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THE GOSPEL IN THE LAW: THE JURISPRUDENCE OF PASTOR NEUHAUS

EDWARD MCGLYNN GAFFNEY, JR.*

In the recent history of the Lutheran Church there have been two pastors who in my view resemble one another in many important respects: Richard John Neuhaus and Dietrich Bonhoeffer.¹ Since, as Shakespeare put it, "comparisons are odorous,"² it might be well to note at the outset some striking dissimilarities between Bonhoeffer and Neuhaus. First, there are some obvious differences in the context of Hitler's Germany within which Bonhoeffer lived and died as a modern martyr in 1944, and the American context of Neuhaus' pastorate, even in the turbulent '60's and early '70's. Another significant difference lies in the fact that Bonhoeffer felt at home with the American "realists" like Reinhold Niebuhr. Neuhaus, in his centennial address at Valparaiso University Law School, intimated his posture on theological pragmatism by citing with approval Herbert Butterfield's famous aphorism that realism is not a school of thought but merely a boast.³ A third major difference is that Bonhoeffer, at least in his earlier stage, accepted a stereotypical theological view of Jews all too common among Christians. After Hitler's promulgation in 1933 of the "Aryan Clauses" which excluded those of Jewish origin, regardless of religious affiliation, from holding office in the state, Bonhoeffer wrote a brief tract on "The Church and the Jewish Question." He observed that "the Jews [not the Romans] had nailed the redeemer of the world to the cross" and that they must, therefore, "bear the curse for [their] action through a long history of suffering. . . . But the history of the suffering of this people, loved and punished by God, stands under the sign of the final homecoming of the people of Israel to its God. And this homecoming happens in the conversion of Israel to Christ."⁴ After the holocaust, these views were repudiated by many

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1. For a comprehensive biography of Bonhoeffer, see E. BETHGE, DIETRICH BONHOEFFER: MAN OF VISION, MAN OF COURAGE (1970).

2. Shakespeare, *Much Ado About Nothing*, Act III, scene 5.

3. Neuhaus, *Law and the Rightness of Things*, 14 Val. U.L. Rev. 1 (1979) [hereinafter cited as Neuhaus].

4. D. BONHOEFFER, NO RUSTY SWORDS: LETTERS, LECTURES AND NOTES, 1928-1936 226 (1965).

Christian theologians, including John T. Pawlikowski.⁵ Pastor Neuhaus would undoubtedly take issue with Pawlikowski's reliance on some recent works of liberation theology. But it seems clear from Pastor Neuhaus' long and fruitful associations with rabbis like Abraham Heschel, from articles on Israel in the magazine edited by Neuhaus,⁶ and from the reference in the centennial address to the need for Christianity to reestablish its "bond with *living Judaism*,"⁷ that Neuhaus would basically agree with Pawlikowski. At least Neuhaus takes a more nuanced and more thoughtful position on the role of the people of Israel in saving history than did the early Bonhoeffer.

On the other hand, there are some striking similarities between Neuhaus and Bonhoeffer. Unlike the editors of the religion section of popular news magazines, I am of the view that Bonhoeffer was passionately concerned about the purity or orthodoxy of the Christian faith. Similarly, Pastor Neuhaus may fairly be characterized just as staunch in resisting any dilution of the Christian message.⁸ Another interesting point of contact between Bonhoeffer and Neuhaus is unusual among Lutheran pastors: neither chose to marry. Although neither would countenance an absolute ecclesiastical rule coupling celibacy and Christian ministry, it is not insignificant that both in fact have been celibates for the sake of the Kingdom (*Matthew* 19:12), or persons able to spend prodigious amounts of energy in the bold proclamation of the gospel of Christ. Thirdly, both are well known theologians who, while remaining loyal sons of the Reformation, became notable leaders in the ecumenical movement for greater unity among the divided Christian churches.⁹

The chief point of contact between these two remarkable Lutheran pastors which fascinates me is their reflections on the significance of law and gospel. Both Bonhoeffer and Neuhaus reflected on these issues at a time when both law and gospel are

5. Among Pawlikowski's many contributions on this theme, see J. PAWLIKOWSKI, *THE CHALLENGE OF THE HOLOCAUST FOR CHRISTIAN THEOLOGY* (1978).

