
BEFORE VIRTUE: HALAKHAH, DHARMAŚĀSTRA, AND WHAT LAW CAN CREATE

DONALD R. DAVIS, JR.*

The proper effect of law is to lead its subjects to their proper virtue.

Thomas Aquinas, *Summa Theologica*, 1–2, 92

I

INTRODUCTION

Among the many contributions made by Marc Galanter to legal scholarship are a few short works on Jewish identity and on Jews in American legal professions. More than his limited published work on aspects of law and Judaism, however, it is Galanter's regular reference to Jewish law in my conversations with him that has led me to explore a link between two places key to his work and his person, namely Israel and India.¹ About the latter, of course, Galanter has written extensively. But to be more precise, the link focused on in this article is actually that between traditional Jewish and Hindu legal texts,² neither of which are bound to a particular place, and neither of which form any significant theme in Galanter's writing. My argument is thus inspired by Galanter, and I hope agreeable to him, but not to be blamed on him.

The topic addressed in this short article is what law creates or produces. Justice is an obvious answer; order is another. Both concepts have long pedigrees in the realms of legal philosophy and political science, neither of which will be discussed here. Instead, this article focuses on another thing that both Jewish and Hindu jurisprudence claim that law can create—a human, not a biological *homo sapiens*, but rather the full ideal of what humans were meant to be. Indeed, it is the essential indistinguishability of law and religion in both traditional Judaism and Hinduism that permits the ideal human to be created through religious law.

Copyright © 2008 by Donald R. Davis, Jr.

This Article is also available at <http://www.law.duke.edu/journals/lcp>.

* Assistant Professor of Languages and Cultures of Asia, University of Wisconsin–Madison. The author would like to thank Charles Hallisey and Mark Csikszentmihalyi for helpful comments on earlier drafts of this article.

1. Galanter himself comments that the connection was made conceptually through his study and advocacy for legal pluralism in both Israel and India. See MARC GALANTER, *LAW AND SOCIETY IN MODERN INDIA* 300 n.8 (Rajeev Dhavan ed., 1989).

2. Galanter's footnotes also make occasional reference to the Confucian tradition as well. See *infra* notes 5, 9, 18.

More concretely, in Jewish and Hindu legal texts, the process of becoming fully human is centered on the study and practice of religious law. For Joseph Soloveitchik, Halakhah, the principal texts and process of Jewish law, can create the “Halakhic man,” a *tzadik*, even a prophet, who is not an obedient slave of God’s law but a cocreator with God of the Torah.³ For Medhātithi, a tenth-century commentator on the *Laws of Manu*, Dharmaśāstra, the texts and tradition of Hindu jurisprudence, can similarly create the “disciplined man” (*śiṣṭa*) who is so imbued with the spirit of the Veda, the perfect revelation, that he can create *dharma* (law or merit) through the force of his own personal substance.⁴ These are ideal horizons, but their importance is not diminished by the difficulty of their attainment. In each case, religion consists in great measure of legal reasoning and processes, the modern circumscription of law to courts, and contracts being a recognized substrate of religion and law in this larger sense.

II

LAW AS CREATOR

The ethical import of religious law has been studied many times. Most often the description of the religious ideal is discussed in terms of the acquisition or cultivation of a radiant morality—the human ideal being to become a moral exemplar whose excellence extends outward to the whole community.⁵ The shift in language from law to morality is troubling because it tends to privilege a view of religion as private and internal, a matter of the “spirit.” Thus, the present comparison centers first on law and what law implies for an understanding of the human ideal espoused in Halakhah and Dharmaśāstra. A conceptual emphasis on morality places the internal and the intuitive above the external and empirical. An emphasis on law, by contrast, suggests that ethical formation consists of refinements and training that respond to external authorities in a ceaseless process of self-examination. That examination of the self, however,

3. JOSEPH B. SOLOVEITCHIK, HALAKHIC MAN (Lawrence Kaplan trans., 1983). Soloveitchik’s views do not, nor were they intended to, represent the variety of Jewish thought on the status and interpretation of Halakhah. It is unimportant for my argument whether Soloveitchik accurately represents Jewish tradition, because his vision of what a Halakhic life is—a simultaneously religious and legal hermeneutic existence—offers a powerful understanding of a potential in the law that has been subdued.

