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Religion, Law and Ethics — A Call for Dialogue

By JEROME HALL*

THE CENTENNIAL of an institution is a time for celebration, reflection, and reaching out toward new goals or fuller realization of long recognized objectives. This symposium is one of the ways Hastings College of the Law is celebrating its centennial in 1978.

The timeliness of the subject of the symposium — the interrelations of religion, law, and ethics — is shown in the recent confluence of many important events. The shocking and tragic actions of lawyers in high political office have aroused an unprecedented interest in the ethics of the legal profession. Do secular and professional ethics suffice? Does professional responsibility need the support of religion? Three years ago the Association of American Law Schools, perhaps influenced by these events, established a Section on Law and Religion, and the participation of many theologians and legal scholars in the Section's annual programs has given ample evidence of interest in a dialogue on the problems involved in the interrelations of law and religion.¹ Simultaneously, at Harvard University there was organized a Committee on Religion and Law. On

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1. Papers presented at annual meetings have been published in 27 *J. LEGAL EDUC.* 380-89 (1976) and in 26 *CATH. U.L. REV.* 17-72 (1976). The essays on Hindu Law and Islamic Law in this symposium are based on papers presented at the 1976 meeting of the Association.

March 5 and 6, 1977, this Committee sponsored a symposium on theology and law focused on "Responsibilities of Vocation," and on April 1, 1977, the Council on Religion and Law, Inc., was organized, a board of directors was selected, and a nationwide program was inaugurated. These events have made it quite clear that the interrelations of religion, ethics, and law involve not only questions of professional responsibility but also basic problems of theory and scholarship.

Participants in the Dialogue

The time has come for a sustained dialogue on this large subject, and in my view the participants should include representatives of all the major religions. Accordingly, the articles in this symposium represent the variety of beliefs expressed in most of the world religions. The desirability of such wide representation was also supported by the fact that in this country, and perhaps especially in California, there are many persons whose religious background is either Asian or bound to their American Indian heritage, and all of these religions are represented in the Hastings student body.

For many years theologians and other scholars, East and West, have studied religions other than their own; presumably one's appreciation of his or her religion is deepened by such comparative study. And for some, in this ever-contracting world, there is the hope of a world religion that, perhaps growing from or centered in their own religion, will stimulate universal fraternal attitudes and mitigate the positivistic tendencies of our times. Others think that pluralism in religion, as elsewhere, is more interesting and desirable, but all can agree that it is an enlightening experience to discover many similarities among the world religions.²

Judaism, Christianity, and Islam share the Old Testament, and even a superficial acquaintance with the religions of other cultures turns up interesting facts and similar beliefs, as, for example, the promised help in times of unrighteousness and the incarnation of

2. "The *Humble, Meek, Merciful, Just, Pious and Devout* Souls, are everywhere of one Religion; and when Death has taken off the *Mask*, they will know one another, tho' the divers *Liveries* they wear here makes them *Strangers*." WILLIAM PENN, *SOME FRUITS OF SOLITUDE*, pt. 1, No. 519, at 99-100 (1900) (1st ed. London 1718).

Krishna,³ a similar tradition of the ancient Greeks,⁴ and Buddha's allegedly mysterious birth with simultaneous miracles;⁵ certainly, Buddha's compassion is universally appreciated. The stages of life and the paths to moral development marked out in Hinduism and in other Eastern religions also suggest interesting comparisons with Western religions. And for philosophically minded persons who reject simplistic conceptions of God, Hinduism may offer a persuasive metaphysics, not as a pantheistic substitute for a personal God, but as an enlargement of their intuitive view of reality.

There are also interesting aspects of comparative law that have been influenced by religion. In the traditional law of Far Eastern countries the eldest son received all of his father's estate but shared that property with his kin. The reasons for this preference were that the eldest son was depended on for the observance of the religious rites for the dead and was to be the religious head of the family. American lawyers are surprised to find that in Japan and other Oriental countries lawyers are less than one-tenth as numerous in proportion to population as they are in the United States. The traditional reliance on mediation and the attitude that it is shameful to resort to law reflect moral and religious beliefs originating in ancient China. It is noteworthy, also, that while Western theories of law stress its imperative character, which is as true of St. Thomas as it is of legal positivists, Eastern thought, particularly as Sir Henry Maine has shown, assimilated law to custom rather than to commands of the Sovereign.⁶ The affinity of Western jurisprudence and Western theology that views God as a commander, viz., the Ten Commandments, is plain; that concept of God is not central in Eastern religion. To these observations regarding comparative religion and comparative law must be added the fact that Japan, South Korea,

3. THE BHAGAVAD GĪTĀ 4:7-8 (2d ed. S. Radhakrishnan trans. 1970).

4. "Little more than a century after [Empedocles'] death, stories were already in circulation which told how he had stayed the winds by his magic, how he had restored to life a woman who no longer breathed, and how he then vanished bodily from this mortal world and became a god." E. DODDS, *THE GREEKS AND THE IRRATIONAL* 145 (1968).

The incarnation of a deity in human form is common in "rude society." I J. FRAZER, *THE GOLDEN BOUGH*, pts. 1 and 2, *THE MAGIC ART AND EVOLUTION OF KINGS* 376 (3d ed. 1911). See also *id.* at 386-421; 7 *ENCYCLOPAEDIA OF RELIGION AND ETHICS* 183-84 (J. Hastings ed. 1915); *THE MYTH OF GOD INCARNATE* (J. Hick ed. 1977).

5. See S. RADHAKRISHNAN, *EASTERN RELIGIONS AND WESTERN THOUGHT* 177 (2d ed. 1940).

6. H. MAINE, *EARLY HISTORY OF INSTITUTIONS* Lect. XII (1875).

India, and other Eastern countries have adopted Western systems of law. This may indicate the greater influence of economics over that of religion. But before a solution can be reached it will be necessary to discover how those Western codes actually function in their Eastern environment; "law in the books" must be distinguished from living law.

