127-28

<sup>59</sup> Abdullah Yusuf Ali, *The holy Quran*, trs Surah Al-Maidah 5.48.

<sup>60</sup> *Ibid.* 2:148.

<sup>61</sup> *Ibid.* 60:7 and 8.

The Islamic tenets, it will be seen, do not disapprove of pluralistic way of life. Even the Covenant of Medina (called Mithaq-i-Medina) clearly approves of pluralistic set up. When the Prophet migrated from Mecca to Medina owing to persecution in Mecca at the hands of Meccan tribal leaders, he found Medina society a pluralistic society. There were Jews, pagans and Muslims and also Jews and pagans were divided into several tribes, each tribe having its own customs and traditions.<sup>62</sup> The Prophet drew up a covenant with these tribes guaranteeing them full freedom of their faith and also creating a common community in the city of Medina with an obligation to defend it, if attacked from outside.<sup>63</sup>

This was in a way a precursor of modern secular nation, every citizen free to follow his/her own faith and tribal customs and their own personal laws but having an obligation towards the city to maintain peace within and defend it from without. The Prophet clearly set an example that people of different faith and traditions can live together in peace and harmony creating a common bond and respecting a common obligation towards the city/country.<sup>64</sup>

### **Certain Observations about religious Liberalism and concept of equality in Islam**

“O Ye who believe! Stand out firmly for Allah , as witness to fair dealing , and let not the hatred of others to you make you swerve to wrong and depart from justice. Be just: that is next to piety: and fear Allah, for Allah is well-acquainted with all that ye do.”<sup>65</sup> ( Sura 5 – Al-Maida, Ayat, 8 )

One basic element in the value system of Islam is the principle of equality. This value of equality is not to be mistaken for or confused with identicalness or stereotype. Islam teaches that, in the Sight of God, all men are equally but they are not identical. There are differences of abilities, potentials, ambitions, wealth, and so on. Yet none of these differences can by itself establish a status of superiority of one man or race to the other. The stock of man, the color of his skin, the amount of wealth he has , and the degree of prestige he enjoys have no bearing on the character and personality of the individual as far

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<sup>62</sup> Michael Cook , (1983) *Muhammad* – Oxford University Press , p. 311.

<sup>63</sup> Abu al-A'la al-Mawdudi, (1976)"Political Theory of Islam," in Khurshid Ahmad, ed., *Islam: Its Meaning and Message* ,London: Islamic Council of Europe, , p159-61.

<sup>64</sup> Ameer Ali : (1997 )*The Spirit Of Islam* – Low Price Publications , A Division of DK Publishers Distributors(P) Ltd., Delhi, p.107-108.

<sup>65</sup> Abdullah Yusuf Ali, *The meaning of Glorious Quran*, trs Sûrah Sura Al-Maida 5.8 (2009) J. JURIS 56

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as God is concerned.<sup>66</sup> The only distinction which God applies is the criterion of goodness and spiritual excellence. In the Qur'an, God says: "O mankind, verily we have created you from a single (pair) of a male and a female, and have made you into nations and tribes, that you may know each other. Verily the most honored of you in the Sight of God is the most righteous."<sup>67</sup> (Qur'an 49: 13)

The differences of race, color, or social status are only accidental. They do not affect the true stature of man in the Sight of God. Again the value of equality is not simply a matter of constitutional rights or gentlemen's agreement or condescending charity. It is an article of Faith which the Muslim takes seriously and to which he must adhere sincerely.<sup>68</sup> The foundations of this Islamic value of equality are deeply rooted in the structure of Islam. It stems from the basic principles such as the following: (1) all men are created by one and the Same Eternal God, the Supreme Lord of all. (2) All mankind belong to the human race and share equally in the common parentage of Adam and Eve. (3) God is just and kind to all His creatures. (4) All people are born equal in the sense that none brings any possession with him, and they die equal in the sense that they take back nothing of their worldly belongings. (5) God judges every person on the basis of his own merits and according to his own deeds. (6) God has conferred on every person a title of honor and dignity.<sup>69</sup>

Such are some of the principles behind the value of equality in Islam. When this concept is fully utilized, it will leave no place for prejudice and persecutions. And when this Divine ordinance is fully implemented, there will be no room for oppression or suppression. Concepts of chosen and gentile peoples, words such as privileged and condemned races, expressions such as social castes and second class citizens will all become meaningless and obsolete.<sup>70</sup>

Islam gives its citizens the right to absolute and complete equality in the eyes of the law. *The believers are brothers (to each other)* (49:10)<sup>71</sup>

This religious brotherhood and the uniformity of their rights and obligations is the foundation of equality in Islamic society, in which the rights and obligations of any person are neither greater nor lesser in any way than the rights and

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<sup>66</sup> A.A.A. Fyzee, *A Modern Approach to Islam*, Lahore: Universal Books, 1978 p. 17

<sup>67</sup> Abdullah Yusuf Ali, *The meaning of Glorious Quran*, trs Sûrah Al- Hujurat 49.13

<sup>68</sup> *Supra* 37 ,Ghassan F. Abdullah p 21

<sup>69</sup> A.A. Maududi, *Human Rights in Islam* Lahore: Islamic Publications: 1977 p 230

<sup>70</sup> Ernest Gellner: 'Muslim Society' – Cambridge University Press, 1981,p. 6

<sup>71</sup> Reference here is to Surah: Al-Hujurat: 49:10.

obligations of other people. Holy Quran and hadith that in their rights and obligations they are all equal.<sup>72</sup>

As far as the non-Muslim citizens of the Islamic State are concerned, the rule of Islamic Shari'ah (law) about them has been very well expressed by the Caliph 'Ali in these words: "They have accepted our protection only because their lives may be like our lives and their properties like our properties" (Abu Dawud). In other words, their (of the Zimmis) lives and properties are as sacred as the lives and properties of the Muslims. Discrimination of people into different classes was one of the greatest crimes that, according to the Quran, Pharaoh used to indulge in: "He had divided his people into different classes," ... "And he suppressed one group of them (at the cost of others)" (28:4).<sup>73</sup>

Islam not only recognizes absolute equality between men irrespective of any distinction of colour, race or nationality, but makes it an important and significant principle, a reality. The Almighty God has laid down in the Holy Quran: (49:13). This means that the division of human beings into nations, races, groups and tribes is for the sake of distinction, so that people of one race or tribe may meet and be acquainted with the people belonging to another race or tribe and cooperate with one another. This division of the human race is neither meant for one nation to take pride in its superiority over others nor is it meant for one nation to treat another with contempt or disgrace, or regard them as a mean and degraded race and usurp their rights. "Indeed, the noblest among you before God are the most heedful of you" (49:13)<sup>74</sup>. This has been exemplified by the Prophet in one of his sayings thus: "No Arab has any superiority over a non-Arab, nor does a non-Arab have any superiority over an Arab. Nor does a white man have any superiority over a black man, or the black man any superiority over the white man. You are all the children of Adam, and Adam was created from clay" (al-Bayhaqi and al-Bazzaz). In this manner Islam established equality for the entire human race and struck at the very root of all distinctions based on colour, race, language or nationality<sup>75</sup>. According to Islam, God has given man this right of equality as a birthright. Therefore no

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<sup>72</sup> "Qur'an – The Guide For Humanity" Radiance Views weekly, New Delhi, – Vol. xxx no. 16-15-11 March, 1995.

<sup>73</sup> Abdullah Yusuf Ali (translation) The Holy Qur'an, p. 1148 (Brentwood, Maryland: Amanat Corporation, 1989). Surah *AL-QASAS* 28:4

<sup>74</sup> Abdullah Yusuf Ali (translation) The Holy Qur'an, Surah *AL-HUJRAAT* 49:13

<sup>75</sup> *Ibid.* p1150

man should be discriminated against on the ground of the colour of his skin, his place of birth, the race or the nation in which he was born.<sup>76</sup>

It is very remarkable that there is nothing in the Quran corresponding to any Muslim state or only the duties or rights of Muslim evidently because the prophet was giving God's message to whole humanity consisting of individuals in all lands living under various political systems<sup>77</sup>. Even the Sura Nissa, which contains the specific directions which from the basic law of Muslims relating to marriage and inheritance, being from the basic law of Muslims relating to marriage and inheritance, begins with : "Oh Mankind" (Ya Ayyuhannass). Its fist fourteen paragraphs are translated as summarized as follows by Abdullah Yusuf Ali:

*All mankind are one, and mutual rights  
Must be respected : the sexes  
Must honour, each the other;  
Sacred are family relationship  
The rise through marriage  
And women bearing children;  
Orphans needed especial loving care;  
In trust in held all property;  
With the duties well-defined;  
And after death, due distribution  
Should be made in equitable shares  
To all whose affection, duty,  
And trust shed light and joy  
On this our life below.<sup>78</sup>*

Although Muslim jurisprudence, as a formal science, developed by only after the death of Prophet and the first four caliphs, yet, the Quranic exhortations and the example and savings of the Prophet bred such a devotion to justice and such solicitude for impartiality and equality before the law-the "king of kings"—that an incident relating to the second Caliph Umar, may be cited from Abdur Rahim's Muhammadan Jurisprudence to illustrate it:

*... Umar appointed the Qadi, and he enforced the principle that the majesty of law was supreme, and that the administration of justice must be above the suspicion of subservience to executive authority. He had once a law suit against a Jew, and both of them went to the Qadi who, on seeing the Caliph, rose in his seat out of deference.*

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<sup>76</sup> *Ibid.* : Abdullah Yusuf Ali(translation) The Holy Qur'an, p. 1151 (Brentwood, Maryland: Amana Corporation, 1989).

<sup>77</sup> *Ibid.*

<sup>78</sup> *Ibid.*

*Umar considered this to be such an unpardonable weakness on his part that he dismissed him from office.*<sup>79</sup>

Yet another question which remains to be answered is about equal rights to all citizens in a country with Muslim majority. It is often argued that Muslims are reluctant to accord equal citizenship rights to religious minorities. No doubt there is some truth in this assertion, but not the whole truth. Some Muslim majority countries certainly do not allow non-Muslims equal rights but many other countries do; for example, countries like Indonesia, Malaysia and Turkey. These countries, though have Muslim majorities, do allow all their citizens, including the non-Muslims, equal political rights and religious rights.

The rights of non-Muslims, in other words, will have to be rethought and reformulated. The Qur'an nowhere states that religion can be the basis of political rights of the people. This was the opinion of Muslim jurists of the medieval period when religion of the ruler determined the status of the ruled. Such a formulation cannot be considered a necessary part of the political theory of Islam. The only model for this purpose can be the Mithaq-i-Madina and this Covenant, as pointed out above, did not make any distinction between people of one religion and the other in matters of political rights.<sup>80</sup> This Covenant, at least in spirit, if not in form, provides a valuable guidance for according political rights to citizens of modern state irrespective of one's religion. It is unfortunate that the later political theorists of Islam almost wholly neglected this significant political document drawn up by the Prophet of Islam. In fact he was far ahead of his time in according non-Muslims equal religious and political rights.<sup>81</sup> The theory of political rights in the modern Islamic state should be based on this document. The lack of democracy and human rights is not because of Islam or Islamic teachings but due to authoritarian and corrupt regimes which totally lack transparency in governance. Again, if we go by the sunnah of the Prophet and record of governance of the rightly guided caliphs, we see that the principle of accountability and transparency in governance was quite fundamental.<sup>82</sup>

Islam, in fact, is the first religion which legally recognized other religions and gave them dignified status and also accepted the concept of dignity of all children of Adam (17:70)<sup>83</sup> irrespective of their faith, race, tribe, nationality or

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<sup>79</sup> A Rahim, *Mubammadan Jurisprudence* (1958)p.21

<sup>80</sup> *Ibid.* p.110.

<sup>81</sup> Abu al-A'la al-Mawdudi,(1976) *Political Theory of Islam* ,Lahore: Islamic Publications, ,p13, 15-17.

<sup>82</sup> *Ibid.* p. 38.

<sup>83</sup> Abdullah Yusuf Ali, *The holy Quran*, trs Surah Al Isra'17:70.

language (49:13).<sup>84</sup> The verse 2:213<sup>85</sup> is also quite significant on the unity of all human beings which is what is the intention of Allah. All differences are human and not divine and these differences should be resolved in democratic and goodly manner (29:46).<sup>86</sup> Islam upholds pluralism, freedom of conscience and human and democratic rights and thus does not clash with the concept of secularism.<sup>87</sup>

The justice to which Islam invites her followers is not limited only to the citizens of their own country, or the people of their own tribe, nation or race, or the Muslim community as a whole, but it is meant for all the human beings of the world.<sup>88</sup>

In this manner Islam established equality for the entire human race and struck at the very root of all distinctions based on color, race, language or nationality. According to Islam, God has given man this right of equality as a birthright. Therefore no man should be discriminated against on the ground of the color of his skin, his place of birth, the race or the nation in which he was born. Islam upholds pluralism. Let's examine the rights of non Muslims in this context.