6. See, e.g., Sherman, *Speaking of God after Auschwitz*, 17 *WORLDVIEW* 26, 29 (Sept. 1974).

7. Neuhaus at 13 (emphasis supplied).

8. This aspect of Pastor Neuhaus' career may be illustrated by the leading role he played in organizing the "Hartford Statement," a response in 1975 by several leading American theologians to what they perceived, *inter alia*, as a loss of a sense of divine transcendence in some of the writing of some of their colleagues. See P. BERGER & R. NEUHAUS, *AGAINST THE WORLD FOR THE WORLD* 1-5 (1976).

9. This aspect of Pastor Neuhaus' career is reflected in the concluding section of his centennial address. See Neuhaus at 13.

threatened with a profound loss of meaning and purpose, and when the relationship between church and state is experiencing a stormy period. These themes are central in the address given by Pastor Neuhaus at the centennial celebration of the Law School at Valparaiso University. I consider it an honor to add a few comments in response to that address concerning the jurisprudence of Pastor Neuhaus, and on the implications of that philosophy (and theology) of law for legal education in a Lutheran law school.

THE JURISPRUDENCE OF PASTOR NEUHAUS

The jurisprudence sketched by Pastor Neuhaus in his address contained three noteworthy features; a definition of law that is historical in character rather than naturalistic, a refutation of the irrationality of modern rationalism in legal theory, and an invitation to discern the "numinous character" of the law.

To be sure, I have the sorts of reservations about Pastor Neuhaus' jurisprudence that one expects a commentator or reactor to have. Unlike many academic reactors I have encountered, however, I should like to underscore my profound agreement with the main thrust of his essay at the outset, and leave my discussion of some problematic areas I see in the essay to later.

Historical Definition of the Law

The first feature of Pastor Neuhaus' jurisprudence which strikes me as extremely valuable is his insistence that law is not a bundle of eternal verities, but "is part of that communal experience we call history, including this present moment."¹⁰ Neuhaus says that what he means by "the law" (distinguished from particular laws) is a "network of binding to which we are related by moral sentiments,"¹¹ such as "shame, guilt, resentment, indignation, reciprocity, trust, [and] mercy,"¹² all of which are "inherently relational."¹³ For Neuhaus the law is at once profoundly personal¹⁴ yet "preeminently a social phenomenon" and "by definition a public enterprise, . . .

10. *Id.* at 1.

11. *Id.* at 4.

12. *Id.* at 3.

13. *Id.* "[Moral sentiments] do not exist in a vacuum; the experience is related to someone or something beyond itself. Guilt is to say you are sorry; gratitude is to give thanks; resentment is to protest." *Id.*

14. "[H]owever much our ideas may be socially constructed and conditioned, it is as individual persons that we give our yes or no to the moral sense that is the foundation of law." *Id.* at 5.

trans-subjective."¹⁵ When Neuhaus essays a definition of the law, each of the above threads are woven together:

The law is more than a body of rules; it is the historical, living process of people legislating, adjudicating, administering, and negotiating the allocation of rights and duties. Its purpose is to prevent harm, resolve conflicts, and create means of cooperation. Its premise, from which it derives its perceived legitimacy and therefore authority, is that it strives to anticipate and give expression to what a people believes to be its collective destiny or ultimate meaning within a moral universe.¹⁶

Perhaps the most laudable feature of this historical definition of law is that Neuhaus has in a stroke managed to transcend the individualist bias of the Enlightenment that has informed so much of western legal thought. In so doing Neuhaus resembles the German theologian, John B. Metz, who has sharply criticized the formal emphasis of much of contemporary theology on the existential situation of an individual decision.¹⁷ Like Metz, Neuhaus has a view of history in which people matter, not solely as solipsistic or atomistic units, but as members of a community which understands the meaning of solidarity.

