Correspondence

Law and Morality

To the Editors: You have performed a valuable service in your beautifully written articles on law and morality in the September issue ("Law and the Rightness [and Wrongness] of Things" by Richard John Neuhaus and "Law, Religion, and the Present Danger" by Harold J. Berman). The academic community generally, and leaders in the areas of law, religion, and philosophy in particular, should be grateful. Not nearly enough thought has been given to the nature of law and to its relation to morality and religion.

Because the authors' main contentions are, I believe, sound and much needed, what is required is a further and still more critical assessment of some of those claims. I am acting on the urge to share two items of constructive criticism.

The authors wish, first of all, to rescue the concept of law from debasement, i.e., treating it as no more than rules that now this, now that group, however large or small, chooses to agree upon and enforce. Second, Berman and Neuhaus want to insist upon the necessity of viewing law in a "transcendent" setting. They both hold that it must be viewed in dynamic relation to religion and/or some metaphysical *Weltanschauung*. On these points I believe they are essentially correct, but both points call for further clarification and analysis.

Concerning the first point—the definition of law—there is a double danger. On the one hand we face considerable difficulty in defining *any* general, universal concept; law, religion, art are terms philosophers have learned, from bitter experience, to define with great caution—if, indeed, one believed they can be defined at all. We are much less likely to get into conceptual trouble if we talk about laws and legal systems, about religions or specific arts. So Professor Berman's motive is highly commendable when he rejects certain positivistic and reductionistic conceptions of law, those that would reduce law to ad hoc rules having the purely utilitarian aim of getting "people to act in certain ways." But partly because of the danger of the general term "law," one may fall into the black-or-white fallacy, i.e., claiming that all laws are of one or the other sort. Some laws, it would appear, can be understood as primarily, if not exclusively, Rawls-like rules, which have a quite limited practical purpose, almost like rules in a game, and which have no massive metaphysical, religious, or similar implications and need no such ontological grounding. Other laws—probably most laws—do need to be seen in the larger context. Thus, it is one thing to decide, on purely utilitarian grounds, what highway speed limit will conserve the greatest energy, reduce the number of accidents, and the like. It is quite another matter to agree on the conditions under which a physician may legally remove the support system of medication from a terminally ill patient.

As for the second main contention, we must beware of the ease with which we appeal to "religion" and to "transcendence" as the necessary setting and grounding for law. *What* religion? What, precisely, is the transcendent on which law is grounded? The point is not that there is no answer; the point is that there are many proposed answers, and on no rational grounds are the candidates equally acceptable. I suggest that several of the most painful and deplorable situations we face today are the result of the control and use of law by a particular religion—more specifically, by the dogmatic claims of a particular religion. Orthodox Judaism in Israel and Ayatollah Khomeini's legalistic application of Islam to Iranian society are only two obvious and dramatic documentations of this point.

What is required is the intelligence and zeal of the authors of the articles in the September *Worldview*, assisted by the friendly analytic skills of like-minded philosophers.

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In Memoriam
THEODORE JACQUENEY
Worldview Associate Editor
1943-1979

WORLDVIEW
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