### **Rights of Non Muslims (Zimmis)**

In Islam, the rights of citizenship are not confined to people born in a particular state. A Muslim *ipso facto* becomes the citizen of an Islamic state as soon as he sets foot on its territory with the intention of living there and thus enjoys equal rights along with those who acquire its citizenship by birth.<sup>89</sup>

The Qur'an says:

“Truly Pharaoh elated himself in the land and broke up its people into sections, depressing a small group among them: their sons he slew, but he kept alive their females: for he was indeed a maker of mischief.” (28: 4)<sup>90</sup>

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<sup>84</sup> *Ibid.* 49:13.

<sup>85</sup> *Ibid.* 2:213.

<sup>86</sup> *Ibid.* 2:213 and Surah Al 'Ankabut 29:46.

<sup>87</sup> Abdulaziz Abdulhussein Sachedina, (2001) *The Islamic Roots of Democratic Pluralism*, Published by Oxford University Press US, p.30-31.

<sup>88</sup> Abdul Qadir & Audah Shahee'; (1970) *Islamic System of Justice*'; Translated by S.M. Hasnain, M.A. Kitab Bhawan, New Delhi p.272.

<sup>89</sup> S.Abul Ala Maududi (1997) *Islamic Law and Constitution* Islamic Publication (Pvt) Lahore, p.283-84.

<sup>90</sup> Abdullah Yusuf Ali, *The holy Quran*, trs Surah Al-Qasas 28.4.

Thus in the eyes of his (*Pharaoh*) government all citizens were not equal in law. All did not enjoy similar rights. Instead he adopted the policy of dividing people into groups and castes and of oppressing one group and exalting another, making one the subject and the other the overlord.

To this effect, the Prophet was reported to have said, "He who unfairly treats a non-Muslim who keeps a peace treaty with Muslims, or undermines his rights, or burdens him beyond his capacity, or takes something from him without his consent; then I am his opponent on the Day of Judgment"<sup>91</sup> (Abu Dawud and Al-Bayhaqi)

Islam has also laid down certain rights for non-Muslims who may be living within the boundaries of an Islamic state and these rights necessarily form part of the Islamic constitution. In Islamic terminology, such non-Muslims are called *Zimmis* (the covenanted), implying that the Islamic state has entered into a covenant with them and guaranteed their protection. The life, property and honor of a *Zimmis* is to be respected and protected in exactly the same way as that of a Muslim citizen. Nor is there difference between a Muslim and a non-Muslim citizen in respect of civil or criminal law<sup>92</sup>. The rule of Islamic Shari'ah (law) about them has been very well expressed by the Khalipha 'Ali in these words: "They have accepted our protection only because their lives may be like our lives and their properties like our properties" (Abu Dawud). In other words, their (of the *Zimmis*) lives and properties are as sacred as the lives and properties of the Muslims. Discrimination of people into different classes was one of the greatest crimes that, according to the Quran, Pharaoh used to indulge in: "He had divided his people into different classes," ... "And he suppressed one group of them (at the cost of others)" (28:4).<sup>93</sup>

The Islamic state should not interfere with the personal rights of non-Muslims, who have full freedom of conscience and belief and are at liberty to perform their religious rites and ceremonies in their own way.<sup>94</sup> They may propagate their religion. These rights are irrevocable. Non-Muslims cannot be deprived of them.<sup>95</sup>

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<sup>91</sup> Hadith ,Sunan Abu Dawud and Al-Bayhaqi .

<sup>92</sup> Mawdudi, S. Abul `Ala', *The Rights of Non-Muslims in Islamic State*, Islamic Publications, LTD. Lahore, Pakistan. 1982 p284

<sup>93</sup> Yusuf Ali, *The holy Quran*, trs Surah Al Qasas 28:4 .

<sup>94</sup> Mawdudi, S. Abul `Ala', *The Rights of Non-Muslims in Islamic State*, Islamic Publications, LTD. Lahore, Pakistan. 1982 p285-86

<sup>95</sup>*Ibid.* , Abul Ala Maududi p.286.

In this way the guarantees and rights given to citizens in a Muslim theocracy based on a proper interpretation of the Quran must be the same as all other citizens. This in turn guarantees the same protection of all citizens independent of any consideration of their religious beliefs. Such is the rationale for the strictest form of secularism. But as we see here and in the following section, the same protections are provided in a properly executed Islamic theocracy as would be in a secular state.

Not only was the Quranic injunctions and the Sunnah of the Prophet on the issue, but the Rightly Guided Khalifa also practiced this, with several authentic incidents to this effect practiced by Umar ibn Al-Khattab and Ali. In short, they are allowed all the rights which are sanctioned by the norms of justice and fairness for people in a civilized society, and in this regard all dealings should be done in a befitting manner because Allah likes people who adopt this attitude.

## **ADDITIONAL RIGHTS AND PRIVILEGES OF NON-MUSLIM CITIZENS**

So far we have referred to those inalienable rights which must necessarily be bestowed upon the Zimmis by an Islamic State, as they have been conferred upon them by the Islamic Shariah. Muslims are not entitled to curtail them in any way whatsoever. They are, however, permitted to grant them other rights and privileges to an extent that is not repugnant to the spirit or the commandments of the Shariah.

Here we attempt to lay down some additional rights that may be granted to the non-Muslim subjects of an Islamic State.

### **(1) Freedom of Expression**

In an Islamic State all non-Muslims will have the same freedom of conscience, of opinion, of expression (through words spoken and written) and of association as the one enjoyed by the Muslims themselves, subject to the same limitations as are imposed by law on the Muslims. Within those limitations, they will be entitled to criticize the Government and its officials, including the Head of the State<sup>96</sup>. They will also enjoy the same rights of criticizing Islam.<sup>97</sup>

The Qur'an says:

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<sup>96</sup> S. Abul Ala Mawdudi, (1982), *The Rights of Non-Muslims in Islamic State*, Islamic Publications, Ltd. Lahore, Pakistan, p.282.

<sup>97</sup> A.A. Maududi, *Islamic law and constitution*, Lahore: Islamic Publications, 12<sup>th</sup> edition 1997 p297.

*"There should be no coercion in the matter of faith." (2:256)<sup>98</sup>*

They will likewise be fully entitled to propagate the good points of their religion and if a non-Muslim is won over to another non-Islamic creed there can be no objection to it. As regards Muslims, none of them will be allowed to change creed.<sup>99</sup>

The Zimmis will never be compelled to adopt a belief contrary to their conscience and it will be perfectly within their constitutional rights if they refuse to act against their conscience or creed, so long as they do not violate the law of the land.<sup>100</sup>

### **(2) Education**

They shall naturally have to accept the same system of education as the Government may enforce for the whole country. As regards religious education, however, they will not be compelled to study Islam, but will have the right to make arrangements for imparting knowledge of their own religion to their children in their own schools and colleges or even in the National Universities and Colleges.<sup>101</sup>

### **(3) Government Service**

With the exception of a few key posts all other services will be open to them without any prejudice. The criteria of competence for Muslims and non-Muslims will be the same and the most competent persons will always be selected without any discrimination. A list of key posts can be easily drawn up by a body of experts. We can only suggest as a general principle that all posts connected with the formulation of State policies and the control of important departments should be treated as key posts.<sup>102</sup> In every ideological state, such posts are invariably given only to such persons who have the fullest faith in its ideology and who are capable of running it according to the letter and the spirit of the ideology. With the exception of these key posts, however, all other posts will be open to the Zimmis.<sup>103</sup> For instance, nothing can debar them from being appointed as Cabinet Ministers, Ministers, Judges, Accountant-General, Chief Engineer or Postmaster-General of an Islamic State.

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<sup>98</sup> Abdullah Yusuf Ali, *The holy Quran*, trs Surah Al-Baqarah 2.256 "Let there be no compulsion in religion: Truth stands out clear from Error: whoever rejects evil and believes in Allah hath grasped the most trustworthy hand-hold, that never breaks. And Allah heareth and knoweth all things."

<sup>99</sup> Supra 92, Abul Ala Maududi, p296-97.

<sup>100</sup> Supra 92, Abul Ala Maududi p.296-97.

<sup>101</sup> Supra 92, Abul Ala Maududi p.297.

<sup>102</sup> S.Abul Ala Maududi, (1997) *Islamic law and constitution*, Lahore: Islamic Publications, p 297-298.

<sup>103</sup> *Ibid* p298.



#### (4) Trade and Profession

In an Islamic State<sup>104</sup> the doors of industry, agriculture, trade and all other professions are open to all, and Muslims have no special privileges over non-Muslims in this regard, nor are the non-Muslims debarred from doing that Muslims are permitted to do. Every citizen, be he a Muslim or a non-Muslim, enjoys equal rights in the field of economic enterprise.<sup>105</sup>

#### Conclusion

As stated above, Islam upholds pluralism, freedom of conscience and human and democratic rights and thus does not clash with the concept of secularism. The Qur'an also states in 22:40 that no religious place should be demolished as in all religious places be it synagogue, or church or monastery, name of Allah is remembered and hence all these places should be protected.<sup>106</sup> This is another tenet of religious liberalism which is upheld by the Qur'an.

The fact that Islam admits freedom of conscience and democratic rights cannot be disputed. Islam also officially accepts religious pluralism in as much as it is Qur'anic doctrine to hold other prophets in equal esteem. The Holy Prophet provided equal social and religious space to all religions present in Medina, as pointed out above, through the Covenant of Medina (Mithaq-i-Medina)<sup>107</sup>. As stated above, Islam upholds pluralism, freedom of conscience and human and democratic rights and thus does not clash with the concept of secularism.

Though, Islam as moral tradition recognizes liberalism and individual freedom based on two matters: first, pluralism calls upon the use of human reason. Quran respects the rational choice and individual motivation. Being Muslim is a rational choice and individual response. Quran explained that there is no compulsion in religion, since religion is the result of individual choice and freedom. Second, social acceptance upon Islamic value as an individual understanding that differs from society to society. This basis of pluralism is maintained by difference of opinion allowed by the social norms. This social dialectic will develop and strengthen the acceptable definition of ethical values.<sup>108</sup>

<sup>104</sup> Supra, 92, p 290

<sup>105</sup> Supra, 92, Abul Ala Maududi ,p 291.

<sup>106</sup> Abdullah Yusuf Ali, *The holy Quran*, trs Surah Al-Hajj 22.40.

<sup>107</sup> Supra 92 p 237.

<sup>108</sup> Sohail H. Hashmi, *Islamic political ethics: civil society, pluralism, and conflict*, Princeton University Press, 2002, p. 39

“The Islam that was given by God is not the elaboration of practices and doctrines and forms that outsiders call Islam, but rather the vivid and personal summons to individuals to live their lives always in His presence and to treat their fellow men always under His judgment.”<sup>109</sup>

The verse 2:213 is also quite significant on the unity of all human beings which is what is the intention of Allah.<sup>110</sup> All differences are human and not divine and these differences should be resolved in democratic and goodly manner (29:46).<sup>111</sup> These are the norms laid down by the Qur'an but the rulers of Muslim countries deviate from these norms to protect their hold on power and blame it on Islam.

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<sup>109</sup> Ameer Ali (1980) *The Spirit Of Islam* – Low Price Publications -A Division of DK Publishers Distributors(P) Ltd., Delhi, p.245.

<sup>110</sup> Abdullah Yusuf Ali, *The holy Quran*, trs Sûrah al-Baqarah 2:213.

<sup>111</sup> *Ibid.* 29..46.

**DIVERSITY, GLOBAL UNITY, AND THE HOLY  
TRINITY:  
MAKING SENSE OF WORLD EVENTS THROUGH AN  
INTEGRATIVE JURISPRUDENCE<sup>®</sup>**

*Pablo S. Hurtado and Kevin H. Govern<sup>®</sup>*

I. INTRODUCTION

Professor Harold Berman in his book, *FAITH AND ORDER: THE RECONCILIATION OF LAW AND RELIGION*,<sup>234</sup> stated that there are three main theories or schools of legal philosophy in a world of legal diversity. He identifies them as the positivist school, the natural law school, and the historical school. In the vast majority of scholarly legal circles, positivism and natural law are viewed as irreconcilable, while the historical school is usually completely ignored.<sup>235</sup> This

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<sup>234</sup> *Faith and Order: The Reconciliation of Law and Religion* is a collection of writings and lectures by Professor Harold Berman that span across his distinguished career of over fifty years. He summarizes his work, "At the highest level, surely, the just and the holy are one, and our sense of each rests partly on our sense of the other." HAROLD J. BERMAN, *FAITH AND ORDER: THE RECONCILIATION OF LAW AND RELIGION*, at x (Scholars Press 1993).