A second important element of Neuhaus' insistence on the historical character of the law is its openness to the future. At one point he writes of the "anticipatory" quality of the law in the following terms: "It reaches forward, so to speak, to embrace an excellence of 'right order' that has not yet been actualized. Law is therefore always provisional, the 'isness' never perfectly embodies the 'oughtness' the 'now' is at its best only a preview of the promised 'not yet'."¹⁸ This statement undoubtedly describes the experience of all of us who deal with the law. Even those who would reduce American law to some tidy and orderly schemes (such as the dons of the American Law Institute with their restatements and model codes) would concede that their efforts are never at an end. Although the experience is familiar, the terms Neuhaus uses to describe it are probably not, for he has appropriated the language of

15. "However we severally acknowledge that which is binding, it is together that we spell out those acknowledgements in the bonding that creates community." *Id.*

16. *Id.* at 6.

17. See J. METZ, THEOLOGY OF THE WORLD 108-11 (1971).

18. Neuhaus at 11.

contemporary theologians like Oscar Cullmann¹⁹ and Werner Georg Kümmel.²⁰ They reemphasized the contrast between a linear, forward-moving concept of time found in the Bible and a pagan model of cyclical time in which there is no real progress but only eternal return.²¹ Neuhaus, indeed, explicitly refers to Eliade and others who have noted a strong similarity in this respect between the "scientific" worldview of the Enlightenment and the "primitive" worldviews of ancient times:

There is finally no real history, no real contingency, no real change; the world is either composed of static entities or what looks like change is simply a cyclical recurrence of the same old thing. The Judeo-Christian tradition, however, is premised upon the notion of real history, real change, happening in an incomplete universe that is still awaiting its promised fulfillment.²²

This focus on the future is the key to another element in Neuhaus' theological jurisprudence—his distinction between covenant and contract. This distinction occurs only once at the beginning of the centennial address and without pointed reference to categories of time: "Contracts spare us the uncertainties of human relationships. The covenant of trust mutually pledged is, by comparison, precarious and arduous in its demand for constant renewal in love."²³ Neuhaus regards the covenant-contract distinction as crucial to the way we think about this country, its past, present, and future. And he has explicitly read into these categories a temporal schema. The first way of thinking is for Neuhaus future-oriented: "Covenant thinking envisions America as a lively experiment with promises to keep and a destiny to be realized within universal history. . . . The covenant appeals to the future for its ultimate legitimation. It can finally be 'proved' correct only by the vindication of reasonable hope."²⁴ By contrast, Neuhaus views contract thinking as locked into the past:

19. See O. CULLMANN, *CHRIST AND TIME: THE PRIMITIVE CHRISTIAN CONCEPTION OF TIME AND HISTORY* (2d ed. 1964); O. CULLMANN, *SALVATION IN HISTORY* (1967).

20. See W. KÜMMELE, *PROMISE AND FULFILLMENT: THE ESTHATOLOGICAL MESSAGE OF JESUS* (1957).

21. See, e.g., M. ELIADE, *THE MYTH OF THE ETERNAL RETURN* (1954).

22. Neuhaus at 11. Neuhaus likewise suggests that "the idea of the 'ongoingness' of law—the way it develops and grows incrementally and corrects itself—is independent upon the Judeo-Christian understanding of history." *Id.*

23. *Id.* at 1.

24. R. NEUHAUS, *TIME TOWARD HOME* 128 (1975).

The contract metaphor, on the other hand, suggests a rational ordering of processes and goals, a bargain struck and adhered to for mutual advantage. . . . Contract thinking must seek its legitimating foundations in what already exists. In its search it turns toward a Golden Age to be reestablished or to some other version of what is "natural." Contract doctrine is closely linked in one way or the another to the Edenic Myth.²⁵

Both Neuhaus' general view of the historical character of law and his distinction between covenant and contract are put to use in his critique of John Rawls' *A Theory of Justice*.²⁶ Neuhaus notes in his centennial address that Rawls' "noble effort" is "elegantly argued and justly influential" and that it "should be welcomed by all who care about the foundation and future of law."²⁷ After summarizing the basic argument of the book, Neuhaus offers the telling criticism that Rawls' "laudable intention" (of restoring "legitimacy to law by developing a normative truth to which otherwise capricious laws are subject"²⁸) miscarries because it denies that law is a historical, living process in which real people allocate rights and duties:

Rawls' people behind the veil are, in fact, non-persons. They have no history, no tradition, no vested interests, no self knowledge, no loves, no hates, no dreams of transcendent purpose. Instead of re-thinking life and law, Rawls has simply subsumed life into a totally abstracted notion of justice that could not be farther removed from the real world in which the legitimacy of law must constantly be renewed.²⁹