One of the guiding lines determining the order of the following articles in the symposium is chronological. Among the world religions, Hinduism is one of the oldest—the pre-Vedas extend back perhaps to 2000 BC. A span of more than 1,000 years separates the earliest books of the Old Testament from the latest. Buddhism arose in the sixth century B.C., but because it grew from Hinduism and because Confucius is next in line (551-479 B.C.), followed shortly by Taoism and because all are Asian, the article on China is placed after that on Hinduism. The essay on Judaism opens the next section, and it is followed by essays on Catholic views of theology, law, and canon law and by one on Islamic theology and law whose roots extend to 610 A.D.⁷ This section of the symposium, guided partly by chronology and partly by the affinity of culture and theme, opens large vistas. The essay on Paul deals with problems that for centuries have greatly concerned theologians; focused on "law and faith," they also raise legal issues regarding law and discretion that have agitated legal thought from Plato's *Statesman* to the present day. The essay on Paul is followed by the article on Erasmus and by two essays on Luther's theology, especially his interpretation of *Romans*. The remaining essays deal with sensitive moral and religious problems—with human suffering, as dramatized in *Job*, and with justice, conscience, and various aspects of professional responsibility.

In this symposium ancient professions are represented — the lawyer, the clergy, and the scholar in law, theology, or moral philosophy. In the exchange among the practitioners, the clergy will probably emphasize religious ideals that, presumably, will sensitize lawyers to act with reference to needs regarding which doubt and inertia would otherwise deter the ethically required actions. The lawyers' contribution to the clergy might center on the "rule of law" and the thesis that faith alone, precious as it is, does not suffice. Law makes liberty possible, including the freedom to worship as one

7. HISTORICAL ATLAS OF THE RELIGIONS OF THE WORLD 299-316 (I. al-Fārūqī ed. 1974).

pleases and to establish and maintain churches; it supplies the structures that are essential to their operation, and beyond that, it helps to actualize justice and the "inalienable rights" enjoined in religion and ethics.⁸ Because of their training and the nature of their work, lawyers may also be expected to join rationalist philosophers in raising many critical questions about theology.

The scholars in law, theology, or ethics are not practitioners in the sense that lawyers and clergy practice their vocations; they are theorists who bring what knowledge they have to a better understanding of law, religion, and ethics. Their influence, therefore, is indirect and depends on the use of that knowledge by the practitioners. These professions obviously perform functions that, judged by their antiquity and universality, serve permanent needs of human beings in all societies.

Interdisciplinary Knowledge and the Language Problem

In the envisioned dialogue, the members of each profession have essential roles and functions. What is involved in the interrelations of their respective disciplines? For more than half a century there has been much talk of "interdisciplinary" study, but no theory of such study or knowledge has been widely recognized, much less accepted. There was, to be sure, the Unity of Science movement espoused, among others, by Otto Neurath. That movement, however, involved the reduction of all concepts to physicalist terms; unacceptable to humanist social scientists, it would find even less favor among those concerned with the interrelations of law and religion.

Although we lack a theory of interdisciplinary knowledge, we can learn some important truths from specific researches in which a specialist in one discipline drew on other disciplines to enlighten his subject.⁹ A legal scholar, puzzled by certain phases of his field of specialization, might draw on history, social science theories of the "case history," methods of empirical research, statistics, and the phil-

8. For the influence of law on and in religion, see H. BERMAN, *THE INTERACTION OF LAW AND RELIGION* ch. 3 (1974). For a critical view of Indian religions and ethics, see A. DANTO, *MYSTICISM AND MORALITY* (1972).

9. See J. HALL, *THEFT, LAW AND SOCIETY* (2d ed. 1952); H. KALVEN & H. ZEISEL, *THE AMERICAN JURY* (1966); K. LLEWELLYN & E. HOEBEL, *THE CHEYENNE WAY* (1941).

osophy of science. He secures a deeper understanding of the law than restriction to the legal materials allows and an intuitive knowledge that accumulates as he probes one or more nonlegal disciplines. The legal scholar also discovers that it is impossible simply to "lift" the findings and theories of those disciplines and "impose" them on legal problems; not only do we not find ready-made solutions, we must often reject or adapt what we do find to the requirements of our own discipline. For example, lawyers interested in criminal responsibility who read books on psychiatry should be cognizant of the fact that there are different schools of psychiatry and that the deterministic postulate of psychiatry does not conform to the moral principles of the law, especially criminal law.¹⁰ He also must be sensitive to the fact of diverging or conflicting views within each discipline; there are at least as many theologies, some of them within the same denomination, as there are sharply opposed philosophies of law. We also learn that it is necessary to keep a firm hold on the distinctive concepts of one's discipline to avoid their dissolution in the terms of a different discipline, as ethics has sometimes disappeared in the facts of evolution or in other facts that were substituted for moral norms and as legal rules dissolved in behavioristic sociologies of law.

In most sociolegal research, there seems to have been no felt linguistic or conceptual problem about the term "law" or about the social disciplines. It was simply assumed that certain statutes and judicial decisions expressed in sanctioned rules issuing from and enforced by the government were laws and that economic history, psychiatry and sociology were likewise readily determinable. In any serious dialogue on law and religion, however, difficult language problems are obviously encountered. Genuine dialogue is communication, and the primary question, therefore, concerns the conditions that make communication possible.

The first difficulty met in an effort to establish the necessary conditions results from the fact that it is impossible to separate religious language, legal language, and ethical discourse. Take the Ten Commandments. For the believer they were promulgated by God and therefore belong to "religion." But some of them were enforced by the political authority of the time, for example, "Thou shalt not steal." This suggests that we should distinguish commands

10. J. HALL, *GENERAL PRINCIPLES OF CRIMINAL LAW* 455 (2d ed. 1960).

expressed in terms of love or in terms of purely internal states from those that are amenable to secular enforcement. Yet, even that distinction raises problems when canon law, church regulations, and penances are compared with the laws and practices of government.¹¹ The task is also complicated by the fact that Western religions were influenced by, and incorporated much of, Greek philosophy and Roman law.¹² Many of Plato's and Aristotle's ethical concepts and principles, for example, voluntary, involuntary and mixed acts, negligence, and punishment, were taken over by Western ethics and religion. Plainly, the need is for a set of definitions of the concepts of religion, law, and ethics that will allow one to make sense of inquiries into their interrelations.