<sup>235</sup> Berman states, "The Historical school has been almost universally disparaged and has virtually disappeared from almost all jurisprudential writings in the twentieth century, at least in England and the United States." HAROLD J. BERMAN, *Toward an Integrative Jurisprudence: Politics, Morality, History*, in *FAITH AND ORDER: THE RECONCILIATION OF LAW AND RELIGION* 289, 310 (Scholars Press 1993). In discussing the historical school Berman spends some time discussing what history is. History is not merely a retelling of the past, but includes a providential understanding. Berman states, "[History means] 'the times,' and especially 'our times,' including times which separate our past times from our future times. It inevitably contains a prophetic element." It is often said that we can learn from history, perhaps it should be said that history is part of God's general revelation to teach man, to warn him, to guide him. Many who believe in absolutes worry when they hear of an evolving historical ethos and changing social attitudes. However, the historical school is distinguishable from relativism.

note will explore the notion of a shared foundation to build and sustain what Berman would call an “ecumenical Christian jurisprudence” – and for that matter domestic and world law – based upon the Holy Trinity.

The fundamental and abiding tension between these three schools has been due to their distinguishable treatment of the law. The positivist school views law mainly as the will of those in power. The positivist is primarily concerned with what the law is. Questions of what the law ought to be are separate and perhaps collateral. The natural law school, by contrast, is primarily concerned with what the law ought to be. Law ought not be a product of the mere will of the state, but rather of reason, conscience, and morality. Finally, the historical school distinguishes itself by asserting that law should primarily be a product of the developing culture of a people. The tension then lies in what each school ignores of the other. The positivist will tend to ignore or minimize the moral and cultural aspects of law. For the natural law school, the will of the state and the cultural development of the people cannot be the ultimate source of true law. For the historical school, the will of the state or an ethereal conscience must be subject to the cultural development of the people.<sup>236</sup> Thus primacy is the issue. Each school seeks to be the prime authority over the others.<sup>237</sup>

In Berman’s view, these three schools, though often pitted against each other philosophically, in fact work together in practice. As evidence he cites the process by which American courts hand down

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The idea here is that the absolutes must be applied at a specific period in time. An example of this is the advent of intellectual property, peer-to-peer networks, iPods, and MP3 files. Thus the eternal absolute that stealing is morally wrong must be applied to a new set of facts and new social or unique cultural phenomena.

<sup>236</sup> Berman succinctly defines these schools by describing their differences. “The Positivist school treats law essentially as a particular type of political instrument, a body of rules laid down (“posited”) by a state, having its own independent self-contained character separate and distinct from both morality and history. The natural law school treats law essentially as the embodiment in legal rules and concepts of moral principles derived from reason and conscience. The historical school treats law as a manifestation of the historically developing ethos, the traditional social representations and attitudes, of a people or society.” *Id.* at 290.

<sup>237</sup> See *Id.* at 292-293.

decisions. They begin with the posited law (positivist theory), then consider the facts of the specific case and take into account justice and consider any equities that may be involved (natural law theory), and finally the court considers any precedent it may be following or setting (historical school theory).<sup>238</sup> Here, despite their supposed philosophical incompatibilities, the three schools are working together in everyday court decisions. Berman thus calls the three schools<sup>239</sup> to move toward an integrative jurisprudence.<sup>240</sup> This “move” would acknowledge the value and truth of each of the schools, letting the schools work together at the philosophical level as they do in practice.

Berman also makes a profound biblical connection to his theory of an integrative jurisprudence. He contends that the Godhead is reflected in the same three schools. Berman writes,

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<sup>238</sup> Berman notes, “American Courts...in deciding cases will turn a positivist eye to the applicable legal rules, a naturalist eye to the equities of the particular case in the light of moral principles underlying the rules, and a historicist eye to custom and to precedent, having in mind not only the precedents of the past, but also the significance of their decisions as precedents for the future.” Harold J. Berman, Epilogue: An Ecumenical Christian Jurisprudence, at 8, <http://www.argobooks.org/berman/pdf/ecumenical-christian-jurisprudence.pdf> (last visited Dec. 28, 2005).

<sup>239</sup> Berman states that, “[Each School] has isolated a single important dimension of law to the exclusion of the others ...it is both possible and important to bring the several dimensions together into a common focus.” Berman, *supra* note 2, at 289.

<sup>240</sup> Berman defines integrative jurisprudence as “a legal philosophy which combines the three classical schools: legal positivism, natural law theory, and the historical school.” *Id.* What we have here is a dysfunctional jurisprudential family. Unfortunately, it is an all too familiar tale of a messy divorce that leaves behind confused children seeking identity and primacy. Berman puts it like this, “The question of primacy only became critical in the eighteenth and nineteenth centuries when legal philosophy in the West was first divorced from theology. Prior to that time it was believed that ultimately it is God who is the author of Law...it was therefore possible to integrate in theological terms the political, the moral, and the historical dimensions of law. ...Aquinas, Grotius, Locke, and others who, despite their diversity, [were] natural law theorists [and] positivists and historicists—all three. ...They resolved the tensions...by finding their common source in the triune God, who himself is an all powerful lawmaker, a just and compassionate judge, and the inspirer of historical change in legal as in other social institutions. Prior to the eighteenth century positivists, naturalists, and historicists theories were not separate ‘schools’ but rather three complementary perspectives on law.” Berman, *supra* note 5, at 8. God is not only a God of laws, but also of reconciliation. That is exactly what an integrative jurisprudence seeks.

Will, reason, memory – these are three interlocking qualities, St. Augustine wrote, in the mind of the triune God, who implanted them in the human psyche when he made man and woman in his own image and likeness ...God the Father is the primary source of will, or purpose, God the son is the primary source of reason, or understanding, and God the Holy Spirit is the primary source of memory, or being in time. Yet the three are one.<sup>241</sup>

Thus, Berman lays out this foundation to build, what he calls, an ecumenical Christian jurisprudence.<sup>242</sup>

This principal of Ecumenical Christian jurisprudence is Berman's integrative theory, which combines the reconciliation of the three schools with the recognition of their ultimate source, which is the triune God. Berman states that an ecumenical Christian jurisprudence is necessary to meet the challenge of an emerging world law.<sup>243</sup> He states that the brining of all the worlds people into a global community is providential.<sup>244</sup> Berman encourages Christians to positively influence the development of world laws and courts<sup>245</sup> by developing laws that follow the principles of Christianity such as love your neighbor as yourself.<sup>246</sup> He also advocates that Christians should seek common ground with other religions and seek any truths we all hold in common.<sup>247</sup> Berman calls Christian leaders to embrace an integrative ecumenical

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<sup>241</sup> *Id.*

<sup>242</sup> See *Id.* "law is indeed a product of will, reason, and memory – of politics, morality, and history – all three; and the synthesis of the three is the foundation of an ecumenical Christian Jurisprudence." *Id.*

<sup>243</sup> See *Id.* at 2-3.

<sup>244</sup> *Id.* at 11.

<sup>245</sup> Berman states, "As we enter the third millennium of the Christian Era, St. Augustine's triune God calls on His children, individually and collectively, to manifest their political will, their moral reason, and their historical memory, in the creation of a body of world law that will support and guide the gradual development of the emerging world society into a world community." *Id.* at 12.

<sup>246</sup> "What they [the peoples of the world] have in common...[is] a global affirmation of the Golden Rule[.]" Harold J. Berman, *The Holy Spirit: The God of History*, THE LIVING PULPIT, Apr.-June 2004, at 32.

<sup>247</sup> "Christians are called on to live in peace and harmony with adherents of other faiths, united with them by the Holy Spirit." *Id.*

Christian jurisprudence if they are to make the most<sup>248</sup> of this unique time in world history in which a global community has emerged for the first time.<sup>249</sup>

Berman's call to an integrative ecumenical jurisprudence demands a response because it offers a different starting point to the questions of what law is. Other legal philosophies such as positivism, natural-law, the historical approach, and their progeny of utilitarianism, economic theory of law, Christian reconstructionism, libertarianism, all of these philosophies look primarily at man first. They look at man's will, or man's reasoning, or man's culture, or his experience, or his economics, but Berman leads us not to these aspects of creation, but to the Creator. Questions such as: What is law? Why do we have laws? What is the purpose of law? And how do those answers affect government and the purpose of government and how a government should function? Most frequently the answers to those questions state that laws and government are needed to maintain order and to protect the people from wrongdoers. Or that man in his role as the Homeric Hero was as Michael Kelly explained fixed upon the humanistic vision of life, where the divine is not the center but where rational and philosophical characteristics, lead to the reinforcement of the idea that life and its purpose are centered around man. That in this idea of the "Greek Legacy" man is able to assume to role of the divine and that using reason or will alone, that man can be granted to power to order his life and world.<sup>250</sup>

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<sup>248</sup> "An ecumenical Christian legal philosophy is needed, which traces world law to all three forms of the triune God in whose image the human psyche is created – political will, moral reason, and historical memory – and which thereby can overcome the tensions and reconcile the conflicts that hold back the fulfillment of God's millennial plan to bring order, justice, and peace to a world community." Berman, *supra* note 5, at 15.

<sup>249</sup> "[W]e are, for the first time, living in a single history." Joseph W. Dellapenna, *The Internet and Public International Law: Law in a Shrinking World: The Interaction of Science and Technology with International Law*, 88 Ky. L.J. 809, 882 (1999). Professor Dellapenna of Villanova University also addresses the issue of a single emerging history as he explores the impact of a shrinking world on the development of the Internet and Public International Law.

<sup>250</sup> "Man, in Homer, begins to think of himself and his deeds as the products of the divine within himself, although Homer still thought of those god-like features as coming to man from without, nevertheless he regarded them as innately human. As a result, a humanistic vision of life was opened up to the Greeks which, as its cultural ideas began to take on a more rational (i.e. philosophical character, led to an increasingly man centered definition of life and purpose... The gods will recede farther into the background if not disappear altogether, and man

We have always found those answers to be insufficient. They seem to be by-products and not the reason for laws. Why should we have order? Why should we protect people from wrongdoers? Why would we call these goals good? It has also been stated that absent the fallen state of man there would be no need for laws or government.<sup>251</sup> The recurring theme seems to be in all these philosophies that law and government are products of a need. The need to maintain order, a need to protect its citizens, a need to produce wealth, a need for justice, a need for personal freedoms, etc. However, Berman's theory does not start with a "need" that must be addressed, but rather a "who" that is addressing man! This is truly a radical departure from other legal theories. Thus it demands a response.

Berman states that our three seemingly diametrically opposed legal theories are not-coincidentally found in the Godhead. If this is true, the implications are far reaching. Laws and government then, are present not because they serve a function (though they certainly do) but because law is in the very character of God, it is who He is,<sup>252</sup> it is His nature, part of His intrinsic being.<sup>253</sup> He is, and He is the same yesterday, today, and forever.<sup>254</sup> When viewed through the lens of law being a reflection of the Godhead rather than law

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will emerge as to think and act in accordance with abstract and Impersonal ideas. Reason in man will assume the role of the divine in man and become the power needed to order his life and world." Kelly, *THE IMPULSE OF POWER*, Part I Ch. 1, (Contra Mundum Books 1998).

<sup>251</sup> The view that that government is a necessary evil can be traced back to St. Augustine. He believed that government was part of the curse placed on man when he fell in the Garden. God did not intend for men to have dominion over other men, only over the earth. Primarily, Augustine believed that government served a negative function – which is to restrain the wicked. AUGUSTINE, *THE CITY OF GOD*, bk. XIX, ch. 15 (Henry Bettenson trans., Pelican Books 1972) (1467).

<sup>252</sup> "God is himself law and therefore law is dear to him." Berman, *supra* note 2, at 292. "God is love" 1 *John* 4:8. These two statements seem opposed at first glance. Is God love or is He law? Berman also addresses this issue. "Love needs law to give it structure; law needs love to give it direction and motivation." BERMAN, *Law and Love, in FAITH AND ORDER: THE RECONCILIATION OF LAW AND RELIGION* 313, 314 (Scholars Press 1993). When Jesus was asked to summarize the Mosaic law, he stated simply that it was love of God and love of neighbor. See *Mathew* 22:36-40.

<sup>253</sup> See *Isaiah* 6:1-4; *Romans* 7:12; *Psalms* 19:7.