Neuhaus links Rawls with contract thinking which, as we have seen, Neuhaus regards as bound up with the past: "Rawls and many other theorists assume a universe in which everything is already in place."³⁰ In *Time Toward Home*, Neuhaus makes this criticism more pointedly:

Rawls rests everything upon the logic emerging from "the original position." Again we encounter, although in new and intriguing form, the Myth of the Return. If only we

25. *Id.*

26. J. RAWLS, *A THEORY OF JUSTICE* (1971).

27. Neuhaus at 9.

28. *Id.* at 10.

29. *Id.* at 10-11.

30. *Id.* at 11.

can get back behind history, if only we can abrogate the particularistic distortions caused by experience in time, we will somehow get in touch with the really real. . . . As with almost all who would discover the truth in Nature and, so incidentally, Nature's God, Rawls would argue from a static and . . . highly mechanistic universe Like Bacon, he would have us play hide-and-seek with a reality that has been hidden by history and is to be sought in nature, including "human nature".³¹

Because Neuhaus understands reality as an unfulfilled, still-provisional project, he can only regard Rawls' theory of law as seriously flawed. Rawls' theory gives priority to an atemporal and hypothetical view of the law which Neuhaus associates with contract thinking. In short, Rawls fails because he attempts to write on an historical subject, law, without taking history seriously.

Perhaps the most extraordinary ahistorical component of Rawls' theory is his "special assumption in that a rational individual does not suffer from envy."³² This assumption is of course a convenient one, for in a stroke Rawls has eliminated the rationality of evil in human history. In this view, though evil be massive and grotesquely genocidal as Cromwell on the Irish, or Hitler on the Jews, it may not be viewed as real in a theory of justice because it is merely irrational. To be sure, some scholars have explicitly supported this notion by claiming, for example, that it is immoral to search for meaning in the holocaust.³³ Others, however, insist that although it might offer some relief to place the holocaust in the category of the irrational, that choice must be eschewed:

One must recognize the rational origins of the Holocaust. It was a planned event with roots in philosophies developed by thinkers still recognized as giants of liberal Western thought. In reflecting about the Holocaust, one must confront theological attitudes central to Christianity almost from its inception. The ideological parents of the Holocaust—Western philosophy and Christian theology—represent the mainstream of western culture and not its lunatic fringe.³⁴

31. R. NEUHAUS, *supra* note 24, at 134; *but see* note 78 *infra*.

32. J. RAWLS, *supra* note 26, at 143.

33. *See, e.g.,* Fackenheim, *The People Israel Lives*, 87 CHRISTIAN CENTURY 563-68 (1970); E. FACKENHEIM, *GOD'S PRESENCE IN HISTORY* (1970).

34. J. PAWLIKOWSKI, *supra* note 5, at 4.

Neuhaus clearly comes down on the side of confronting the full horror of historical events like the holocaust. He integrates this choice into his theory of law when he rejects the ahistorical contractual model of rationality constructed by Rawls as "an indulgence of naturalistic fantasies about human nature," as "liberal seepage of irresponsible sentimentality," and as "an illusory escape from history's horrors, from both the Gargantuan horrors such as Auschwitz and the quotidian horrors of the jealousies, fears, compulsive pettinesses and cruelties that are our lot."³⁵ If Lutheran pessimism about human nature lies beneath Pastor Neuhaus' rejection of Rawls' sentimental notion of an envyleless species, Lutheran hope in the triumph of grace abounds in Neuhaus' notion that the horrors of history do not have the last word. Alluding again to his model of covenantal thinking, Neuhaus asserts that the way to counter these horrors is "by appeal to what may yet be, not by seeking refuge in an idealized past or in a fantastical notion of human nature."³⁶