4. See the discussion in Medhātithi’s commentary on *Laws of Manu* 2.6, translated in MANUSMṚTI: WITH THE ‘MANUBHASHYA’ OF MEDHĀTITHI 206–08 (Ganganath Jha trans., 1999).

5. For an example, see René Goldman, *Moral Leadership in Society: Some Parallels Between the Confucian “Noble Man” and the Jewish “Zaddik,”* 45 PHIL. E. & W. 329 (1995). Goldman’s essay is quite interesting, but underemphasizes the role of law in both Jewish and Confucian traditions. It seems shallow, for instance, to characterize the difference between Hillel and Shammai as being between learning and law, *id.* at 350, when both men’s views were valued and important to the formation of Rabbinic law itself. Similarly, to describe the Confucian tradition as possessing an “aversion to law,” *id.* at 358, seems unfairly to limit law to *fa*, in the stereotypical sense of legalism, rather than extending it, as many have done, also to *li*, the rituals and rules at the heart of Confucian ethical formation. For a good discussion of *li* and law, see R.P. PEERENBOOM, LAW AND MORALITY IN ANCIENT CHINA: THE SILK MANUSCRIPTS OF HUANG-LAO 124–30 (1993).

includes developing an awareness of one's actions by objectifying them and comparing them to legal norms.

Alasdair MacIntyre's *After Virtue* provocatively criticizes the state of contemporary moral philosophy and its history.⁶ For MacIntyre, the intractability of contemporary moral debates stems from the lack of shared goods in Aristotle's sense. People line up on either side of an issue and, because they lack a common teleological focus, they can never engage in rational argument, at least as subsumed by the movement toward a shared good.

MacIntyre's analysis of the problem is persuasive, but his solution—namely, a kind of return to Aristotelian virtues—is less so. MacIntyre appeals to his special definitions of “practices” and “internal goods” to define virtues.⁷ The missing element is that “practices” are undertaken in the shadow of, and “internal goods” are defined by, rules or laws that are themselves “socially established” and “cooperative” (even if they are theologically understood as eternal, given, and transcendent).⁸ Moreover, the practice of “practices” involves a repetitiveness and detailed attention to minor rules that closely resemble religious life itself.⁹ Maimonides, for instance, says, “Know that these moral virtues and vices are acquired and firmly established in the soul by frequently repeating the actions pertaining to a particular moral habit over a long period of time and by our becoming accustomed to them.”¹⁰ Finally, “internal goods” are defined as benefiting the “whole community” most often and most easily through an acceptance of a religious worldview that provides unassailable assumptions. In this way, law and religion—what MacIntyre calls “moralities of law”—play a larger role in the acquisition of virtues than he allows, precisely because that role is played most importantly *before* virtue arises.

6. See generally ALASDAIR MACINTYRE, *AFTER VIRTUE: A STUDY IN MORAL THEORY* (2d ed., 1984).

7. *Id.* at 187–91. MacIntyre defines “practice” as “any coherent and complex form of socially established cooperative human activity through which goods internal to that form of activity are realized in the course of trying to achieve those standards of excellence which are appropriate to, and partially definitive of, that form of activity, with the result that human powers to achieve excellence, and human conceptions of the ends and goods involved, are systematically extended.” *Id.* at 187. By “internal good,” MacIntyre intends the contextual and experiential good obtained through practice in his sense that leads to “a good for the whole community who participate in the practice.” *Id.* at 190–91.

8. *Id.* at 190. MacIntyre recognizes the importance and priority of rules but does not give sufficient weight to the powerful, sometime determinative, effect that rules and the community of preexisting “practitioners” have on the cultivation of virtue and the pursuit of goods. *Id.* at 190.

9. JONATHAN Z. SMITH, *IMAGINING RELIGION: FROM BABYLON TO JONESTOWN* 38–39 (1982), speaks of such repetition and “obsessive” concern for details and rules as the heart of religion. Quoting Freud, then adding his own remark, Smith states, “[L]ittle preoccupations, performances, restrictions and arrangements in certain activities of everyday life . . . elaborated by petty modifications . . . [and] little details . . . [the] tendency to displacement . . . [which] turns apparently trivial matters into those of great and urgent importance remains, for me, the most telling description of a significant (perhaps, even distinctive) characteristic of religious activity that I know.” *Id.* However, Smith says nothing of the transformative power of such repetition—precisely the emphasis found in Jewish, Hindu, and Confucian traditions.