The principal direction of the required analysis is determined by the fact that the essence of communication is the sharing of common ideas. Interdisciplinary dialogue must start with common meanings and then elucidate the distinctive concepts of the various disciplines by rendering them common by illustration, by reference to shared experiences, and by the use of intuition, analogies, and other devices. There is a set of widely shared secular moral principles. The concept of rule, linguistically represented by prescriptions or injunctions, is found in the three fields and disciplines as are the so-called "performatives" expressed in promises. "Sanction" is a privation in all the disciplines, but the sanction of religion is postponed to Judgment Day while the exigencies of survival require legal sanctions here and now. The legal sanction is inexorable in its meaning though not in actual practice; the divine sanction is a matter of grace and mystery.

The most important concepts are "religion," "faith," and "law," each of which has been defined in dozens of ways. It is an easy solution to say that a writer may define these terms in any way he pleases, but the fact is that unless he defines them in significant terms, genuine dialogue is impossible, and significance, in my view,

11. For a discussion of R. Sohm's interpretation, see J. ADAMS, *ON BEING HUMAN RELIGIOUSLY* ch. 13 (1976).

12. "The Roman Christians . . . thought as lawyers, in terms of legal concepts, with no mysticism." J. RANDALL, JR., *THE ROLE OF KNOWLEDGE IN WESTERN RELIGION* 38 (1958).

"As soon then as [the Western provinces] ceased to sit at the feet of the Greeks and began to ponder out a theology of their own, the theology proved to be permeated with forensic ideas and couched in a forensic phraseology." H. MAINE, *ANCIENT LAW* 363-64 (London 1861).

is determined by three factors. First, the definition should reflect sensitivity to the relevant linguistic history during which certain connotations gathered around these terms; second, the definition should represent current thought, interests, and problems; and third, it should indicate the philosophical perspective of the writer. I have discussed the meaning of "positive law" elsewhere in detail¹³ where I took a natural law direction, and I shall shortly say what I mean by "faith."

In this endeavor and especially in the interpretation of religious and legal texts, we must deal explicitly with the language problem. Each profession has its authoritative texts — the Constitution, statutes, and decisions in the one case, the Bible, theological statements, and the Church's pronouncements in the other. One profession speaks of "statutory construction," the other in terms of "exegesis" and "hermeneutics."¹⁴ Exegesis is closer to statutory construction while hermeneutics is wide-ranging elucidation that takes account of a writer's psychology and contemporary historical and cultural situations. Current hermeneutical theories had their origin in the post-Kantian distinction between natural science and the cultural disciplines. The former is marked by observation of external facts, while the latter operate by empathy, by sympathetic participation in other persons' lives and actions. Kant's *Critique*, which made mind the central factor in knowledge of the world, was in later interpretations supplemented by a more adequate psychology of the authors of biblical or theological statements, and if history is but the actualization of mind, hermeneutics in that view depends finally on psychology. Later ideological developments reverted to realism and still others to a synthesis of the two perspectives.

Corresponding to these movements in philosophy and historiography, biblical hermeneutics became objective or subjective, conservative or liberal, social or individualistic. There are many other divergencies; for example, some theologians remain entirely within the text of the Bible, playing "the language game" strictly by internal distinctive rules, while others consult history, psychology, current situations, and personal motivation. Some exegetes take every word in the Bible as inspired by God; others distinguish the Ten Commandments and the Sermon on the Mount from prescriptions about women,

13. J. HALL, *FOUNDATIONS OF JURISPRUDENCE* (1973).

14. See Grislis, *The Hermeneutical Problem in Richard Hooker*, in *STUDIES IN RICHARD HOOKER* 159 (W. Hill ed. 1972). See also SRI AUROBINDO, *ON THE VEDA* 36-37, 55-57, 69, 379-81 (1964).

witches, and sexual offenses. Recent linguistic philosophy treated religious language from the perspective of the external observer and held that it was prescriptive or exhortative or emotional but not descriptive; it did not state or imply any facts. This fallacy, and especially the failure to realize that the believer's faith causes him to interpret religious language uniquely, underlines the essential role of empathy in any realistic hermeneutics.

Against these brief observations on theological hermeneutics, some comparisons with legal language and interpretation may be suggested. Biblical language is often concrete and pictorial while legal language is typically abstract. Biblical language expresses emotion, reverence, and prayer, but both biblical language and legal language abound in prescriptions and performatives, and if we take account of what transpires in court, there are also expressions of emotion, and a litigant may "pray" that the court grant his request.

Just as biblical exegetes have distinguished different types of religious language so, in law, one may classify legal language as ordinary speech, as technical "words of art" that may be common law or professional terms, or as legislative terms. The interpretation of legal texts varies, at least as regards the attitude of judges, in relation to whether the text is part of a constitution or a statute or a decision; and again, as regards statutes, interpretation varies depending on whether the statute is penal or civil. Able judges do not find treatises on statutory construction helpful. It is to these judges rather than to those treatises that one must go for insights paralleling those found in theology. Holmes placed his finger on the crux of legal interpretation when he said, "[T]he meaning of a sentence is to be felt rather than to be proved" ¹⁵ Frankfurter added further insights: "[T]he troublesome phase of construction is the determination of the extent to which extraneous documentation and external circumstances may be allowed to infiltrate the text on the theory that they were part of it" ¹⁶ "There are varying shades of compulsion for judges behind different words, differences that are due to the words themselves, their setting in a text, their setting in history." ¹⁷ These comments point to subtleties that escape those who take the canons literally.

15. *United States v. Johnson*, 221 U.S. 488, 496 (1911).

16. Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 529 (1947).

17. *Id.* at 534.

Are there parallels or analogies between biblical parables and legal fictions? A parable, for example, that of the prodigal son, is true not in the sense that those facts actually happened but in the sense of communicating a truth about God. A legal fiction, for example, that a landowner who maintains an attractive nuisance has "invited" children to go on his land, is literally fictitious but is known to be such and is used to effect a just result that requires one to treat situation A "as if" it were actually situation B. In a case where the defendants took a horse and buggy for a joyride, intending to return them, they later decided to sell the buggy, at which time the required *mens rea* concurred with the act of taking viewed as a "continuing trespass," and they were guilty of larceny.¹⁸

Closer to the parable are the hypothetical facts judges sometimes pose to make a point. For example, in the *Evans* case¹⁹ a federal statute forbade bringing in aliens illegally and also forbade harboring such aliens, but the penalty clause referred only to the illegal bringing in of aliens. In rejecting the prosecution's argument that the penalty clause also applied to the harboring, the court stated a set of hypothetical facts. Suppose, it said, an innkeeper knowingly furnishes lodging to an alien whose visa has expired. To treat such a harboring as seriously as the bringing in and to apply the same penalty — five years' imprisonment — to both would be unreasonable and is therefore a matter for legislation not for adjudication.