<sup>254</sup> See *Hebrews* 13:8; *Revelation* 1:8; *Exodus* 3:14; *John* 8:58.



merely being a method to address human temporal needs, laws and government cease to be a burden on society, a necessary evil that humanity must endure.<sup>255</sup> Nor are they a by-product of the curse placed on man in the garden.<sup>256</sup> Rather they are a glimpse into the Eternal Being, His character, His justice, His mercy, His love. Therefore we have a criterion to guide us as we form and reform our laws and our governmental institutions, and we do so not grudgingly, but with the knowledge that laws that reflect the character of God will be a light to our world and will testify of His greatness.<sup>257</sup>

Berman bases much of his ecumenical Christian jurisprudence theory on St. Augustine's writings on the Trinity. In this response to Berman's theory, it is necessary to go directly to the source of the Holy Scriptures to substantiate St. Augustine's will, reason, and memory description of the Godhead with Berman's application to the current state of legal philosophy. This response will focus on providing a biblical foundation for Berman's theory of an integrative and ecumenical Christian jurisprudence. To be asked and answered are these following fundamental issues: Is there a scriptural basis for the correlation that Berman makes between the three schools of legal philosophy and the Godhead? Are there scriptural examples to any legal or governmental system that follow an integrative jurisprudence? Is an integrative jurisprudence reflective of a Christian theistic worldview? And finally, how can an integrative

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<sup>255</sup> "If men were angels, no government would be necessary." The Federalist No. 51 (James Madison). I do not think that Madison was referring to heavenly beings, for even one-third of the angels rebelled against the Most High. See *Revelation* 12. In general terms, I believe that Madison was simply saying that if men acted generally trustworthy they would not need to be checked as either private citizens or public servants. This philosophy most closely resembles that of Augustine for government is serving the negative function of restraining the wicked. See Augustine, *supra* note 18.

<sup>256</sup> See generally *Id.* (The reciprocal implication is that if man is not fallen than laws and government are not needed). I disagree with that premise. I submit that laws and government would be present even if man were not fallen, because laws and government are a reflection of the image of God in man. They would arise naturally as part of the *imago dei* within humanity. Discussed further *infra* II(B)(4).

<sup>257</sup> Perhaps even more so than the city on a hill of which John Winthrop dreamed. See John Winthrop, *A Model of Christian Charity* (1630) in 7 COLLECTIONS OF THE MASSACHUSETTS HISTORICAL SOCIETY 33-34, 44-48 (3d ser. 18380, *reprinted in* 1 A DOCUMENTARY HISTORY OF AMERICAN LIFE 66-69 (Jack P. Green ed., 1966).

jurisprudence positively impact the development of international or world law?

## II. SCRIPTURAL BASIS FOR AN INTEGRATIVE JURISPRUDENCE AND THE GODHEAD

The Trinity is not a doctrine that can be derived from reason, or observed in nature, or even deduced or inferred from human experience. It is a doctrine that is unique among all the religions and belief systems of the world.<sup>258</sup> The Trinity is only known because God has revealed it to man through divine revelation. Professor Edward J. Murphy of Notre Dame Law School explains:

Philosophers, ancient and modern, have offered many arguments for the existence of God. But no philosopher ever undertook to demonstrate that God is three persons in one divine nature. We simply would not know of the Trinity unless God had chosen to tell us about it. For only through revelation can it be known that the one divine nature is possessed in its totality by three distinct persons.<sup>259</sup>

God reveals this truth about the makeup of His divine nature in the very first chapter of the Bible as if saying these are the very first things that must be understood. Moses<sup>260</sup> shares the account of creation<sup>261</sup> and at the climax of the account is the creation of man.

Then God said, 'Let Us make man in Our image, according to Our likeness ...' God saw all that He had made, and behold, it was very good.<sup>262</sup>

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<sup>258</sup> See generally Trinity, Answers.com, <http://www.answers.com/topic/trinity> (last visited Dec. 30, 2006) (Judaism and Islam, the other two major monotheistic religions of our world, reject the doctrine of the Trinity. Pagan polytheistic religions and philosophies have a history of divine triads amongst their many other gods. However, the idea of one true God in three persons is distinct to Christianity).

<sup>259</sup> Edward J. Murphy, *The Sign of the Cross and Jurisprudence*, 69 Notre Dame L. Rev. 1285, 1286 (1994).

<sup>260</sup> Traditionally held as the author of the Pentateuch.

<sup>261</sup> *Genesis* 1-2.

<sup>262</sup> *Genesis* 1:26-31 (New American Standard Bible).

In these verses there are at least two foundational truths. The first is that God paused before creating man and consulted with the Holy Council. God says, “Let *Us* make man in *Our* image, according to *Our* likeness.”<sup>263</sup> The Godhead, the Three-in-One, thus desires to implant the image and likeness of itself on man, and in fact He does so. Secondly, God looks upon all of His creation, which now includes man created in His image, and declares that it is “*very* good.”<sup>264</sup> This is reminiscent of when Jesus answered the rich young ruler who addressed Jesus as “Good teacher” and Jesus answered him by saying, “Why do you call Me good? No one is good except God alone.”<sup>265</sup> God alone is good and His creation, which bears His image and likeness, are therefore also good.

The implications of man being created in the image of a triune God are crucial to understand God’s creation order. Again, Murphy explains, “The Trinity is the central fact of all reality. There is nothing more basic than this. It is a fact of such overriding significance that everything else must be seen in relationship to it.”<sup>266</sup>

In this next section we will explore the implications of the Trinity in human experience, specifically in social orders.

#### *A. The Centrality of the Trinity in Human Experience*

The three-in-oneness of God contains three distinct persons, but yet is one in being.<sup>267</sup> Thus, there is both unity and diversity present in the Godhead. Unity and diversity are equally present individually and are in perfect relational harmony.<sup>268</sup> Man being created in the image of God thus has worth both as an individual, but also as a member of a group. Nancy R. Pearcey, the Francis A. Schaeffer

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<sup>263</sup> *Genesis* 1:26 (NASB).

<sup>264</sup> *Genesis* 1:31 (NASB).

<sup>265</sup> *Mark* 10:18 (NASB)

<sup>266</sup> Murphy, *supra* note 24, at 1286-1287.

<sup>267</sup> “[O]ne in being and three in person” NANCY R. PEARCEY, *TOTAL TRUTH* 132 (2004).

<sup>268</sup> “God is not “really” one deity, who only appears in three modes: nor is God “really” three deities, which would be polytheism. Instead, both oneness and threeness are equally real, equally ultimate, equally basic, and integral to God’s nature.” *Id.*

Scholar at the World Journalism Institute, a visiting scholar at Biola University's Torrey Honors Institute, and a senior fellow at the Discovery Institute, addresses the implications of the Trinity on human social orders in her book *TOTAL TRUTH*:

[The Trinity] provides a solution to the age-old opposition between collectivism and individualism. Over against collectivism, the Trinity implies the dignity and uniqueness of individual persons. Over against radical individualism, the Trinity implies that relationships are not created by sheer choice but are built into the very essence of human nature. We are not atomistic individuals but are created for relationships.<sup>269</sup>

Pearcy also explains that because of the fallen nature of man, this balance between unity and diversity has been lost in human experience. Societies have either stressed the primacy of the individual or the group, always at the expense of the other.<sup>270</sup>

One need not look very far to observe examples of this tension in western civilization between the individual good and the group good. In the Cartesian tradition man is seen in his role as an individual, in his paper *Man and the modern mind*, as the individual man has the duty to “start from nothing for nothing was certain in the mind of man and from this basis he would create a new world by means of his unaided reason.”<sup>271</sup> From the Cartesian perspective, law and man now faces new challenges. Terrorism has forced the United States to find new ways to attempt to balance individual civil liberties (the individual good) with national security (the common good).<sup>272</sup> In a recent eminent domain case<sup>273</sup>, the United States Supreme Court ruled in favor of the City of New London (the group good), for the city to develop higher tax generating properties such as hotels, retail stores, and restaurants.

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<sup>269</sup> *Id.*

<sup>270</sup> *See Id.* “Ever since the Fall, however, societies have tended to tilt toward either the individual or the group” *Id.*

<sup>271</sup> *Makers of the Modern Mind*

<sup>272</sup> Visit <http://www.heritage.org/Research/HomelandDefense/wm612.cfm> and <http://www.aclu.org/safefree/patriot/index.html> for opposing views of the PATRIOT Act.

<sup>273</sup> *Kelo v. City of New London*, 545 U.S. 469 (2005).

The property rights and interests of the current owners (the individual good) was ruled inferior to the interests of the city's group good. Federalism is also an attempt to balance the diversity of the individual good of the states with the unity of a centralized government that is to protect the common good of the nation.

These tensions are not limited to the American democratic experience. In early twentieth century Russia, debate raged over the right of an individual to leave an inheritance (an individual good). The idea of privately owned property passing to another private individual at the original owners death was not consistent with Soviet philosophy. Subsequently, in 1918 the Soviet Bolsheviks abolished inheritance. The new law<sup>274</sup> simply stated that upon the death of the owner, his property would become the property of the state (the group good). Interestingly, the abolition of inheritance lasted only four years.<sup>275</sup>

Pearcey also offers four examples where this tension between the individual and the group in human experience is evident. Firstly, family law reflects this tension. In the family unit there are two individuals who come together to form something that is more than merely "the sum of its parts." It becomes a "being" unto itself. Therefore the husband, the wife, and the married couple are defined as both individuals and as the relationship they hold as one being or entity.<sup>276</sup> In American family law we have seen the pendulum swing from recognising the primacy of the family as a unit to the primacy of the individuals in the family.<sup>277</sup> The marriage union went from

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<sup>274</sup> See 1 Sob. Uzak., RSFSR, No. 34, item 456, Apr. 26, 1918.

<sup>275</sup> See Frances Foster, *The Development of Inheritance Law in the Soviet Union and the People's Republic of China*, 33 *Am. J. Comp. L.* 33 (1985); Comment, *Soviet Inheritance Law: Ideological Consistency or a Retreat to the West?*, 23 *Gonz. L. Rev.* 593 (1988).

<sup>276</sup> "Every married couple knows that a marriage is more than the sum of its parts—that the relationship itself is a reality that goes beyond the two individuals involved. The social institution of marriage is a moral entity in itself, with its own normative definition. This was traditionally spoken about in terms of the common good: There was a "good" for each of the individuals in the relationship (God's moral purpose for each person), and then there was a "common good" for their lives together (God's moral purpose for the marriage itself). Pearcey, *supra* note 30, at 132.

<sup>277</sup> See generally *Maynard v. Hill*, 125 U.S. 190 (1888) (marriage as an institution, something more than a mere contract between two consenting parties); *Meyer v. State of Nebraska*, 262 U.S. 390 (1923) (the U.S. Constitution

being considered more than a mere contract, rather a separate institution (entity),<sup>278</sup> to being declared “not an independent entity...but an association of two individuals.”<sup>279</sup> The Trinity teaches that both the individuals that make up the family and the family unit in and of itself have value and should be recognized. That balance is still being sought in American courts today.

Rousseau attempted to explain this phenomenon as a function of the home. In other words that to property combat vice. Rousseau claimed that “the charms of home” are the means by which society strengthens the bonds between one another, and in doing so improves the lives of those involved. “The charms of home, are the best antidote to vice. The noisy play of children, which we thought so trying, becomes a delight; mother and father rely more on each other and grow dearer to one another; the marriage tie is strengthened. In the cheerful home life the mother finds her sweetest duties and the father his pleasantest recreation. The real nurse is the mother and the real teacher is the father.”<sup>280</sup>

Pearcey also addresses the unity and diversity image of the Trinity in philosophy, politics, and economics.

Ever since the ancient Greeks, philosophers have asked, Does ultimate reality consist of a single being or substance (as in Pantheism) or of disconnected

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protects the right of an individual to marry); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (legislation may not unreasonably interfere with the liberty of parents . . . to direct the upbringing and education of children under their control); *Prince v Massachusetts*, 321 U.S. 158 (1944) (Constitution respects realm of the family, however it is not fully beyond the police power of the state); *Eisenstad v. Baird*, 405 U.S. 438 (1972) (providing dissimilar treatment for married and unmarried persons concerning access to contraceptives violates the Equal Protection Clause); *Skinner v. Oklahoma*, 316 U.S. 535 (1942) (marriage and Procreation a basic liberty); *Loving v. Commonwealth of Virginia*, 388 U.S. 1 (1967) (freedom to marry is a vital personal right); *Zablocki v. Redhail* 434 U.S. 374 (1978) (The decision to marry is among the personal decisions protected by the right of privacy); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (the marriage relationship lies within the zone of privacy created by several fundamental constitutional guarantees).

<sup>278</sup> See *Maynard v Hill*, 125 U.S. 190 (1888).

<sup>279</sup> See *Eisenstad v. Baird*, 405 U.S. 438 (1972).