10. MAIMONIDES, *ETHICAL WRITINGS OF MAIMONIDES* (Raymond L. Weiss & Charles E. Butterworth eds., 1975).

The unexplained element in MacIntyre's definition of virtue is that it is an "acquired human quality."¹¹ How is it acquired? The answer given by Jewish and Hindu jurisprudence is first through law, that is, through the study and practice of religious law. MacIntyre emphasizes virtue as something possessed before practice and the achievement of good. Jewish and Hindu traditions emphasize the reverse, however. They do so because an initially blind and repeated self-acceptance of the obligations and prohibitions of law, what MacIntyre calls "to enter into a practice,"¹² produces the experiential and practical insight into the "internal goods" of ideal Jewish or Hindu life that then subsequently modulates into virtue or virtues. The radiant morality of the Jewish *tzadik* or the Hindu *śiṣṭa* possesses a beauty that transcends the limitations of being outside a "practice," and its charismatic attraction may be the first impetus for entering into a "practice." Virtue manifests itself to the uninformed as beauty and charisma. At the same time, one cannot merely will or claim for oneself the possession of such virtues. Instead, the value of virtue, as opposed now to its beauty, can be appreciated only by someone who is already convinced of the value of the "practices" and the "internal goods" in each tradition.¹³ Law is collectively the first instrument, the practical embodiment, and, in an extended sense, the tangible reward of that conviction.

Rules are prior to repeated activity; repeated activity leads to socially established "practices"; "practices" achieve goods; and goods instill, and arise simultaneously with, virtues. Virtues, in this view, validate and naturalize the spirit of the rules and the value of the prescribed activity. Whereas virtues may appear to emerge innately in certain persons, the recognition of human qualities as virtues emerges only after "practice." The acquisition of the unity of virtues in Aristotle's sense¹⁴ is coextensive and contemporaneous with the acquisition of *eudaimonia*, true human flourishing as an ultimate good. Virtues do not precede *eudaimonia*; they constitute it.

For MacIntyre, law and virtue have to be informed by a teleology, a shared good, in order to have authority.¹⁵ The nurturing of virtue for MacIntyre, however, follows closely on the heels of the identification of that shared good.

11. Emphasis added. MacIntyre's full definition of virtue, *supra* note 6, at 191, reads, "A virtue is an acquired human quality the possession and exercise of which tends to enable us to achieve those goods which are internal to practices and the lack of which effectively prevents us from achieving any such goods."

12. *Id.* at 190.

13. In terms of MacIntyre's chess metaphor, *supra* note 6, at 188, one may be initially attracted by the sheer beauty of watching excellent chess without any knowledge of its rules. However, religious law of the sort described here would reject that someone could ever really learn to play chess well out of the desire for a merely "external good," including in this case its beauty. As MacIntyre himself suggests, external motivations are premised on the expectation that an appreciation or conviction of the "internal goods" in chess play will build in the person. "External goods," including both beauty and especially the "moralities of law," therefore, serve as more than enticements; they create the conditions of possibility or an openness to virtue that may be impossible otherwise.

14. On his view of the inseparability of virtues from one another, see ARISTOTLE, *NICOMACHEAN ETHICS* § 6.13.6 (Terence Irwin trans., 2d ed. 1999).

15. MacIntyre, *supra* note 6, at 258.

For Jewish and Hindu texts, by contrast, the shared good of Torah and Veda, respectively, is mediated in the first place by rules. And it is rules that promote the virtues that sustain a human life. In other words, laws are the first means of entry onto the religious path. They are an invitation to the rhetorical community associated with Torah or Veda.¹⁶ To think of laws as constraints on freedom is to misunderstand what true freedom is in these religio-legal worldviews.¹⁷ Law prescribes certain activities and demands certain restraints that enable new activities and new knowledge that are otherwise impossible. The repetition of such activities—whether it be related to ritual, diet, marriage, contracts, inheritance, or the suppression of crime—constitutes the normative practice of the community. Virtues come to be appropriated through a socialization in and self-yoking to that normative practice.¹⁸

Consider the structure of the famous *Laws of Manu*, for instance: the first half of the work, which gives detailed rules for the daily life of Brahmins of various kinds and in various stages of life, culminates in an altogether different listing of the “ten-point law.”¹⁹ This list includes what can only be called virtues: resolve, forbearance, self-control, understanding, learning, truthfulness, et cetera. Though it is a stretch to read the text as giving myriad rules that *result* in a handful of virtues, it is reasonable to view the *Laws of Manu* as placing first priority on *dharma* as a set of enjoined practices and only a distant, secondary importance to *dharma* as a collection of virtues.