In addition to Brandeis briefs and cases where judges have probed legislative histories, legal hermeneutics has been most advanced in case histories of important decisions,²⁰ in detailed studies by social scientists of judges and their past decisions with a view to predicting future decisions, and in occasional ventures into cultural legal history where not only the statutes and decisions were carefully analyzed but also political, economic, and psychological factors were explored. Biblical hermeneutics has much to offer in the further advance of legal interpretation, and the ultimate challenge is an inclusive theory of language.

18. *Commonwealth v. White*, 65 Mass. (11 Cush.) 483 (1853).

19. *United States v. Evans*, 333 U.S. 483 (1948).

20. See, e.g., J. HALL, *THEFT, LAW AND SOCIETY* 3-33 (2d ed. 1952) (discussing *Carrier's Case*, Y.B. 13 Edw. IV, f.9, pl.5 (1473)).

Specific Problems

What specific problems might profitably be addressed in a dialogue on the interrelations of religion, law, and ethics? The influence of religion is so pervasive that it is impossible to limit its impact on law to any list of specific instances. Thus, William Temple, Archbishop of Canterbury, stated, "[T]he primary form of love in social organization is Justice."²¹ In the American Declaration of Independence, Jefferson wrote that men are endowed by their Creator with certain inalienable rights, and our Bill of Rights, the English bills of rights, and similar declarations and laws in other countries have plainly been influenced by religious ethics and ideals. A Commandment forbids "false witness against your neighbor"; *Psalm* 15:2-5 enjoins speaking the truth and proscribes slander and taking a bribe "against the innocent."²² St. Paul said, "[P]utting away falsehood, let every one speak the truth with his neighbor, for we are members one of another." *Ephesians* 4:25. Taking an oath by a witness in a courtroom, traditionally by reference to "Almighty God," or occasionally now in terms of conscience, is also evidence of a direct influence on procedure. The covenant with God, reaffirmed on the Mayflower and in Colonial law,²³ includes a religious dimension that for thousands of years made marriage more than a secular contract and also influenced the law of divorce and sexual offenses. Some tinge of that religious connotation may even today account for the prima facie duty to keep one's promises that distinguishes deontological from utilitarian ethics.

Among specific branches of the law, the richest mine is in the area of the influence of religion on criminal law. Pollock and Maitland traced the *mens rea* principle to St. Augustine, who said, "*Ream linguam non facit nisi mens rea*,"²⁴ repeated almost verbatim in the laws of Henry I. There are biblical expressions that might have

21. Quoted in A. T. Denning, *The Influence of Religion on Law*, Earl Grey Memorial Lecture no. 33 at 9, King's College Newcastle upon Tyne (1953).

22. All biblical references are to *THE NEW OXFORD ANNOTATED BIBLE* (2d ed. 1971).

23. "[T]he influence of religious ideas in the formative period of American law was often decisive . . ." R. POUND, *INTERPRETATIONS OF LEGAL HISTORY* 24 (1923). See also R. POUND, *THE SPIRIT OF THE COMMON LAW* 32-59 (1921) (puritanism and the law).

24. 2 F. POLLOCK & F. MAITLAND, *THE HISTORY OF ENGLISH LAW* 476 § n.5 (2d ed. 1923).

suggested the *mens rea* formula, for example, *Mark* 7:15-23, and Seneca wrote, "*Actio recta non erit, nisi recta fuerit voluntas . . .*"²⁵ That the distinction between *mala in se* and *mala prohibita* was lifted from the theological *leges mere poenales* is also evident.²⁶ There are other concepts of deeper, richer connotation, among them defilement, sin, guilt, forgiveness, expiation, and punishment; these concepts lie buried in the long past history of the race, millenia before anything like public criminal law existed.²⁷ But their influence is patent and operative in our own times, for example, the guilt in realization of one's sin or crime, the revulsion experienced when a murder is committed, and, at the other extreme, the persistence of the ideal of rehabilitation despite current disappointment with penal institutions.

Paralleling the concept of defilement is harm; other pairs are sin-crime and forgiveness-pardon. Each of these concepts shares a common meaning, and they also have distinctive meanings. Both aspects call for elucidation by reference, so far as possible, to shared concepts and experiences. Differences are not annulled in this way. For example, in theology, sin is a breach of one's relation to God, while crime is a violation of positive law; in theology forgiveness precedes or may preclude punishment (except for the expiation or remorse of one who appreciates the forgiveness of his sin), but "pardon" in law may be granted to an innocent person mistakenly convicted.

I turn now to a more general problem: law and faith. "Almost all of the problems of jurisprudence," said Dean Pound, "come down to a fundamental one of rule and discretion, of administration of justice by law and administration of justice by the more or less trained intuition of experienced magistrates."²⁸ This problem was first formulated by Plato in the *Statesman* where he criticized law on two grounds: law consists of generalizations that cannot fit the unique character of the litigants or the particularity of each situation and, second, law remains fixed while facts, institutions, and needs change. Plato's preference was for the "Philosopher-King" which in some contexts of the dialogue meant God. But since there is no Philosopher-King on earth, or not enough of them, Plato's second

25. 3 EPISTLES OF SENECA 92 line 57 (Loeb Classical Library 1925).

26. For citations to the above historical references, see J. HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 79-80, 338 n.50 (2d ed. 1960).

27. See P. RICOEUR, THE SYMBOLISM OF EVIL (1967).

28. R. POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW 111 (1922).

choice was the rule of law; that was best in the imperfect world of actual states.²⁹ We are indebted to Aristotle for the first detailed articulation of equity as "a correction of legal justice," "a correction of law where it is defective owing to its universality."³⁰

What is the relation of these jurisprudential ideas to biblical statements and theological discussions of law and faith? Jesus said, "Think not that I have come to abolish the law and the prophets; I have come . . . to fulfil them." *Matthew* 5:17. His criticism of certain laws, for example, those regarding healing on the Sabbath, washing hands, and the punishment of adultery, resembles current criticism of outmoded positive laws and penalties that are regarded as unduly severe.