The Irrationality of Rationalism

In the jurisprudence of Pastor Neuhaus, the law is not self-legitimizing. If it is to be obeyed, it is because of the something beyond law itself. Neuhaus acknowledges the contribution of scientific method in breaking down authoritarian models of legal theory which commanded obedience solely on the basis that "the king or the church or the Bible or tribal custom says so."³⁷ The tautology that the law is the law is the law is for Neuhaus plainly insufficient. Accordingly, he can describe the Enlightenment as a liberation from such authoritarianism. But he is quick to point out that the rationalistic spirit of the Enlightenment is itself irrational when it forbids a challenge to the authority of law beyond the positivist dictates of legislature or court. He tweaks contemporary positivism by noting its similarity with medieval authoritarianism: "The king forbade the challenge ['By what authority?'] because it was deemed impious or insubordinate. Certain moderns forbid the challenge because it is deemed meaningless or irrelevant. But the point is that both proscribe what is the foundation of the authority that law claims for itself."³⁸

And he states that there is an insidious character in the new authoritarianism precisely because it masks itself as freedom:

35. R. NEUHAUS, *supra* note 24, at 136.

36. *Id.*

37. Neuhaus at 6.

38. *Id.* at 6-7.

The slavery that claims to be freedom is the most desperate slavery because it has subsumed into itself the idea of emancipation. Much juridical theory today—as indeed much thought in other disciplines—is in bondage to a species of rationality that refuses to ask, or even forbids the asking of, the questions that get in the way of making jurisprudence an “exact science.”³⁹

The Numinous Character of the Law

Pastor Neuhaus has pointed the way toward an understanding that the law “partakes of a numinous, even a divine character that, like religion, is binding.”⁴⁰ The significant thing about this step in Neuhaus’ jurisprudence is that he avoids saying that the law is to be obeyed on the strength either of its self-sufficiency or of some extrinsic power, be it of king or church, legislature or court. Rather, the numinous character of the law arises from within the human experience of law as incomplete and as even in need of reference to questions of right and wrong: “Critical reason invokes the ‘oughtness’ of things in order to bring the ‘isness’ of things under judgment.”⁴¹

In his methodical rejection of extrinsicism in his argument, Neuhaus resembles the brilliant French philosopher, Maurice Blondel (1861-1949). In his major work, *L’Action*,⁴² Blondel set forth a program of formulating a notion of transcendence or of the supernatural that does not rely on an “outsider God” or theological “Deus ex machina.”⁴³ For Neuhaus there is a legitimate role for theology in jurisprudence precisely because what he means by theology is the disciplined application of critical reason to the meaning of life. It is the exploration of ultimate meaning, the source and purpose of all reality. For Neuhaus it “is important to underscore that, while theology may speak of the supernatural and of other worlds, its meaning is the meaning of *this* life, *this* world, *this* history of which we are part.”⁴⁴ With this understanding of the theological enterprise, it is easy for him to conclude that “in law or any other field,

39. *Id.* at 7.

40. *Id.* at 5.

41. *Id.* at 7.

42. M. BLONDEL, *L’ACTION, ESSAI D’UNE CRITIQUE DE LA VIE ET D’UNE SCIENCE DE LA PRATIQUE* (1893).

43. For valuable studies of Blondel’s thought, see H. BOUILLARD, *BLONDEL AND CHRISTIANITY* (1969); J. LACROIX, *MAURICE BLONDEL: AN INTRODUCTION TO THE MAN AND HIS PHILOSOPHY* (1968); J. SOMERVILLE, *TOTAL COMMITMENT: BLONDEL’S “L’ACTION”* (1968). See also G. BAUM, *MAN BECOMING: GOD IN SECULAR EXPERIENCE* 1-36 (1970).

44. Neuhaus at 9.

the search for ultimate meanings that provide morally binding legitimacy . . . is a theological search."⁴⁵

Critical Observations

As I stated above, I am fundamentally in accord with the jurisprudence I have outlined above. Some aspects of this program, however, seem to me to require further elaboration or correction. I submit these comments in the hope that further dialogue and reflection will yield yet a stronger view of the law and its legitimacy than that already sketched so brilliantly by Pastor Neuhaus.

I have, for example, intimated that I admire the Blondelian approach Neuhaus appears to have adopted in his characterization of law as a theological enterprise. But just as Blondel's search for an intrinsic way of demonstrating the need for supernatural never diminished his commitments as a Roman Catholic,⁴⁶ so also Neuhaus' search for a transcendent referent point within the law should in no way diminish his commitments as a Lutheran. Yet I find some apparent discrepancies between some of Neuhaus' views and those I have come to associate with Lutheran confessional postures which call for more work if Neuhaus' jurisprudence is to be taken as authentically Lutheran.