The movement is really chronological. Virtue, being an acquired quality or habit, must be forged in the crucible of practices that conform to rules. All elements—rules, practices, and virtues—are equally important and equally constitutive of *dharma*, but one cannot obtain virtue without rules and practices.²⁰

More interesting, in contrast to a modern legal perspective, is that in this view practices that conform to rules *automatically* produce virtues or, better, material virtue or virtue-substance.²¹ Think, for example, of a man who

16. Cf. James Boyd White, *Law as Rhetoric, Rhetoric as Law: The Arts of Cultural and Communal Life*, 52 U. CHI. L. REV. 684, 691 (1985) (“The law is an art of persuasion that creates the objects of its persuasion, for it constitutes both the community and the culture it commends.”).

17. Hegel defined freedom in a similar way, though the *telos* of his *Rechtsphilosophie* was, of course, the State. See G.W.F. HEGEL, ELEMENTS OF THE PHILOSOPHY OF RIGHT § 149 (H.B. Nisbet trans., 1991).

18. Cf. PHILIP J. IVANHOE, CONFUCIAN MORAL SELF CULTIVATION 5 (2d ed. 2000) (“The willingness to submit to mutually agreeable ‘rules’ or forms of play is the beginning of one’s sense of ritual propriety.”).

19. PATRICK OLIVELLE, MANU’S CODE OF LAW: A CRITICAL EDITION AND TRANSLATION OF THE MĀNAVA-DHARMAŚĀSTRA § 6.91–93 (2005). Compare this with *Laws of Yājñavalkya* § 1.122, where a similar list is given. For a complete English translation of the *Laws of Yājñavalkya*, see VISHWANATH NARAYAN MANDLIK, VYAVAHARA MAYUKHA OR HINDU-LAW (1880).

20. Cf. Paul Hacker, *Dharma in Hinduism*, 34 J. OF INDIAN PHILOS. 479, 490 (2006). One may compare rules, practices, and virtues of *dharma* to Hacker’s distinction of *dharma* before, during, and after its performance or realization (*Vollzug* in the original German).

21. Such an assertion also runs counter to MacIntyre’s distinction of external and internal goods, for one can possess the former outright and yet have no virtue at all, while the latter relies on rules only as a necessary, but neither efficient nor sufficient cause.

annually cheats on his taxes by exaggerating his charitable contributions. If he, short of being audited and prosecuted, stops this practice in order to conform to the legal rule, then he might be said to have acquired an incremental increase in his honesty-substance. He may be known publicly as an honest man, but society does not normally count mere reputation as true virtue. Still, his virtuous act is itself lawful, good, and incrementally beneficial to his own true virtue. The point from the Hindu law side, however, is that virtue is not an absolute possession but is rather directly linked to what one actually does as measured against the empirical sources of *dharma*.²² One has the ten-point law in direct proportion to one's observance of the great variety of *dharma*s.²³ In this way, though the law cannot recognize virtue as such, rather only conformable action, it can produce virtue or virtue-substance. In Hindu jurisprudence, it is not *dharma* merely to think "virtuously" about performing rituals, abstaining from certain foods, charging appropriate interest, et cetera. Once one does act according to rule, however, a virtue-substance is produced.

Now, this does not sound right today because we all agree that law and morality can diverge, that a virtuous person can be legally condemned while a corrupt person is enabled by the law.²⁴ But, from the perspective of these religious laws, rules must start the process off and are fundamental. The amassing of virtue-substance through good practice insists that virtue cannot precede good practice in the first instance. Virtue-substance once obtained may be "spent" in the further pursuit of goods through practice, but it may equally be "spent" pursuing practices that do not conform to and are not *dharma*.²⁵ Here, think of the converse case of a man who has always properly paid his taxes but this year decides to fudge things a bit for a new car. Supposing these two hypothetical men sent their taxes in on the same day: which of them at that moment is virtuous? Would it solve the problem if the second man did it to pay for his dying wife's cancer treatments? In this case, virtue as a moral possession is meaningless because it becomes a game of weighing the relative good produced by two different actions without a way to evaluate which is better. Such explorations in obsessive hypothetical problem-solving, what Pincoffs famously called "Quandary Ethics," lead one away from the integration of law,

22. Cf. MAIMONIDES, MISHNEH TORAH (Vol. 1, Book of Knowledge), LAWS OF REPENTANCE § 3.1 (Moses Hyamson trans., 1974): "One whose merit surpasses his iniquity is a *tzadik*."