It is St. Paul's epistles, especially *Romans*, that have the greatest interest for dialogue.³¹ If we are to understand St. Paul's thesis regarding law and faith, we must first see what he means by "law."³² For Paul, there is "the law of the Spirit," *Romans* 8:2, which apparently is synonymous with the "law of God," *Romans* 7:22, 8:7; *Luke* 10:25-28. "Law" sometimes means moral principles. Again, as a Pharisee, Paul was familiar with the Torah and the numerous rules or laws which they promulgated. There was the positive law imposed by the ruler, *Romans* 13, and, finally, that very different law "in my members," *Romans* 7:23.³³

It is important, next, to keep in mind Paul's statements: "What then shall we say? That the law is sin? By no means!" *Romans* 7:7. "The law is spiritual," *Romans* 7:14; "the law is holy," *Romans*

29. PLATO, *THE COLLECTED DIALOGUES OF PLATO* 1063-64, lines 294-95 (E. Hamilton & H. Cairns eds. 1961).

30. ARISTOTLE, *ETHICA NICOMACHEA* bk. V, pt. 10, in *THE WORKS OF ARISTOTLE* (W. Ross trans. 1925).

31. As regards the following comments, I ask the reader's indulgence for an amateur's use of the dominant conventional interpretation.

32. "Nor must one try to define the law in biblicist terms, such as by identifying the Old Testament with the law and the New Testament with the gospel, for in fact the New Testament also contains law in a certain sense, and the Old Testament already contains the gospel [O]ne and the same saying can have the effect of the law, or can be taken as the gospel [F]or example, one can understand the first commandment in such a sense that the voice of the gospel is heard in it." G. EBELING, *LUTHER* 133 (1970).

33. Paul "not infrequently continued to use the Law as authority quite in the manner of his fathers." A. DIESSMANN, *PAUL — A STUDY IN RELIGIOUS HISTORY* 99 (2d ed. 1926).

7:12. He speaks of "the just requirement of the law," *Romans* 8:4, and asks, "Is the law then against the promises of God?" And he answers, "By no means!" *Galatians* 3:21; *Romans* 3:31.

What then was Paul's complaint, his cry of despair? Why did he speak of "the curse of the law"? *Galatians* 3:13. It was because the law "in my members," *Romans* 7:23, tempts transgression and, given human imperfection, leads inevitably to sin. "[T]he power of sin is the law," 1 *Corinthians* 15:56; hence, if judgment is based on obedience to the law, there is no escape from damnation. By that test "the whole world may be held accountable to God," *Romans* 3:19. He anticipates a point made by twentieth century scholars who said that criminal law is the formal cause of crime in his statement that "where there is no law there is no transgression." *Romans* 4:15. Salvation, therefore, depends on faith, for Paul, faith in Christ which saves erring man from the law of sin and death. *Romans* 8:2. In sum, "a man is justified by faith apart from works of law." *Romans* 3:28.

Despite Paul's "By no means!" and his injunction to obey positive laws because rulers are God's agents, *Romans* 13:1-7, the "curse of the law" has been taken as criticism of positive law. Law is said to be an inadequate vehicle of justice; it is only a compromise among conflicting interests; many laws become outmoded and, in any case, law cannot keep abreast of social change; law deals only with external actions, not with conscience or motivation, and so on. Many of these criticisms have been voiced on moral or practical grounds, not influenced by Paul's epistles. But the conjunction of Plato's criticism, Paul's "curse of the law," and secular professional evaluations raise many questions based on the distinctive perspectives of religion, law, and ethics.

For example, a legal problem currently agitated in many countries, namely, that of *error juris*, bears comparison with Paul's thesis. The traditional rule of law is that *ignorantia legis neminem excusat*. In recent years this has been challenged on the ground that many laws are so obscure or technical that no one, not even lawyers, can know all of them and also on the ground that by the traditional maxim even those who have consulted competent lawyers and have followed their advice have no defense and are thus in a predicament that parallels the inevitability of transgression emphasized by Paul. One suggested reform is that serious crimes be set apart from novel ones or technical infractions and that the traditional rule be retained as

to the former but not as regards the minor offenses. The 1975 German Penal Code totally rejects the traditional law and makes *error juris* a defense, limited, however, by the defendant's negligence.³⁴ In the legal professional view, the limitations of law are mitigated in these ways and by the wise use of discretion. Paul was not interested in mundane reforms; his concern was with ultimate judgment. In law and ethics, evil and guilt are judged by reference to the past and future practical needs, while, for Paul, evil and guilt are tied to hope, the hope of salvation.

Paul's epistles, placed in the wider orbit of religious ethics, suggest many other problems that might be discussed: the importance of action in the lawyer's perspective versus exclusive concentration on faith; question about civil disobedience vis-à-vis the ruler's divine agency; and points where religious ethics seem to contradict the moral principles expressed in positive law, for example, such precepts as "resist not evil," "turn the other cheek," "divest yourself of all your property," and so on. The lawyer, accepting the law of self-defense and the defense of other persons, the prevention of crime, and many other rules based on traditional and rationalist morality, may be expected to ask clergy and theologians to clarify this problem, and the rationalist moral philosopher may be expected to raise questions about biblical views of sex, women, slavery, and civic duties. He might also say, "to forgive one who has harmed me is a valid moral precept, but am I in a moral position to forgive one who has harmed another person?" Are the contradictions only superficial or must we reject one or the other morality? Finally, there are larger questions such as the relevance of religion to political and economic issues in a modern industrial society.

Perennial Problems

I wish finally to discuss problems that every thoughtful person faces regardless of his vocation; one's stand on these issues will influence his position regarding all other questions. At the heart of these problems is the question of religious faith, and pursuant to the canon suggested above, I shall say what I mean by "faith." Before doing that, however, it should be noted that there is no debate in

34. See Arzt, *Ignorance or Mistake of Law*, 24 AM. J. COMP. L. 646 (1976); Hall, *Comment on Error Juris*, 24 AM. J. COMP. L. 680 (1976).

the Bible about the existence of God. It never occurred to the Prophets of the Old Testament or the Apostles of the New Testament to question the existence of God; that was assumed to be as certain as the existence of the land, stars, and one's neighbors. But skeptics (and every thoughtful person is sometimes skeptical) have raised serious questions about the rationality of faith.