<sup>280</sup> *MAKERS OF THE MODERN MIND*, THOMAS NEIL (1984)

particulars (as in atomism)? In politics, the opposing poles play out in the two extremes of totalitarianism versus anarchy. In economics, the extremes are socialism or communism versus laissez-faire individualism.<sup>281</sup>

In practice, the polarizing philosophies of the individual versus the group are very difficult to execute in their purest sense because of God's triune image implanted in man. What results is a hybrid where the primacy is slightly skewed either in favor of the individual or the group. The more skewed the primacy of one becomes, the more likely the other is to suffer. In other words, if the individual good is given primacy, the common good will suffer, and vice-versa. Both the individual good and the common good must always be addressed and kept in balance.<sup>282</sup> Without the foundation of the Trinity, however, society is left grasping between the two extremes. Influential philosopher Jean-Jacques Rousseau (whose writings greatly influenced Robespierre, Marx, Lenin, Mussolini, Hitler, Mao, and Pol Pot) stressed the primacy of the individual, labeling personal relationships such as marriage, family, church, and workplace as oppressive.<sup>283</sup> By contrast, Buddhist philosophy stresses that individuality is only an illusion and that Nirvana is reached when the "one" individual self is merged (lost) into the group universal One.<sup>284</sup> Only the Trinity can bring reconciliation between the individual good and the common good, between diversity and unity. Finally, Pearcey concludes by stating, "By offering the Trinity as the foundation of human sociality, Christianity gives the only coherent basis for social theory."<sup>285</sup>

In modern legal parlance, the Trinity provides public policy for social orderings by providing that both the individual and the group have innate equal value. The protection of each should be equally sought, and any bent towards the primacy of either should be avoided. The goal is to balance unity and diversity as it is balanced in the Trinity.

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<sup>281</sup> Pearcey, *supra* note 30, at 133.

<sup>282</sup> *Id.*

<sup>283</sup> *Id.* at 138.

<sup>284</sup> *Id.* at 146-47.

<sup>285</sup> *Id.* at 133.

*B. The Centrality of the Trinity in the Law*

As stated, the image of the triune God in man provides *the* coherent foundation for man's social orders. Both the individual and common good are thus given their equal value. The tension that exists between unity and diversity in society can be reconciled as they are reconciled in the Trinity. This same species of tension exists in the law. The Trinity must be the beginning point to resolve this tension in the law as well. Murphy again describes the centrality of the Trinity, this time in the law, "In formulating a legal philosophy, the Christian must, of course, begin with the triune God [.]"<sup>286</sup> Can unity in law and diversity of jurisprudence be reconciled?

The three schools of legal philosophy that Berman addresses have variously define law. However, their definitional differences are due to their self-imposed limited viewpoint. As Berman advocates, however, a particular aspect of the image of the triune God is evident in each. Further exploring each of the three schools will provide more insight into how each school reflects one particular aspect of the image of the Godhead.

1. Positivism, Will, and the First Person of the Trinity

The Positivist school defines law as the will of the lawmaker.<sup>287</sup> Positivism reverted to REX LEX.<sup>288</sup> Positivism is primarily interested in what the law is and not what it ought to be.<sup>289</sup> Positivism firmly believes that law must be distinguished from

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<sup>286</sup> Murphy, *supra* note 24, at 1290.

<sup>287</sup> See John Austin, *The Province of Jurisprudence Determined*. Austin's command theory defined law as the signification of the desire of the sovereign.

<sup>288</sup> See Samuel Rutherford, *Lex, Rex* (1644). Rutherford's *Lex, Rex* brought him wide attention as a political theorist. The title of the book was purposely deceptive as it could mean the law and the prince or what was Rutherford's actual message which was that the law is king. Rutherford was espousing a political theory that the King was subject to the law. This was in contrast to the prevailing political theory that what the king willed was the law (i.e. REX LEX).

<sup>289</sup> "[Positivism] endeavors to answer the question, What is Law? But not the question, What ought it be?" Hans Kelsen, *The Pure Theory of Law Part I*, 50 L.Q.Rev. 474 (1934), *reprinted in* IS HIGHER LAW COMMON LAW? 76 (Jeffrey A. Brauch ed., 1999).



justice to be understood as a science. Hans Kelsen, a prominent positivist, wrote in his exposition of the positivist theory, *The Pure Theory of the Law*, that justice connotes an absolute value and that it (justice) is an irrational ideal.<sup>290</sup> The idea of justice is only used as a carrot to manipulate the populace into obeying the will of those in power.<sup>291</sup> As far as validity of a law, positivism is only concerned with whether the process or procedure of law making was properly followed in the promulgation of the rule.<sup>292</sup> The positivists' dilemma lies in their desire to prove that laws are the sole property of will, while using rational thought and reason to do so. They wish to strip the study of law from "irrational" concepts such as justice, fairness, and eternal truths, so that a "rational" or "scientific" study of law can be accomplished. If law is only the unfettered will of the sovereign,<sup>293</sup> then their "rational" studies will lead them to frustration. Pure will does not have to be rational, or consistent, or follow rules of procedure.<sup>294</sup> What is the purpose of seeking a rational study of the irrational?<sup>295</sup> It is because the positivist theory seeks legitimacy. Thus, they value the fruit more than the tree that bore it by refusing to acknowledge that the tree is as relevant as the fruit. The tree, to the positivist, is a mere collateral issue that must be addressed separately from the fruit. Yet, the fruit of consistency and procedure, which the positivists seek, are picked from the tree of justice and fairness.<sup>296</sup>

<sup>290</sup> *Id.*

<sup>291</sup> Hans Kelsen, *The Pure Theory of Law Part II*, 51 L.Q.Rev. 517 (1935), reprinted in *IS HIGHER LAW COMMON LAW?* 76 (Jeffrey A. Brauch ed., 1999).

<sup>292</sup> *Id.* at 74.

<sup>293</sup> Oliver Wendell Holmes, Jr., explained that law was what was "in accordance with the will of the de facto supreme power in the community." To Holmes, a good law was one which reflected the "will of the dominant forces of the community." See ALBERT W. ALSCHULER, *LAW WITHOUT VALUES: THE LIFE, WORK AND LEGACY OF JUSTICE HOLMES* 58-59 (2000).

<sup>294</sup> Pure will is only force which will inevitably lead to violence. As St. Thomas Aquinas explained, "A tyrannical law, through not being according to reason, is not a law, absolutely speaking, but rather a perversion of law..." Peter Kreeft, *A Summa of the Summa: The Essential Philosophical Passages of St. Thomas Aquinas' Summa Theologica Edited and Explained for Beginners* (1990), reprinted in *IS HIGHER LAW COMMON LAW?* 25 (Jeffrey A. Brauch ed., 1999).

<sup>295</sup> Or said more specifically - Why then do positivist seek a rational study of the irrational will?

<sup>296</sup> Hans Kelsen himself ran when faced with his theory made reality. Kelsen fled Germany, when the will of the lawmaker in Nazi Germany declared Kelsen less than human. JEFFREY A. BRAUCH, *IS HIGHER LAW COMMON LAW* 69

This is not to say that will does not play a role in what law is. The positivist may have unknowingly and unwillingly still tapped in to the eternal, even the Eternal Being. They seek to find only the “is”, what they seek was given to Moses at the burning bush when the Eternal uttered His name, “I AM.”<sup>297</sup> HE IS. Is God then, like the positivist theory of law, just an unfettered will, acting on whim alone? Is there no ought to His is? God is a triune being and it is God the Father who is attributed with pure will. It is the Father’s will that must be done.<sup>298</sup> It is God’s will that should be sought.<sup>299</sup> Yet there are two more persons in the trinity.

This is somewhat the situation scene in the Newtonian model of God. In the Sir Isaac Newton’s view, God is best seen as “a personal God, but imperceptibly He becomes the God of deism, the all-knowing, all-good Creator who, after making the best possible universe and giving it ironclad rules of operation, withdrew into His heavens to watch His perfect piece of machinery tick away”<sup>300</sup>.

Positivists, by treating the “ought” as distinguished from the “is” are left with a vacuum of purpose. They recognize this vacuum and seek to fill it with Utilitarianism, the social sciences, the great American pragmatism and convenience, or the theory of law and economics defining wealth as the greatest good to seek. Positivists would say social utility is good, or convenience is a good that is naturally sought, or wealth is a good thing to increase, or crime is a thing that must be deterred. Law thus becomes a useful means or instrument to accomplish these ends and judicial decisions are mere experimentations in social utility. If law is only force these attempts are meaningless and futile. Berman explains:

If law is merely an experiment...why should individuals or groups of people observe those legal rules or commands that do not conform to their interests? ... [F]ar more important than coercion in

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(1999). Positive law gives no solutions to the great evils of society such as segregation or ethnic cleansing. There is only is and no ought.

<sup>297</sup> *Exodus* 3:14

<sup>298</sup> *Mathew* 6:10; *Mathew* 26:39; *Mathew* 26:42; *Mathew* 7:21; *Mathew* 10:29; *Mathew* 12:50; *Mark* 14:36; *Luke* 22:42; *John* 6:40; *Galatians* 1:4.

<sup>299</sup> *Mathew* 6:10; *Mathew* 26:42; *John* 7:17; *Romans* 8:27; *Romans* 12:2; 1 *Thessalonians* 4:3; 1 *Thessalonians* 5:18.

<sup>300</sup> MAKERS OF THE MODERN MIND

securing obedience to rules are such factors as trust, fairness, credibility, and affiliation. ... In the last analysis, what deters crime is the tradition of being law-abiding, and this in turn depends upon a deeply or passionately held conviction that *law is not only an instrument of secular policy but also part of the ultimate purpose and meaning of life*<sup>301</sup> (Emphasis added).

What positivists ultimately seek is purpose or validity for law's existence.

## 2. The Natural-law, Reason, and the Second Person of the Trinity

The natural law states that some laws are basic and fundamental to human nature and are discoverable by human reason.<sup>302</sup> Professor J. Budziszewski, professor of government and philosophy at the University of Texas, would add that the natural law is not only right for all, but at some level known to all – the universal common sense of the human race.<sup>303</sup>

Many times natural law theory is disparaged as a religious doctrine and therefore discarded in legal discourse. However, natural law has its roots in Greek philosophy. Aristotle states, “There is a natural form of political justice which has the same validity everywhere and does not depend upon acceptance.”<sup>304</sup> In addition, the Roman jurist Cicero placed natural law in the context of reason: “True law is right reason in agreement with nature; it is of universal application, unchanging and everlasting.” He further explains, “And there will not be different laws at Rome and at Athens, or different laws now and in the future, but one eternal and unchangeable law will be valid

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<sup>301</sup> Berman, *supra* note 1, at 1.

<sup>302</sup> Encyclopedia information about natural law on Answers.com. The Columbia Electronic Encyclopedia, Sixth Edition Copyright © 2003 by Columbia University Press. Published by Columbia University Press, <http://www.answers.com/topic/natural-law>(last visited Dec. 30, 2006).

<sup>303</sup> J. BUDZISZEWSKI, *WHAT WE CAN'T NOT KNOW* 15 (2003).

<sup>304</sup> See Aristotle, *Politics*, bk. IV, ch. 11, at 157-60 (Barker trans., 1995), *reprinted in* THE HISTORY, PHILOSOPHY, AND STRUCTURE OF THE AMERICAN CONSTITUTION 5-7 (Douglas W. Kmiec, et al., 2<sup>nd</sup> ed. 2004).

for all nations and at all times.”<sup>305</sup> St. Thomas Aquinas when speaking of the natural law stated that, “the light of natural reason, whereby we discern what is good and what is evil, which is the function of the natural law, is nothing else than an imprint on us of the Divine light.” The common law tradition of England was held to be a reflection of the natural-law. Professor Scott Pryor, Associate Professor of Regent University Law School writes, “At one point in history, the common law itself came to have an authoritative voice. The common law was not simply the object of study, it was the historically instantiated expression of a higher law.”<sup>306</sup> The natural law tradition has also played a major role in the development of American legal thought. The Declaration of Independence is widely held as one of the most famous and important legal declarations of the natural-law. The Declaration of Independence calls on the authority of the law of nature and nature’s God to declare the infant nation independent from tyranny. It speaks of self-evident truths, and unalienable rights endowed by the Creator, and of men being created equal.

But the natural law tradition did not die with the founding Fathers. The Civil Right’s movement found its “ought” to the positive laws “is” in the natural-law. Martin Luther King, Jr., in “Letter from Birmingham Jail” explained why civil disobedience was appropriate, “There are just and unjust laws...An unjust law is no law at all...an unjust law is a human law that is not rooted in...natural-law. ...So I can urge men to disobey segregation ordinances because they are morally wrong.” Natural law is the “ought” that the positivists seek to distinguish in their search for the “is.” Therefore, although the will of the state is segregation, Martin Luther King, Jr., can say with authority, “it ‘ought’ not to be” and therefore it is no law at all and there is “legal” right to disobey the will of the state; and the posited law of England “is” taxation without representation, but Jefferson can write, “it ‘ought’ not to be” for it violates a precept of the natural law which makes English tax on the colonies no law at all

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<sup>305</sup> Marcus Tullius Cicero, *De Legibus* bk. III, at 211 (Clinton Walker Keyes trans., 1928), reprinted in *THE HISTORY, PHILOSOPHY, AND STRUCTURE OF THE AMERICAN CONSTITUTION* 13 (Douglas W. Kmiec, et al., 2<sup>nd</sup> ed. 2004).