23. The status of the virtues among the famous renouncers of the Hindu tradition is a different matter, and many different opinions have been given about their legal status and rights and about the prerequisites necessary to have the virtue-without-dharmic-action existence that they are sometimes said to have. See generally Patrick Olivelle, *Renouncer and Renunciation in the Dharmasāstras*, in STUDIES IN DHARMAŚĀSTRA (Richard W. Lariviere ed., 1984).

24. Hindu legal texts such as the *Laws of Bṛhaspati* recognized this, too: "The issue of a lawsuit may convert a thief into an honest man, and an honourable man into an offender." See JULIUS JOLLY, THE MINOR LAW-BOOKS 284–85 (1889).

25. MACINTYRE, *supra* note 6, at 200–03, recognizes this possibility and responds with an appeal to shifting contexts and circumstances within a view of the "unity of life," an oscillation between potentially tragic conflicts of goods that are each contextually virtuous, but that can only be ordered relative to each other by an appeal to a transcendent virtue of constancy or integrity.

religion, and ethical virtues envisioned in Hindu jurisprudence.²⁶ Moreover, this kind of tragic conflict of virtues would, in Hindu law, be restated in legal terms as the determination of the proper scope of rules in particular contexts—a determination that Hindu law insists must occur with marked realism and situational reasoning.²⁷

Turning to Jewish legal traditions, Deuteronomy 30:16 states: “If you obey the commandments of the LORD your God . . . then you shall live” Starting from this passage, Calum Carmichael builds an interpretation of the unity of seemingly disparate Deuteronomic laws on the basis of an insistent separation of life and death.²⁸ The close association of law and life throughout is itself a theme evident in later Rabbinic works to the modern day, as in Maimonides: “[L]ife . . . is the reward for performing the commandments”; “the Torah; this is the tree of life.”²⁹

The strong formulation of this sentiment in the work of Soloveitchik leads to a further point about the relation of law and the ideal, virtuous human life. Soloveitchik understands the study and practice of Halakhah as not merely enabling human life, but as affirming it: “God commanded man, and the very command itself carries with it the endorsement of man’s existence.”³⁰ This affirmation also permits and, in his view, demands a human responsibility for creation, especially, but by no means limited to, self-creation. The links between command and creation for Soloveitchik are, first, “contraction” (*tzimtzum*), the idea that the transcendent and infinite can become concrete and finite, and, second, the holiness connected to this “descent of divinity.”³¹ Soloveitchik in fact makes a direct equation of these elements: “the realization of the Halakhah=contraction=holiness=creation.”³² In this magisterial vision of the potential of human life, law’s realization, what throughout this article has been called its study and practice, is coextensive with a religious view that understands an individual’s creation of the self as both the highest gift and the highest burden. It would have tainted the majesty of his vision if Soloveitchik had considered just how common or practicable his beautiful ideal of law and human life is for most people. The rarity of achieving the exalted status of prophet, the end and goal for Soloveitchik,³³ forces us to ask again how virtues manifest in most lives.

26. Edmund Pincoffs, *Quandary Ethics*, 80 MIND N.S. 552 (1971).

27. See Donald R. Davis, Jr., *A Realist View of Hindu Law*, 19 RATIO JURIS 287 (2006); Donald R. Davis, Jr., *Maxims and Precedent in Classical Hindu Law*, 33 INDOLOGICA TAURINENSIA 33 (2007).

28. CALUM CARMICHAEL, *THE SPIRIT OF BIBLICAL LAW* 126–41 (1996).

29. MAIMONIDES, *supra* note 10, at 169.

30. SOLOVEITCHIK, *supra* note 3, at 71.

31. *Id.* at 108.

32. *Id.* at 109.