In elucidating the meaning of "faith," the first need is to distinguish faith as belief in certain propositions, for example, that God exists, from faith as an experience and commitment. If both meanings are included in a definition of "faith," faith is (1) belief in the existence and supreme goodness of a transcendent Personality, therefore worthy of worship; (2) belief in the eventual vindication and victory of goodness over evil; (3) belief in the progressive fulfillment or actualization of one's potentialities; (4) the experience of an I-Thou relation that, for the believer, is an experience of the presence of God; and (5) a commitment of the whole person, involving emotion, need, hope, and unlimited awe and reverence.

What follows regarding faith is not meant to be a psychological description of the process of actually becoming religious. When I speak of the "leap to faith," I do not mean to imply that one first examines the rational grounds of faith and then decides to become a believer; nor do I imply that such a decision is irrational.³⁵ Faith may be an unsought gift or it may result from conditioning in childhood or from one's later experience.³⁶ The following is the kind of analysis of the rational components of faith that lawyers are trained to evaluate.

The lawyer's professional work develops a rationalist mentality because, except for occasional vestiges and the weight of historical accident, our legal system is a rational body of rules, principles, and procedures. Lawyers are familiar with rules of evidence and rational modes of proof and persuasion. They know that there are differences in the degree of persuasion involved in a civil suit, in certain exceptional civil actions such as fraud, and in a criminal prosecution. These differences are formulated in terms of "preponderance of the

35. Even so staunch a rationalist as Brand Blanshard wrote, "[T]he very election of faith as an authority is, if the choice is responsible, itself an act of reason." B. BLANSHARD, *REASON AND BELIEF* 277 (1974).

36. For a thoughtful description see Price, *Faith and Belief*, in *FAITH AND THE PHILOSOPHERS* 3-25 (J. Hick ed. 1966).

evidence," "clear and convincing proof," and "proof beyond a reasonable doubt."³⁷ Does the preponderance formula mean that the jury must only believe that the plaintiff's evidence is more probable than that offered by the defendant? In this view a jury may not believe either side but only assess the respective probabilities. This has suggested an alternative view of the preponderance formula, namely, that the jury must to some degree believe that the plaintiff's evidence is true. "Clear and convincing" evidence has a more subjective reference to belief than the preponderance formula, but can it be distinguished from belief "beyond a reasonable doubt"? A logical distinction might be that "clear and convincing" evidence is compatible with a reasonable doubt and is thereby distinguishable from the maximum degree of belief required in a criminal case. It may be thought, however, that any doubt sincerely held by normal persons is a reasonable doubt. Despite these logical and linguistic difficulties it seems plausible that there are degrees of belief, better described, perhaps, as degrees of feeling or conviction that elude neat description.³⁸

These legal rules of evidence are reflections of "natural reason," and they could enter into dialogues in several ways, for example, to test the validity of theological arguments for the existence of God and to distinguish secular beliefs, even those held without any reasonable doubt, from faith that is so firm (Job's) that it excludes the slightest shadow of doubt and persists even in the face of evidence that on rational grounds is plainly contradictory. In these and other ways the rationality of the law of evidence in the trial of an issue of fact joins philosophical rationalism in raising pertinent questions about faith.

Against this background of the rationalism expressed in the law of evidence and of the above definition of faith, let us consider some obstacles to religious faith that confront the twentieth century mind, the most serious of which are the dominating positivist perspective enforced by popular views of science and the problem of evil. As to the first problem, it is certain that among educated believers the ancient "war between science and religion" is a thing of the past. Within its realm of generalized, verifiable descriptions of perceptible facts together with the supporting theories and hypotheses, science is

37. McBaine, *Burden of Proof: Degrees of Belief*, 32 CALIF. L. REV. 242 (1944).

38. See *State v. Sauer*, 38 Minn. 438, 38 N.W. 355 (1888).

recognized as supreme. One explanation or rationalization of this opinion is that science has its realm and methods and theology has its distinctive sphere of relevance and its methods — and never the twain shall meet; or, better, science and religion are different ways of interpreting the world. Some theologians, such as Kierkegaard and Barth, exclude as irrelevant not only science but also “natural reason,” in which view it follows that none of the so-called proofs of the existence of God is valid, and, by like token, aggravated by the difficulty of proving any negative proposition, science cannot prove that God does not exist.

A different direction, taken by Teilhard de Chardin, among other scholars, is that God in his infinite time and purpose works through and in nature, for example, in evolution; the laws and complexities of nature discovered by scientists only reveal God’s greatness and his consummate artistry. This perspective has the advantage of avoiding a mental dichotomy.

Skeptics, however, challenge the grounds of any religious faith, not merely the compatibility of orthodox religion with modern science. Such twentieth century minds are impressed, perhaps obsessed, by the fact that microscopic man inhabits a planet that is only a speck in an inconceivably vast universe; for educated persons the notion that a gigantic ghost is “out there” above the clouds is fantastic.³⁹ What is prominent and often dominant in the twentieth century is a positivist cast of mind that is skeptical of nonperceptible reality and intuitive knowledge and especially of any claim of mystical experience.

What can be said to these intellectuals in justification of one’s faith? First, there is the undeniable fact that, as Plato put it, the world is a cosmos, not chaos. Einstein, striking a similar note, said that the most incomprehensible fact of the universe is that it is comprehensible. These statements by Plato and Einstein, separated though they are by thousands of years, point to one plank that the believer stands on in justification of his faith — order implies mind, and cosmic order, God’s mind.

Although there is widespread skepticism of most of the alleged “proofs” of the existence of God, there is much appeal in this argument from purpose or design; even Hume made a grudging con-

39. See J. ROBINSON, *HONEST TO GOD* (1963).

cession to the validity of that thesis.⁴⁰ Order, as shown in the heavens, in the functions of the brain, and the purposive actions of human beings, is accounted for by the skeptic as the product of chance. Which is the more probable? Was it an accidental "big bang" that transformed gaseous matter into organic molecules that culminated also by chance in *homo sapiens*? Is it consistent with sole reliance on the indifference of natural forces that there was an ingredient in the evolutionary process that emerged in higher forms of life, culminating in man and civilization? It can hardly be doubted how jurors would assess the respective probabilities, and since even Hume gave some weight to the thesis from design, intelligent believers can hardly be accused of superstition if they find mind, will, and purpose manifested in the world and regard that as a rational support of their faith.