<sup>306</sup> C. Scott Pryor, *The Third National Conference of the Association of the Religiously Affiliated Law Schools: Mission Possible: A Paradigm for Analysis of Contractual Impossibility at Regent University*, 74 *St. John's L. Rev.* 691, 707 (2000).

and may be “legally” disobeyed. The idea of basic human rights is founded in the natural law tradition and not in the idea that positive law is the only true law.

Is this to say that positive law theory is incorrect, and we only need natural law in our society? Not at all. In fact, natural law itself dictates the need for a positive-law. Jeremy Waldron, in his essay *THE IRRELEVANCE OF MORAL OBJECTIVITY* (1962),<sup>307</sup> explained with regards to so-called “legal positivism” that:

[L]aw can be understood in terms of rules of standards whose authority derives from their provenance in some human source, sociologically defined, and which can be identified as law in terms of that provenance. Thus statements about what the law is – whether in describing a legal system, offering legal advice, or disposing of particular cases – can be made without exercising moral or other evaluative judgment.<sup>308</sup>

Almost 800 years before Waldron, St. Thomas Aquinas answered the question whether promulgation is essential to a law. He first answered that promulgation or posited law is necessary for notification and for the law “to obtain its force.” He goes on to summarize what is now revered as the most complete definition of law, “[Law is] an ordinance of reason for the common good, made by him who has care of the community, and promulgated.” Waldron and Aquinas address the issue for the need of promulgation, both to notify the public and for the law to have enforcement value. Therefore, positive law serves a requirement of justice from the natural-law.

The natural law is often criticized in that it relies too heavily on reasoning. The criticism lay in that these universal truths or laws that the natural law holds to exist, cannot be known at some level by all or even discoverable through reason alone. As opposed to positivists, natural law theorists do not deny the moral or supernatural origin of law. However, many who believe in

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<sup>307</sup> Waldron, Jeremy in George, R.P. (ed.) *Natural Law Theory: Contemporary Essays* (Clarendon Press, Oxford, 1992), 160, *cited with authority in* Olsen, Henrik P., *Law in its Own Right* (Hart Publishing, Oxford, 1999), 29-30.

<sup>308</sup> *Id.*, at 29-30.

eternal<sup>309</sup> and divine law,<sup>310</sup> may deny the capacity for man to reason sufficiently to discover these truths on their own. What role, if any, does reason play in the eternal? If the positivists unknowingly pointed to the will of the Father, does natural law also point to reason in the Godhead?

Proverbs chapter eight commends wisdom.<sup>311</sup> In verses 22-31, wisdom is personified and it is universally understood as a description of Christ.<sup>312</sup> Wisdom is thus personified as the Christ. The eternal wisdom, understanding, knowledge, perfect and holy reason, is embodied in the second person of the Trinity. Verse 23 explains that this Wisdom was established from everlasting, at the beginning, and that He was the master workman of creation (verse 30). It is well understood that this is what the Apostle John alluded to in the first verses of his Gospel.<sup>313</sup> Jesus Christ himself refers to this passage as he prays to his Father right before he is betrayed.<sup>314</sup> It is a mystery of the gospel. Mathew Henry in his commentary of

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<sup>309</sup> St. Thomas Aquinas when answering, “Whether there is an Eternal Law? ... a law is nothing else but a dictate of practical reason emanating from the ruler who governs a perfect [complete] community... the world is ruled by Divine Providence... the whole community of the universe is governed by Divine Reason ... and since the Divine Reason’s conception of things is not subject to time but is eternal ... therefore it is that this kind of law is eternal.” Aquinas, *supra* note 50, at 21. Augustine however goes on to explain that things can be know in two ways, either in and of themselves or through their effects. Since we cannot know God in and of Himself, we can not know the full extent of the eternal law, only the effects of it. *Id.* at 25

<sup>310</sup> “The divine law is that part of the eternal law which God made known by special revelation.” FN 257, *Id.* at 23.

<sup>311</sup> The chapter begins with, “Does not wisdom call And understanding lift up her voice?” The whole chapter is a call from Solomon to humanity to search and heed the call of wisdom. *See Proverbs 8.*

<sup>312</sup> “[*Proverbs 8:22-31*] is not meant of a mere essential property of the divine nature, for Wisdom here has personal properties and actions; and that intelligent divine person can be no other than the Son of God” Mathew Henry, *Matthew Henry Complete Commentary: Commentary on Proverbs 8*, at <http://bible.crosswalk.com/Commentaries/MathewHenryComplete/mhc-com.cgi?book=pr&chapter=008> (last visited Dec. 28, 2005).

<sup>313</sup> “In the beginning was the Word, and the Word was with God, and the Word was God. He was in the beginning with God. All things came into being through Him, and apart from Him nothing came into being that has come into being.” *John 1:1-3*

<sup>314</sup> “Now, Father, glorify Me together with Yourself, with the glory which I had with You before the world was.” *John 17:5*

Proverbs eight, describes this mystery, “All divine revelation is the revelation of Jesus Christ, which God gave unto him, and here we are told who and what he is, as God, designed in the eternal counsels to be the Mediator between God and man.” Further, “Wisdom explains herself (v. 23): I was set up from everlasting. The Son of God was, in the eternal counsels of God, designed and advanced to be the wisdom and power of the Father... both in the creation and in the redemption of the world.” Therefore Christ, (wisdom or perfect reason personified), is the mediator between man, and the Father’s perfect holy will. The Father himself declares the link between reason and redemption in Isaiah, “Come now, and let us reason together,” Says the LORD, “Though your sins are as scarlet, They will be as white as snow; Though they are red like crimson, They will be like wool.”<sup>315</sup> The Father invites man in Isaiah to reason with him. In Proverbs He cries out to Man to heed the call of wisdom. The Father is saying, “Listen to my son, in whom I am well pleased.”<sup>316</sup> What does the son testify about the Father? “Let your will be done.”<sup>317</sup> The Apostle Paul also addresses the link between Christ, Wisdom, Mediator, and God’s will in his first letter to the Corinthians in chapter one verse 21, “For since in the wisdom of God the world through its wisdom did not know him, God was pleased through the foolishness of what was preached to save those who believe. Jews demand miraculous signs and Greeks look for wisdom, but we preach Christ crucified: a stumbling block to Jews and foolishness to Gentiles, but to those whom God has called, both Jews and Greeks, Christ the power of God and the wisdom of God,” then in verse 30, “It is because of him that you are in Christ Jesus, who has become for us wisdom from God—that is, our righteousness, holiness and redemption.” Jesus Christ, the wisdom of God, and man’s redemption. The Father and the Son unite will and reason.

### 3. Historical Jurisprudence, Memory, and the Third Person of the Trinity

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<sup>315</sup> *Isaiah* 1:18.

<sup>316</sup> *Mathew* 17:5. It is also important to note that it is through Christ that the world is created. It is through Christ that the world was created and redeemed. After creation, the Father is pleased with the work of his son and declares it to be good and at the work of redemption the Father declares his completed pleasure in satisfaction in the redeeming work of his son.

<sup>317</sup> *Mathew* 6:10; *Mathew* 26:42.

The historical school of law arose as a separate theory of jurisprudence in the 19<sup>th</sup> century, mainly in Germany.<sup>318</sup> The historical school holds that “legal institutions of a people are, like their art or music, an indigenous expression of their culture, and cannot be externally imposed.”<sup>319</sup> The term *Volksgeist* is frequently used when speaking of the historical school which translates in English to the “Spirit of the People.”<sup>320</sup> Cultural norms that develop over time are then the ultimate root of law for those who adhere to a historical jurisprudence. Law is simply another expression of a people’s particular set of values that they wish to be enforced by the sovereign. In this context the historical school was closely tied to a sense of nationalism. The historical school felt it a duty to fight against the encroachment of both positive and natural law theory. In Germany, Friedrich Karl Von Savigny, set forth a theory of historical jurisprudence as a response to a call in his country to codify the law.<sup>321</sup> Savigny felt that a codified positive law would do away with the national consciousness; the distinct identity of a people would be at grave risk and at the mercy of the law-giver. Savigny also felt that natural rights were the product of a “shallow philosophy” and the natural law theory as a whole was “infinitely arrogant.”<sup>322</sup> Only through the study of history, historical jurisprudence theorists believed, could an appropriate study of law be accomplished.

The historical school has much in common with the positivist school. There are only two relevant differences between the two legal philosophies -- the definition of a sovereign and the validity of a law. Though they may take slightly different roads they arrive at the same “is” devoid of an “ought.” The sovereign in the historical school is the people. It is the people’s collective historical will that determines what the law is. Though instinctively in the West we trust the will of the people above the will of a central government, the spirit of the people is just as capable of depravity as any sovereign. The historical school places the validity of a law on whether it arises from the people as part of the accepted norm of

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<sup>318</sup> Berman, *supra* note 2, at 304.

<sup>319</sup> *Id.*

<sup>320</sup> *Id.* at 299.

<sup>321</sup> *Id.* at 298

<sup>322</sup> *Id.*



that particular society. The necessary process for validity may differ from that of the positivist school, but it remains a process that defines the validity of a law. History alone, at best, can teach us how things came to be as they are, but history alone does not provide a standard for an “ought.”

Is this to say that the historical school was absolutely irrelevant in its observations of the role that history plays in the development of law? Does the historical school also point to the triune God?

As stated above, St. Augustine also attributes memory as a quality of the triune God.<sup>323</sup> Man, created in the image of the triune God, is a creature of memory as well. This is more of an inference of reason, logic, and of simple observation than of biblical exegesis. St. Augustine’s doctrine that will, reason, and memory as the interlocking qualities of the mind of God and that they directly correspond to the three persons of the Trinity, leaves a remainderman of memory to the Holy Spirit. The case to attribute “memory” as a specific function of the Holy Spirit is implicit, for it has very little direct or explicit biblical support.<sup>324</sup>

The Holy Spirit plays many functions. Thus it is difficult to categorize it specifically to memory. The Holy Spirit makes the will of the Father known.<sup>325</sup> He also provides a renewed mind capable of better reasoning. As it pertains to memory, the Holy Spirit does, however, reveal the future.<sup>326</sup> He reminds of the words of Christ.<sup>327</sup> He directs in the ways of godliness, directs decision-making.<sup>328</sup> He guides.<sup>329</sup> He appoints leaders.<sup>330</sup> And He directs where to go and

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<sup>323</sup> Berman, *supra* note 5, at 8.

<sup>324</sup> In contrast to what we have found with the Father and Son, it is a constant trait that “will” is attribute to God the Father., and there is ample explicit support for “reason” to be attributed to directly to the Son. However, the trait of “memory” corresponding directly and specifically individually to the Holy Spirit is more implicit.

<sup>325</sup> 1 *Corinthians* 2:10,13.

<sup>326</sup> *Luke* 2:26; *Acts* 21:11.

<sup>327</sup> *John* 14:26.

<sup>328</sup> *Acts* 15:28. Decision making can be also properly attributed to reason, however a decision is made at a point in time, therefore there are past and future considerations. The Holy Spirit can direct a decision that may seem contrary to reason, but because of His omniscience, He may properly direct decision making to fulfill the will of God for the future.

<sup>329</sup> *John* 16:13.

where not to go.<sup>331</sup> However, these examples only point to the much larger doctrine of God's providence. For a history to have an "ought," it must be providential. Prof. Berman defines history more completely when he writes,

When we say "history" we mean something more than chronology; we mean not merely change but patterns of change, implying direction in time, which in turn implies either purpose or fate. We mean either Hebrew linear history from Creation to the coming of the Messiah, or Greek cyclical history, or Enlightenment progress, or Christian history of fall and rise, decline and regeneration, death and rebirth. "History" does not mean "the past," nor does it mean "time" in some abstract Kantian sense. It means, rather "the times," and especially "our times," including times which separate our past times from our future times. It inevitably contains a prophetic element.<sup>332</sup>

Prophecy *is* a gift of the Holy Spirit,<sup>333</sup> but the work of Providence is not necessarily attributed directly to the person of the Holy Spirit anywhere explicitly in Scripture. By inference, it is the Holy Spirit that works in the hearts of man, and directs his paths, and if He does so individually, it would seem proper to believe that He does so collectively as well. The idea of the "fullness of time" is a theme of the gospel.<sup>334</sup> God providentially, by inference through the Holy Spirit, brought Joseph to Egypt to save the sons of Israel. By Providence Rahab met and hid the spies in Jericho, to usher the children of Israel into the land flowing with milk and honey. By Providence the vastness of the Roman Empire was used to spread the gospel to spur the growth of the early church. Providence is a common theme throughout scripture, and it would not be a huge leap to state, as Pope John Paul, II, that the "Holy Spirit works in all creation and history."<sup>335</sup> History becomes, in fact, another means by

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<sup>330</sup> *Isaiah* 48:16; *Acts* 13:2; 20:28.