33. See *id.* at 128.

My reading of Jewish and Hindu legal texts suggests that with rare (but crucial) exceptions, people cannot be virtuous, only their actions can be.³⁴ Law can create prophets, Halakhic men, sages, and divine beings, but it usually does not. For *becoming* virtuous as a kind of permanent status is reserved only for a special few who not only embody the law but also transcend it. And, it is only *by means* of the law that one can transcend it. For the rest of us, however, this kind of transcendence is an aspirational horizon, part of what motivates us to make our discrete actions lawful and virtuous. The realizations of law do accumulate virtue—substance in the individual and that accumulation *tends* to lead to continued, virtuous action because of the realization of the “internal goods” achieved at the same time. A definitive, and seemingly irreversible, change of status to the point of being unable to act against law and virtue is justly placed in the grasp of only the mythological few.

III

CONCLUSION: CONTEMPORARY IMPLICATIONS

It is unfair and unreasonable to expect this very strong ideal of ethical cultivation enabled through the study and practice of law to take hold in contemporary legal settings, especially because of the religious assumptions and leaps of faith that made such views possible in both traditional Jewish and Hindu law. Nevertheless, something valuable may still be learned through an encounter with religious legal texts such as Halakhah and Dharmaśāstra. Even a limited appropriation of the ideals set forth in Jewish and Hindu legal texts—not to mention ideals in Islamic, Confucian, and other religious legal traditions—could create the possibility for law students, lawyers, and other professionals to move beyond the materialistic and instrumentalist prepossessions that afflict law today.³⁵ The vocational applications of law and the intense preparations needed to pursue them must, of course, be preserved, but the modern habit of leaving the law at the courtroom door should be broken in favor of seeing what law can create outside as well—not only the “justice in many rooms” of Galanter’s legal pluralism,³⁶ but also the ethical liberation of law as duty and ethos.

It is difficult to say how best to incorporate the value of “what law can create” into contemporary settings without an explicit tie to a particular religious tradition. One way is exemplified in the work of Harold Berman, who has carefully examined the role of religion in the formation of Western legal systems and, on that basis, advocated an “integrative jurisprudence” that moves

34. It is interesting to note in this connection that both *mitzvah* and *dharma* have the dual sense of rule and the result of observing the rule. The good results produced by “doing *mitzvahs*” and “performing *dharmas*” are conceived as substances that an individual possesses.

35. BRIAN Z. TAMANAHA, *LAW AS A MEANS TO AN END: THREAT TO THE RULE OF LAW* (2006), gives a devastating critique of the instrumentalism of contemporary jurisprudence.

36. Marc Galanter, *Justice in Many Rooms: Courts, Private Ordering, and Indigenous Law*, 19 J. LEGAL PLURALISM 1 (1981).

between legal theories that many consider incommensurable.³⁷ Within legal studies, a vibrant group of scholars is working on law and religion, and there Berman's efforts have borne fruit. Within religious studies, however, law is at best a marginal topic. Expanded approaches to law from the side of religious studies, both academic and theological, would reveal the importance of law to religious ethics in greater detail.³⁸ In both academic and theological arenas, furthermore, a greater focus on law will affect a larger segment of society in the form of students and practitioners who would also be able to see the historical importance of law to religion and the artificiality of their present separation.

Another way of communicating "what law can create" to a larger audience that would include legal professionals is represented by the law-and-literature or law-and-humanities fields. The problem in these fields, however, is that they suffer from precisely the kind of irresolvable moral debate that MacIntyre so effectively criticizes. The two sides are, allegedly, those who think literature and other humanistic study make people better or more moral and those who think this is absurd—as any observation of people's behavior reveals. On the latter side, Richard Posner has undoubtedly caught more than a few scholars overstating the case for what literature can bring to the study and practice of law, not to mention to their own moral situation.³⁹ No matter how often it may be heard at humanities pep rallies, it seems impossible to demonstrate that studying literature *by itself* makes people better, more moral, and so forth. At the same time, Posner gives an uncharitable reading of the works of White, Nussbaum, and others in the law-and-literature field, calling them collectively the "edifying school of legal scholarship."⁴⁰ An engagement with the humanities, including the kind of ethical study of law outlined here, yields not a greater personal morality, but rather an expansion of the capacity for criticism generally. Said's meditation on humanistic education makes the case without reference to law:

[H]umanistic study, with all its inner movements, disputed readings, contentious as well as cerebral ratiocinations . . . can move beyond and inhabit more than just the original privacy of the writer or the relatively private space of the classroom or inner sanctum . . . [into] widening circles of awareness And this is what resistance is: the ability to differentiate between what is directly given and what may be withheld . . .