The appreciation of cosmic order is also a moving personal experience, an experience of awe and reverence. The beauty of landscapes, woods, oceans, and works of art stimulates not only an aesthetic response but also a sense of wonder. More wonderful still are those aspects of human life that are as mysterious as they are inspiring, for example, the fact that from the union of two microscopic cells should grow a Socrates, a Buddha, a St. Francis. Appreciation of beauty, of the achievements of science, with its implications for integrity and the value of truth, of countless other achievements, and, finally, of the wonder, awe, and reverence of creative, sustaining reality join the intellectual discovery of order and design to lend additional support to religious faith.⁴¹

Of equal or even greater importance as a rational step toward, or ingredient of, faith is that knowledge which, among rationalists from Plato onward, has formed a bridge from a perceptible world to transcendent reality, namely, knowledge of the existence or subsistence of relations and values. For example, we see a woman carrying an infant in her arms, but we do not see that they are related as mother and child; we apprehend or intuit that relation.

40. "In a word, CLEANTHES, a man, who follows your hypothesis, is able, perhaps, to assert, or conjecture, that the universe, sometime, arose from something like design . . ." "[T]he cause or causes of order in the universe probably bear some remote analogy to human intelligence . . ." D. HUME, *DIALOGUES CONCERNING NATURAL RELIGION*, pts. V & XII at 168-69, 227 (N.K. Smith ed. 1947) (1st ed. London 1779) (emphasis in original; footnote omitted).

41. For a discussion of the distinctive character of religious awe and wonder, see H. LEWIS, *OUR EXPERIENCE OF GOD* 107-10 (1959).

Again, given the propositions that all men are mortal and that Socrates is a man, we intuit their implication — that Socrates is mortal. There are innumerable interpersonal relations, and in current theology the I-Thou relation, in contrast with the I-It relation, is particularly suggestive. These and countless other relations are not merely events in our minds although, of course, minds are required to discover them. Nor are relations only words or ways of talking although speech is the only way to communicate one's apprehension of relations. Relations "exist" or subsist, and if that is granted, at least as a tenable rational interpretation, we have taken a long step from the perceptible world to transcendent reality, although not yet to divine Reality.

We come next to what for many is even more important in the justification of their faith, namely, their experience of values. Moral philosophers have built their systems on various ultimate postulates. For St. Thomas Aquinas it was a self-evident truth that one should seek good and avoid evil; Bentham's postulate was the pleasure-pain principle; for Kant, it was practical reason or what was logically presupposed in sound moral judgments. With all deference to these "great dead," it seems preferable to begin at least with one's personal experience of moral values. Everyone has wanted to do something or wanted very much not to do something either because of an emotional surge or a bias one way or the other or because of personal gain. At the same time, unless he is abnormal, he experienced a sense of duty and often acted in accordance with that obligation, sometimes against a very strong desire; like relations, obligations are not perceptible.

Another common experience is the use of moral language. Hardly a day passes without saying, "That is good, that is bad; I or he ought or ought not to do that; he should not have done that or omitted doing that." We praise the self-sacrificing hero and damn the ruthless dictator. If we are to defend the rationality of these daily expressions and our moral experience, we must reject the views (1) that obligation is a kind of desire; (2) that we acted as we did because we were conditioned to act that way — which only refers the problem to the past; (3) that moral values and religious experiences are illusions projected from a subconscious need for a father-substitute;⁴² and (4) that our valuations are mere expressions of emo-

42. With reference to Freudian and other causal explanations of religion that trace

tion or personal taste or of approval or disapproval or exhortation — though all of these may be involved. We argue about the *validity* of moral judgments, but we do not debate matters of personal taste; we do not argue with those who like raw fish, but we do argue for the validity of valuations supported by relevant facts.

What was said above about the subsistence of relations also applies to values. When we say, "There is a good, kind person," or "He did the right thing," at the same time rejecting the above positivist interpretations, we are driven to find some kind of existence for the stated moral qualities or the implied moral laws. Certainly, they are not figments of one's mind; approval or disapproval, to be sure, is mental and verbal, but the quality of what is approved or disapproved is not something that happened in someone's mind. Because those "somethings" are not perceptible, we are led again to a transcendent aspect of the world, a value cosmos.

Not only skeptics but also some rationalists who support the above indicated metaphysics of relations and values will object that this does not warrant "spiritualizing" moral values in a mysterious extra-human realm; why not recognize, as did Durkheim, that values are made by society? To this, the believer replies first, that man is part of the world; even if obligation and other values are man-made, that fact admits transcendence as part of the world. Second, even if it is granted that value judgments do not ascribe non-natural qualities to actions or events and that obligation does not exist apart from human attitudes, these attitudes must conform to objective principles or moral laws. These laws or principles are valid by reference to a reality that includes many facts which are beyond human creation, for example, the physical world, the structure and vulnerability of biological organisms, and the conditions necessary for human survival. Moreover, the unconditional character and absolutely compelling authority of these laws support the hypothesis of their dependence on a divine mind.⁴³ Of course, there are other rational hypotheses about these problems but none can claim the equal sup-

its origin to the child's relationship with his father or to other conditioning, apart from the question of the validity of those theories, it should be noted that a causal explanation of a belief must be distinguished from its justification. Suppose it to be true that one's need for a father-substitute and his conditioning in childhood led or caused him to become a believer. To *justify* that belief, one needs to give *reasons* in its support.

43. See A. EWING, *VALUE AND REALITY* 204 (1973).

port of great rationalist philosophers. Third, one is warranted in testing faith as a hypothesis by practice that brings further evidence of its validity. Faith sensitizes the believer to an appreciation of values that is inaccessible to the skeptic, and not least among the rational proofs is the satisfaction experienced in the religious life. In sum, faith is a complex conviction and experience composed of rational and nonrational, but not irrational, factors.⁴⁴ What distinguishes positivists, skeptics, and logically bound rationalists from believers is the fact that those who live religiously preserve a grain of mysticism that is neither the experience of what a psychiatrist might call hallucinations, nor an *a priori* faculty of mind, as Otto argues,⁴⁵ but is a kind of insight wrapped in emotion, a sensitivity of imagination and an unlimited capacity for awe and reverence.