<sup>331</sup> *Acts* 8:29; 10:19,20; *Acts* 16:6,7.

<sup>332</sup> Berman, *supra* note 2, at 309.

<sup>333</sup> *1 Corinthians* 14:1.

<sup>334</sup> *Galatians* 4:4; *Mark* 1:15

<sup>335</sup> Holy Father's General Audience Address of August 12, 1998.

which the Eternal, existing outside of time, becomes as one of us, existing within the constraints of time. Time itself becomes a means of communication between God and man.

Therefore, history alone only provides, at best, a retelling of the past. Providential history provides much more. It explains the happenings of the past to give purpose and meaning to today, and direction and guidance for the future – including in the area of law.

#### 4. Unity and Diversity, and Integrative Jurisprudence

The Trinity has provided us with a coherent foundation for the reconciliation of positivism, natural-law, and historical jurisprudence. Just as there are three distinct persons in the Trinity, there are three distinct aspects to law. However, the Godhead is more than just the sum of its parts. It is the relationship between the three distinct persons that make the Godhead – He is one being. And it is the relationship between positivism, natural-law, and historical jurisprudence that unite them. The three schools can be identified distinctly, and each has its distinct value, but they inevitably interact. They *must* interact because the imprint of the triune God is in them. The Fall has made it seemingly impossibly difficult to give each school its value as each school fights for primacy. However, the image of the triune God resurfaces as the three interact in practice. The law then becomes something more than the sum of the individual parts of the three schools, it is their interaction, their relationship, which will unite them into one coherent philosophy of law. This is an integrative jurisprudence that will result in a complete jurisprudence – unity and diversity in law as in the Trinity. May the prayer of Jesus to His heavenly Father in the Garden of Gethsemane be echoed for the three schools, “that they may be one even as We are.”<sup>336</sup>

For this to happen there needs to be more than a realization and understanding of the image of the triune God within man and man’s social orderings. Because of the Fall, a renewing of the minds is needed. Romans chapter twelve, “And do not be conformed to this world, but be transformed by the renewing of your mind, so that you may prove what the will of God is, that which is good and

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<sup>336</sup> *John* 17:11.

acceptable and perfect.”<sup>337</sup> The New International Version translates the passage as, “Do not conform any longer to the pattern of this world...” The pattern of the world is to separate the aspects of law and to give one particular aspect primacy over the others. The reconciliation of the three schools requires a renewing of the *mind* to know the *will* of the Father -- this is the work of the Holy Spirit.<sup>338</sup> Here again will, reason, and memory are working together again. For an integrative jurisprudence to come into being, the Holy Spirit must renew the mind to be able to know and apply the will of the Father.<sup>339</sup>

In final analysis, the Scriptures provide ample foundation for Berman’s application of St. Augustine’s description of the character of the triune God. The Trinity provides a model for unity and diversity in human social orders. This model of unity and diversity applied to the three schools of jurisprudence provide a coherent foundation for their reconciliation and integration.

### III. SCRIPTURAL EXAMPLES OF LEGAL OR GOVERNMENTAL SYSTEMS THAT FOLLOW AN INTEGRATIVE JURISPRUDENCE

The Scriptures have provided a foundation for an ecumenical integrative jurisprudence. They also provide an application to an integrative jurisprudence as it relates to law and government. The author of Hebrews teaches that Jesus is a High Priest in the order of Melchizedek.<sup>340</sup> The priesthood in the order of Melchizedek is established in Genesis and the Psalms.<sup>341</sup> The account in Genesis begins with Abraham returning from a battle when Melchizedek the King of Salem meets him.<sup>342</sup> Abraham then proceeds to offer his

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<sup>337</sup> *Romans* 12.

<sup>338</sup> *1 Corinthians* 2:10,13.

<sup>339</sup> The application of the will with a renewed mind, occurs at a particular point time in a particular situation, and in a manner that transcends that particular moment. May the Father’s “will be done, On earth as it is in heaven” *Mattheu* 6:10.

<sup>340</sup> *Hebrews* 7:1-10.

<sup>341</sup> *Genesis* 14; *Psalms* 110:4.

<sup>342</sup> Melchizedek offers Abraham bread and wine, coincidentally the sacraments of the Lord’s Supper. *Genesis* 14:18.

tithes to Melchizedek.<sup>343</sup> Melchizedek is described as being a king as well as a priest of God Most High. Later, in the Psalms and in Hebrews, it is said that Melchizedek had neither beginning nor end, thus resulting in his priesthood being eternal. Melchizedek is known as a type of Christ.<sup>344</sup> Jesus will return as King of Kings,<sup>345</sup> He is the eternal High Priest,<sup>346</sup> and His kingdom will endure forever.<sup>347</sup>

Here again we see Berman's integrative jurisprudence. Jesus as King relates to a political or state authority. He has been given all authority in heaven and on earth.<sup>348</sup> He has all authority to promulgate law. He is the lawmaker, the lawgiver. It is His will that rules. He is the positivist. He is also the High Priest.<sup>349</sup> He has all moral authority. He is Justice. He is Truth.<sup>350</sup> He is Wisdom.<sup>351</sup> He is the embodiment of the natural law. Finally, His rule is eternal, from beginning to end, yes, the Alpha and Omega.<sup>352</sup> It is His Story. He is History. Integrative jurisprudence is embodied in one man, the God-man, Jesus Christ.

Is this not what humanity yearns for? Not a coercive state ruling by force, not a moral majority ruling under the threat of moral condemnation, and not a blind nationalism ruling under the guise of popular opinion. Berman explains:

With the Enlightenment, Western legal philosophers sought a new ultimate authority. Some found that ultimate authority in politics, others found it in morality, still others found it in history. The positivists say that the ultimate source of law is the will of the lawmaker and its ultimate sanction is political compulsion: they deify the state. The naturalists say that the ultimate source of law is reason and conscience and its ultimate sanction is moral condemnation: they deify the mind. The

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<sup>343</sup> *Genesis* 14:20.

<sup>344</sup> *See supra* note 95.

<sup>345</sup> *Revelation* 17:14.

<sup>346</sup> *Hebrews* 7:1-10.

<sup>347</sup> *Isaiah* 9:7.

<sup>348</sup> *Daniel* 7:14.

<sup>349</sup> *Supra* note 101.

<sup>350</sup> *John* 14:6.

<sup>351</sup> *Proverbs* 8.

<sup>352</sup> *Revelation* 1:8.

historicists say that the ultimate source of law is national character, the historically developing traditions of the people, what in the United States is sometimes called the unwritten constitution, and that its ultimate sanction is acceptance or repudiation by the people: they deify the people, the nation.<sup>353</sup>

The ultimate source humanity seeks is Christ. He alone balances the equation. The fullness and completion of Berman's theory will not be realized until Christ's return and reign on earth. It is then our present task, as we wrestle with the legal questions of the day, as we continue to form our government, as we interpret our written constitution, and so forth, that we do so by heeding Berman's call to an integrative jurisprudence. This is a story of reconciliation, of Law and Religion, of Church and State, of Politics and Morality, of Will and Reason, all tied together with a providential view of history. We do so knowing that our efforts may point towards the ultimate reconciliation, which is between God and Man.

An integrative jurisprudence is not only a call to the legal community; it is a call to all of humanity and humanity's institutions – the individual, the family, the church, and the state. An integrative jurisprudence reflects the image of the Triune God in legal philosophy, but it is useful in understanding all of man's institutions since they all have the image of God in them. The chart below is an attempt to organize how the image of the triune God and an integrative jurisprudence reemerges in all of man's societal institutions.

|                                                                 |            |                |                             |
|-----------------------------------------------------------------|------------|----------------|-----------------------------|
| Jesus Christ,<br>High Priest in<br>the order of<br>Melchizedek  | King       | Priest         | Eternal                     |
| Integrative<br>Jurisprudence<br>(Professor<br>Harold<br>Berman) | Positivism | Natural<br>law | Historical<br>jurisprudence |
| The Mind of                                                     | Will       | Reason         | Memory                      |

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<sup>353</sup> Berman, *supra* note 2, at 293.

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|-------------------------------------------------|-----------|-------------|------------------------------|
| God<br>(St. Augustine)                          |           |             |                              |
| Branches of<br>Government                       | Executive | Legislative | Judicial                     |
| Societal<br>Institutions                        | State     | Church      | Family and<br>the Individual |
| Spheres of<br>Authority                         | Political | Moral       | Cultural                     |
| Family<br>(cornerstone of<br>society)           | Father    | Mother      | Children                     |
| The Individual<br>(made in the<br>image of God) | Will      | Reason      | Memory                       |

In each of these social orders man's fallen nature creates angst for primacy. Again, the Trinity provides the only coherent foundation to bring each column into harmony with its members to form a unified entity. We submit that tomes could be filled applying the foundation of the Trinity to each of these social orders. An aside that could also fill volumes is how exactly the Fall effected the image of the triune God in man and the purpose and role of man's societal institutions during this time before the restoration of the created order.<sup>354</sup> However, would these principles of unity and diversity function under any understanding of God? Under what particular worldview could these principles actually work? We submit that non-Christian and Christian jurisprudential positions, juxtaposed in a pluralistic society, can and have led to conflicts of culture, which make an integrative jurisprudence difficult to establish. Both must

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<sup>354</sup> See, F.C. Coplestone, *Aquinas* 237 (1955), *reprinted in* THE HISTORY, PHILOSOPHY, AND STRUCTURE OF THE AMERICAN CONSTITUTION 13 (Douglas W. Kmiec, et al., 2<sup>nd</sup> ed. 2004), for a discussion concerning the roll of the image of God and the fallen nature of man in government. "It is a mistake to think that government exists simply in order to keep the peace and punish evil doers. According to Aquinas, government would be required even if there were no evildoers and even if no one was inclined to break the peace. St. Augustine had been inclined to speak as though the State were a result of the Fall of man and as though political authority existed primarily because fallen human beings stand in need of a coercive power to restrain their civil tendencies and to punish crime. But this was not at all Aquinas's point of view. "Man by nature is a social animal. Hence in a state of innocence (if there had been no Fall) men would have lived in society. But a common social life of many individuals could not exist unless there were someone in control to attend to the common good." *Id.*

be understood in such circumstances, but we will endeavor to show how the Christian Theistic worldview provides coherence and sensibility.

#### IV. INTEGRATIVE JURISPRUDENCE AND A CHRISTIAN THEISTIC WORLDVIEW

In this final section this response will address three final points. First, the concept of worldview itself reflects the image of the triune God in every human being (theist, atheist, and everyone in between) will be discussed. Second, how a Christian Theistic worldview is necessary to fully understand and properly apply an ecumenical integrative jurisprudence. And finally, we will address how the Trinity again provides an answer to the challenge of how to take a concept so rooted in Christian theism and take it to a pluralistic emerging global community

##### *A. The Centrality of the Trinity in Worldview*

James W. Sire (Ph.D., Univ. of Missouri), in his seminal work, *The Universe Next Door: A Basic Worldview Catalog*, defines worldview as:

[A] commitment, a fundamental orientation of the heart, that can be expressed as a story or in a set of presuppositions (assumptions which may be true, partially true, or entirely false) which we hold (consciously or subconsciously, consistently or inconsistently) about the basic constitution of reality, and that provides the foundation on which we live and move and have our being.<sup>355</sup>

Sire states that worldview is distinguishable from a personal philosophy or an adopted theology, which very few people would be able to define much less live by consistently. But, rather, everyone has a worldview. It is the framework in which individuals actually operate in their everyday lives. Actions reflect the worldview, which may or may not be in line with a professed philosophy or theology.<sup>356</sup> The fact that everyone has a worldview is a product of

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<sup>355</sup> JAMES W. SIRE, *THE UNIVERSE NEXT DOOR* 17 (4<sup>th</sup> ed. 2004).

<sup>356</sup> *Id.* at 16.



humanity being created in the image of God. Every human being has the imprint of God set inside of him. A further exploration of the definition of worldview will provide correlation between the will, reason, and memory that make up the image of the triune God in man.

Sire states that a worldview provides the “rock-bottom” answers to seven specific questions. These questions in and of themselves, I submit, are reflective of the Triune God.