37. See HAROLD J. BERMAN, *LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION* (1983); HAROLD J. BERMAN, *LAW AND REVOLUTION, II: THE IMPACT OF THE PROTESTANT REFORMATIONS ON THE WESTERN LEGAL TRADITION* (2003); Harold J. Berman, *Toward an Integrative Jurisprudence: Politics, Morality, History*, 76 CAL. L. REV. 779 (1988).

38. For what an incorporation of law in Hindu studies might look like, see Donald R. Davis, Jr., *Hinduism as a Legal Tradition*, 75 J. AM. ACAD. RELIGION 241 (2007) and DONALD R. DAVIS, JR., *Law*, in *STUDYING HINDUISM: KEY CONCEPTS AND METHODS* (S. Mittal & G. Thursby eds., 2008). For an interesting comparative perspective on law in Islamic ethics, see A. Kevin Reinhart, *Islamic Law as Islamic Ethics*, 11 J. RELIGIOUS ETHICS 186 (1983).

39. See RICHARD A. POSNER, *LAW AND LITERATURE*, 305–44 (rev. ed., 1998).

40. Posner, *id.* at 307–26, reduces the arguments of Nussbaum, White, West, and others to a common case that literature functions to edify. This not only collapses the differences between the individual arguments but also oversimplifies their common argument that, in my view, advances literature as a means of bringing to consciousness fundamental human problems, forms of suffering, and conflict, not of guaranteeing a moral response to such awareness.

because one's own circumstances as a humanistic specialist may confine one to a limited space . . . or because one is indoctrinated to recognize only what one has been educated to see or because only policy experts are presumed to be entitled to speak Does one accept the prevailing horizons and confinements, or does one try as a humanist to challenge them?⁴¹

While one may not agree with Said's default subversiveness or resistance, one can still appreciate the power of humanistic study to produce expanding awareness, the possibility of empathy, and the courage to criticize. A recognition of these capacities as goals of humanities education might erase the divide over the role of literature in law and of law in the humanities. Greater integration of the two—pragmatically, more humanities courses in law schools and more law courses in colleges of arts and sciences—has tremendous potential to revive the idea and the experience that law can create good, not primarily as a tool of social engineering, but as a necessary point of entry to the formation of ethical habits and the *possibility* of ethical choice for the good.⁴²

In this way, law once again appears before virtue, and although it may not ensure that people make virtuous choices from then on, the study and practice of law as ethics and duty does create the very conditions of possibility for informed, free (and, therefore, ethical) choice.⁴³ Without the humanities, one is fettered by prejudice. With the humanities, prejudice becomes the hermeneutical starting point for lifelong acts of self-creation and self-conversation that are otherwise impossible.⁴⁴ The examples of Jewish and Hindu views of law, while not directly applicable in most contexts, do nevertheless provide models of and for the role that legal study and legal observance can play in the creation of democratic citizens—people who are aware of the “internal goods” of law and other human institutions, who participate in their “practice,” and who have, therefore, earned the right to criticize them when necessary.

41. EDWARD W. SAID, HUMANISM AND DEMOCRATIC CRITICISM 75–76 (2004).

42. It is worth indicating that the kind of integration I intend would not mean simply more courses on *Billy Budd* and *The Trial*, but an incorporation of legal studies into history, religion, art, and any other humanistic field creative scholars might find productive.

43. The emphasis on law's capacity to produce virtue—substance as opposed to virtuous persons in both Jewish and Hindu legal texts has implications for current discussions of “virtue jurisprudence.” The small group of scholars who try to relate virtue ethics to law tend to take for granted the process by which virtue is formed in the first place. That assumption needs to be reexamined, perhaps along the lines suggested here. On “virtue jurisprudence,” see Lawrence B. Solum, *Virtue Jurisprudence: A Virtue-Centered Theory of Judging*, 34 METAPHILOSOPHY 178 (2003) and ROBERT P. GEORGE, MAKING MEN MORAL: CIVIL LIBERTIES AND PUBLIC MORALITY (1995). For a critique, see R.A. Duff, *The Limits of Virtue Jurisprudence*, 34 METAPHILOSOPHY 214 (2003).

44. I refer here, of course, to Gadamer's rehabilitation of prejudice in the context of the “human sciences.” See HANS-GEORG GADAMER, TRUTH AND METHOD 277–307 (Joel Weinsheimer & Donald G. Marshall trans., 2d ed. 1989).