Many readers are, I hope, in substantial agreement with the foregoing analysis, though they may prefer to stress other matters, such as the example of parents, their own instinctive turn to prayer in times of crisis, and their experience of a spiritual quality in I-Thou relations. Some, perhaps many, will balk at any religious commitment because they cannot reconcile an omniscient, omnipotent, perfectly good God with the evil of this world, the disease, famine, war, hunger, earthquakes, and the miserable lives led by so many millions of human beings. Worse yet is the history of religious persecution that extends from the trial of Socrates, "the best man in Athens," and of many others who challenged Greek religion, to the barbaric treatment of the Christian martyrs; it includes inquisitors and witch hunters, the wars of religion, and, in the present century, the genocide, and the existence of organizations dedicated to the destruction of those espousing other religions — all this in the name of religion!

Indeed, one might well conclude that if this earthly life is the "end-all" of human existence, it is impossible to reconcile the vast enormity of evil and pain with omnipotent benevolence. Among sensitive persons in the twentieth century, the inevitable questions are: Has religion done more harm than good? Is it not a divisive force rather than one that fosters fraternal affection? Even if the achievements of religion, such as respect for personality, the generosity and altruism that often go unnoticed, and the fostering of the arts, are greatly appreciated — still the question persists as to the

44. See note 35 *supra*.

45. R. OTTO, *THE IDEA OF THE HOLY* (2d ed. 1950).

balance. Specifically, does not Humanism offer more than religion? Many lawyers come to mind as examples: Clarence Darrow, an avowed atheist, who was a very compassionate human being; and Archibald MacLeish, the lawyer-poet whose drama *JB* ends on a note of agnosticism or atheism tied to an eloquent expression of love and compassion for all fellow creatures doomed to suffer the slings of fortune. No doubt, many other examples could be adduced.

Before the verdict is returned by those who cannot reconcile the evil of this world with the existence of an omnipotent, perfectly good Creator, let us pause for further reflection. In the first place, one must admit that evil sometimes serves a purpose, that facing evil is a necessary condition of courage, that poverty stimulates altruism, and that pity and even love are stirred by human suffering and need. Suffering sensitizes many persons to the troubles and disadvantages of others. Evil should not be isolated but should be considered in the full context of the conduct it engenders. Then there is the question of human freedom and the consequent imputation of persecution and much other evil to human beings, not to God. Still, it must be granted, most of the enormous harm wrought by earthquakes, flood, and lightning cannot be ascribed to human limitations.

For those who have not experienced the *numen* or the *mysterium tremendum*, something must be added or something must give way. Among the latter strategies is the belief that God, though perfectly good, is not omnipotent and that He suffers with suffering men and women. The difficulty here is that belief in a future in which wrongs will be righted and goodness prevail implies God's omnipotence. Despite all, the believer is sustained by an intuitive sense of mystery and, also, by the fact that the loss of faith would aggravate the pain.

Before the final verdict is rendered, especially regarding persecution and other harms committed by human beings, there are two additional steps to be taken to narrow the meaning of "religion." Here, perhaps, jurisprudence can make a contribution to theology, for in dealing with their subject matter, all legal philosophers are agreed that before a rule can be called "legal," the system to which it belongs must be substantially *effective*. This distinguishes positive laws from a set of ideals that do not influence conduct. The other direction is that taken by natural lawyers who, besides using uncontroversial criteria, limit "law" to morally valid enactments and decisions.⁴⁶

46. J. HALL, FOUNDATIONS OF JURISPRUDENCE 21-77 (1973).

If we apply these restrictions to "religion," several important consequences follow. "Effectiveness" implies that faith alone does not suffice to characterize a person as "religious." What counts equally is action; the test is action that expresses faith. This formulation — action expressing faith — may help to unite those who emphasize faith and those who stress works. If we also think that the soundest secular morality is a minimal essential of religion, we will distinguish "religion" from "cult" in ways that would exclude from "religion" not only fanatics who have persecuted or discriminated against persons of different beliefs but also sanctimonious observers of ritual and dogma.

I have discussed only a few of the problems that would be important in a dialogue on the interrelations of religion, law, and ethics, and for the most part I have tried to raise questions rather than to provide solutions. Discussion groups will differ in their preferences as to these and other topics they wish to explore. The influence of religious faith is so pervasive that it should probably be first on any list of topics to be discussed. Of almost equal importance is the language problem which involves not only the interpretation of texts but also interdisciplinary knowledge and the conditions of communication. The influence of religion on law and the reciprocal influence of law on religion suggest, first, a concentration on particular fields of law, then, a study of codes such as those of Hammurabi, Manu, and parts of the Koran and the Bible, and, thence, a consideration of the wider questions of law and equity, law and nonlegal agencies, and law and faith. Relevant in this context would be interrelations of comparative religion and comparative law. There are also many social, political, and economic problems that lend themselves to interdisciplinary discussion, and not least in importance among them are the problems of responsibility and how on that practical level the professions can best cooperate. The historical approach is important in the analysis and discussion of all the problems and so, too, are the views of great theologians, moral philosophers, and legal scholars.

I believe the time is ripe for a continuous discussion of these important questions. The interest of theology, ethics, and law and their interrelations is a sufficient reason for participation; in fact, many have found the study of these disciplines absorbing and often fascinating. One may also believe that the knowledge acquired by

members of the learned professions will filter through and be disseminated among large sections of the population, and, having allowed our hopes to soar, why should we limit them or the influence of the dialogue in any way or to one country?

Finally, on behalf of the editors of the *Hastings Law Journal* and, indeed, of the entire Hastings community, I thank the authors of the following essays for their distinguished contributions to the Symposium. I also thank James Luther Adams, Professor Emeritus in the Harvard Divinity School, who made many helpful suggestions, and my student assistants — Van H. Cline, a member of the staff of the *Journal*, and Margaret Susan Wilson, M.A., California Institute of Asian Studies. In 1976, I was for five weeks a Resident Scholar in the Rockefeller Foundation's Center at Bellagio, where the beauty of the setting was conducive to the study of theology and planning the Symposium.