### 1. Will, and the “Is” Questions

The first four of Sire’s questions deal with ultimate reality. Simply stated the questions are, “What is?” Specifically:

1. What is prime reality – the really real? Sire, “To this we might answer God, or the gods, or the material cosmos. Our answer here is the most fundamental. It sets the boundaries for the answers that can consistently be given to the other six questions”<sup>357</sup>

2. What is the nature of external reality, that is , the world around us? Sire, “[Do] we see the world as created or autonomous, as chaotic or orderly, as matter or spirit...”<sup>358</sup>

3. What is a human being? Sire, “we might answer: a highly complex machine, a sleeping god, a person made in the image of God, a naked ape.”<sup>359</sup>

4. What happens to a person at death? Sire, “we might reply: personal extinction, or transformation to a higher state, or reincarnation, or departure to a shadowy existence on “the other side.”<sup>360</sup>

All four of these questions seek to ultimately find what “is.” What are the naked facts? Is there a God? If yes, what kind of god *is* it?

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<sup>357</sup> *Id.* at 20.

<sup>358</sup> *Id.*

<sup>359</sup> *Id.*

<sup>360</sup> *Id.*

*Is it one or many? Is it personal or impersonal? Is the material world the only reality? Is it created or evolved? Is it orderly or chaotic? Is a human a highly evolved organism? Is a human a creature created in the image of God? What is a human after his death? Is a dead human just decomposing matter? Is a dead human now transcending into a spiritual reality?*

These are all “is” questions. They are simply defining how the world “is.” They are positivist in nature. They are “will” questions because that is how the world has been “willed” into order, whether by God or by nature, depending on your answer to the questions. Finally, these questions are also reflective of the first person of the Trinity. Things are the way they are because that is what the Father willed it to be. He is the ultimately reality. He created the “world around us.” He created man with an eternal spirit to commune with Him in eternity after life on earth has ended for him. Therefore, the first four of Sire’s questions can be organized to correlate to the “is” of the Father’s will.

## 2. Reason, and the “Ought” Questions

The next two questions deal with reason, ought, and correlate to the second aspect of the Trinity. They are:

5. Why is it possible to know anything at all? Sire, “Sample answers include the idea that we are made in the image of an all-knowing God or that consciousness and rationality developed under the contingencies of survival in a long process of evolution.”<sup>361</sup>

6. How do we know what is right and wrong? Sire, “Again, perhaps we are made in the image of a God whose character is good, or right and wrong are determined by human choice alone or what feels good.”<sup>362</sup>

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<sup>361</sup> *Id.*

<sup>362</sup> *Id.*

These questions deal with what can be known. What can be reasoned? What are the “oughts” derived from knowledge or reason. These are the questions that natural law addresses. As stated above, wisdom is personified in the book of Proverbs as the Christ. Jesus is the wisdom of God. When one puts on the mind of Christ is when the will of the Father is known.

### 3. Memory, and the History Question

Finally, the last question addresses history:

7. What is the meaning of human history? Sire, “To this we might answer: to realize the purposes of God or the gods, to make a paradise on earth, to prepare for a life in community with a loving and holy God...”<sup>363</sup>

Memory is the third character of the triune God and is represented here by the final question that needs to be addressed to assess a worldview. It is the question that historical jurisprudence attempts to address. As stated above, implicitly, it is the Holy Spirit that directs the paths of individuals and peoples, to bring things into accordance with the will of the Father.

### 4. Concluding the Centrality of the Trinity in Worldview

The image of the triune God reemerges again, this time in Sire’s definition of worldview. As stated by Sire, everyone has a worldview, and as stated in the Scriptures everyone has the image of God in them. It is inescapable. The fall has tainted everyone’s worldview, but the concept remains ready to be awakened and brought in reconciliation with its created purpose.

#### *B. Christian Theism Worldview Necessary to Apply an Ecumenical Integrative Jurisprudence*

Sire answers the seven questions and thus defines Christian Theism in the following manner:

1. God is infinite and personal (triune), ..., and good.<sup>364</sup>

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<sup>363</sup> *Id.*

<sup>364</sup> *Id.* at 26

2. God created the cosmos ex nihilo to operate with a uniformity of cause and effect in an open system<sup>365</sup>
3. Human beings are created in the image of God and thus possess personality, self-transcendence, intelligence, morality, gregariousness and creativity.<sup>366</sup>
4. Human beings can know both the world around them and God himself because God has built into them the capacity to do so and because he takes an active role in communicating with them.<sup>367</sup>
5. Human beings were created good, but through the fall the image of God became defaced...<sup>368</sup>
6. For each person death is either the gate to life with God and his people or the gate of eternal separation...<sup>369</sup>
7. Ethics is transcendent and is based on the character of God as good (holy and loving)<sup>370</sup>
8. History is linear, a meaningful sequence of events leading to the fulfillment of God's purposes for humanity.<sup>371</sup>

When Sire describes God's personal nature under Christian Theism, Sire's remarks are in line with Percy's unity and diversity statement on the Trinity. Sire states, "He [God] is a unity, yes, but a unity of complexity."<sup>372</sup> This also is in line with the integration of the three schools – though they are diverse and complex there can be unity because it is a reflection of the image of God.

Sire also defines Christian Theism as belief that God is good. As in God is the very definition of good. Under Christian Theism goodness is defined in two ways, Sire states, "through holiness and through love."<sup>373</sup> Sire explains that, "first that there is an absolute

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<sup>365</sup> *Id.* at 29

<sup>366</sup> *Id.* at 31

<sup>367</sup> *Id.* at 34

<sup>368</sup> *Id.* at 37.

<sup>369</sup> *Id.* at 40.

<sup>370</sup> *Id.* at 41.

<sup>371</sup> *Id.* at 42.

<sup>372</sup> *Id.* at 27.

<sup>373</sup> *Id.* at 29.

standard of righteousness (it is found in God's character) and, second there is hope for humanity (because God is love and will not abandon his creation)"<sup>374</sup> This is inline with Berman's writing on the relationship between law and love. It is also very much in line with Berman's hope that there can be a reconciliation between the three schools. Even if the three schools have fallen, God will not abandon His creation and provide the means for reconciliation.

Sire also states that God's created universe is "open." Meaning that history is not programmed. Berman's definition of History is also in line with the Christian Theistic worldview in that although History is providential, man is still open to make decisions. He can affect history. Man's actions have consequences, such as when Adam and Eve ate of the apple, yet God still providentially works within this open environment of history to provide guidance and purpose for the future.

Sire states that in Christian Theism God wants to make Himself known to man, and He uses both general and special revelation.<sup>375</sup> Christian Theism also states that the second person in the Trinity came down and lived among men. Sire describes reason and knowledge in men, "God's own intelligence is this the basis of human intelligence. Knowledge is possible because there is something to be known (God and His creation) and someone to know (the omniscient God and human beings made in his image)."<sup>376</sup> Man is fallen and therefore his understanding has been "tainted" but Christ provided the redemptive means to bring "humanity on the way to restoration of the defaced image of God...substantially healing in every area."<sup>377</sup>

Finally, Sire states, "History is not meaningless... it is a form of revelation"<sup>378</sup> for those with a Christian Theistic worldview. Berman is inline with this excellent analysis of what history is in its full meaning and understanding of history when he states that history has "inevitably prophetic element."

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<sup>374</sup> *Id.*

<sup>375</sup> *Id.* at 35.

<sup>376</sup> *Id.* at 42.

<sup>377</sup> *Id.* at 39.

<sup>378</sup> *Id.* at 43.

In conclusion Berman's ecumenical integrative jurisprudence makes sense only under a Christian Theistic worldview. Under this worldview, there is a triune personal God. This God wants to make Himself know to man, who is His creation that bears his image and likeness. Because of the image of God on man, man reflects many of the attributes of God, such as will, reason, and memory. Because of man's fallen nature these attributes are tainted. However God himself has provided the means of restoration back to the fullness of the image and likeness of God. History is where all this is played out, and history itself becomes part of God's communication with man.

*C. The Centrality of the Trinity in Addressing the Legal Needs of the  
International Community*

How can a jurisprudence that is so drenched in a Christian theistic worldview be relevant and effective to a post-modern society in the West and a pluralistic international community? Berman's concluding call is for Christian legal leadership to embrace an integrative ecumenical Christian jurisprudence if they are to make the most of this unique time in world history in which "humanity is for the first time living a single history."<sup>379</sup> For the first time since perhaps the Tower of Babel,<sup>380</sup> God's message in history is singular to all of humanity. Before, each nation or region had its own distinct history that God used as part of His revelation and prophetic element specific to those people. But now all of humanity is living one history. Providential history teaches that God is sovereign, yet He has left the universe open. He has been moving to make the global community emerge. However, the future is not programmed, and human actions affect the future. How does a jurisprudence founded on the Trinity respond to this opportunity?

The Trinity provides 1) a public policy of unity and diversity, and 2) a model to reconcile the three schools of jurisprudence. Adherents to an Integrative Jurisprudence can go forward boldly with these two foundational truths because all of humanity and all human social orders bear the image of God. The individual good versus the common good is a real, tangible, practical issue that is as relevant

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<sup>379</sup> See *supra* note 17.

<sup>380</sup> *Genesis* 11:1.

today as ever. The Trinity provides value for both, and a call to balance those two interests. An integrative jurisprudence provides a model where positive law and natural law reconciled actually strengthen each other by giving law both structure and the moral weight needed to garner the confidence in law that has been lost.<sup>381</sup> It is necessary that Christians provide coherent, relevant, solutions to the international community as it develops into a system of world law. The move toward world law is inevitable. Without the Trinity as a foundation, world law will be grasping for solution as the rights of the individual and the need of the common good will be fighting for primacy, only to surely cause great suffering in the future. It is necessary to sit at the table and to address issues of public policy and to foster an interaction between the three schools of jurisprudence.

Berman believes that the world community and the West can benefit each other as they engage in the development of a world legal tradition.<sup>382</sup> First, Berman states, the world can benefit from the West's "concept of ongoing evolving legal tradition."<sup>383</sup> This concept is a "conscious historical evolution of law over generations and centuries."<sup>384</sup> A developing world legal tradition must be autonomous from any political system, so that it can endure beyond any great revolution.<sup>385</sup> Secondly, Berman believes that as the West engages the world, the West will be challenged to "rediscover its religious roots and its threefold source in . . . politics, morality, and history."<sup>386</sup>

Berman cites many examples of the spontaneous emergence of world law.<sup>387</sup> This includes mercantile law,<sup>388</sup> sports law,<sup>389</sup>

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<sup>381</sup> Berman, *supra* note 2.

<sup>382</sup> Harold J. Berman, *The Edward Douglas White Lectures on Citizenship—The Western Legal Tradition in a Millennial Perspective: Past and Future*, 60 *La. L. Rev.* 739, 762 (2000).

<sup>383</sup> *Id.*

<sup>384</sup> *Id.*

<sup>385</sup> *Id.*

<sup>386</sup> *Id.*

<sup>387</sup> Berman, *supra* note 5, at 12-14.

<sup>388</sup> *See Id.* at 12-13. (international recognition of negotiable bills of lading and letters of credit developing out of centuries of interaction between the transnational community of merchants, bankers, carriers, underwriters, and their lawyers).

environmental law,<sup>390</sup> world intellectual property rights,<sup>391</sup> protection of universal human rights,<sup>392</sup> and criminal law.<sup>393</sup> Berman believes that these developments “reflect a universal belief in law.”<sup>394</sup> This should not be surprising as all of mankind is made in God’s image and “God is himself law,”<sup>395</sup> and it would only be natural for His creation to reflect, even begrudgingly, an essential composition of His character.

## V. CONCLUSION

The Apostle Paul is reported to have said:

The God who made the world and everything in it is the Lord of heaven and earth and does not live in temples built by hands. And he is not served by human hands, as if he needed anything, because he himself gives all men life and breath and everything else. From one man he made every nation of men, that they should inhabit the whole earth; and he determined the times set for them and the exact places where they should live. God did this so that men would seek him and perhaps reach out for him and find him, though he is not far from each one of us.<sup>396</sup>

An ecumenical Christian integrative jurisprudence provides the only coherent foundation to address the legal issues of today and

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<sup>389</sup> See *Id.* at 13. (200 different sports organized at a world level with an Arbitration Court holding jurisdiction to hear disputes arising out of Olympic competition).

<sup>390</sup> *Id.*

<sup>391</sup> *Id.*

<sup>392</sup> *Id.*

<sup>393</sup> *Id.* at 13-14. “Statute of the International Criminal Court, to which... over ninety nations have subscribed, gives that court jurisdiction over murder, rape, apartheid, and various other “crimes against humanity” when committed as part of a widespread or systematic attack directed against any civilian population.”  
*Id.*

<sup>394</sup> *Id.* at 14.

<sup>395</sup> Berman, *supra* note 18.

<sup>396</sup> *Acts* 17:24-27.



tomorrow. The centrality of the Trinity provides a public policy of unity and diversity and the model to reconcile positivism, natural law, and historical jurisprudence. God has brought humanity together at this time to live a single history, “so that men would seek him and perhaps reach out for him and find him, though he is not far from each one of us.”<sup>397</sup>

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<sup>397</sup> *Id.*