First, the Lutheran emphasis on *sola scriptura* leads me to expect that at some point in his address Neuhaus would refer to the authority of scripture. For in the light of contemporary biblical scholarship on the communal and historical character of the process known as inspiration,⁴⁷ this theme need not lead one back into extrinsicism. Nor, indeed, must the theme of revelation itself be viewed in extrinsicist terms.⁴⁸

A future elaboration of the theological aspects of Neuhaus jurisprudence might well take into account the following biblical

45. *Id.*

46. See, e.g., M. BLONDEL, L'UNITE CATHOLIQUE: EXIGENCIES PHILOSOPHIQUES DU CHRISTIANISME 97-111 (1950).

47. See, e.g., McCarthy, *Personality, Society and Inspiration*, 24 THEOLOGICAL STUDIES 553-76 (1963), and McKenzie, *The Social Character of Inspiration*, 24 CATH. BIBLICAL Q. 115-24 (1962), on the related issue of scriptural inerrancy. See also Lohfink, *Über die Irrtumslosigkeit und die Einheit der Schrift*, 174 STIMMEN DER ZEIT 161-81 (1964).

48. See, e.g., Barr, *Revelation through History in the Old Testament and Modern Theology*, 17 INTERPRETATION 193-205 (1963); R. FUNK, HISTORY AND HERMENEUTIC (1967); W. PANNENBERG, REVELATION AS HISTORY (1968); J. ROBINSON & J. COBB, THEOLOGY AS HISTORY (1967).

themes: (1) the dependency, at least in form, of the central biblical theme of covenant (*b'rith*) on secular contracts or suzerainty treaties especially between the Hittite kings and their vassals;⁴⁹ (2) the distinctive purposes and methods of those responsible for the different strata within Pentateuchal law or the Torah;⁵⁰ (3) the meaning and scope of the decalogue;⁵¹ (4) the reasons why some of the prophets abandoned the legal terminology of *b'rith* and began to employ personal or familiar metaphors such as "bride" to describe the relationship of Israel with its Lord;⁵² (5) the exaltation of the law in Israel's worship (*Psalms*);⁵³ (6) the variety of attitudes of Israelites towards the law of their pagan conquerors and overlords, the Egyptians, the Assyrians, the Babylonians, the Persians, the Greeks, and the Romans;⁵⁴ (7) the varieties of viewpoints on the meaning of history in Israel: traditio-historical, prophetic, and apocalyptic;⁵⁵ (8)

49. See, e.g., Mendenhall, *Law and Covenant in Israel and the Ancient Near East*, 17 *BIBLICAL ARCHEOLOGIST* 26-46, 49-76 (1954). For a critical review of the literature, see D. MCCARTHY, *OLD TESTAMENT COVENANT: A SURVEY OF CURRENT OPINIONS* (1972).

50. For example, one might contrast the author of Deuteronomy, who generally offers some event in Israel's past as the reason for obeying the Commandments (see, e.g., *Deuteronomy* 16:1-8), with the priestly group responsible for the laws regarding the ritual of sacrifice and legal purity; the priestly legislation seldom includes a clause explaining the historical reason why it should be obeyed. See, e.g., *Leviticus* 2: 1-16; but see *Leviticus* 19: 2-4. On the complicated question of Pentateuchal source criticism, see O. EISSFELDT, *THE OLD TESTAMENT: AN INTRODUCTION* 155-241 (1965); M. NOTH, *A HISTORY OF PENTATEUCHAL TRADITIONS* (1972). A less technical account is found in P. ELLIS, *THE MEN AND MESSAGE OF THE OLD TESTAMENT* 51-99 (1963).

51. That is, are all the commandments binding equally on all persons? See, e.g., E. NIELSEN, *THE TEN COMMANDMENTS IN NEW PERSPECTIVE: A TRADITIO-HISTORICAL APPROACH* (1968); A. PHILLIPS, *ANCIENT ISRAEL'S CRIMINAL LAW: A NEW APPROACH TO THE DECALOGUE* (1970); J. STAMM & M. ANDREW, *THE TEN COMMANDMENTS IN RECENT RESEARCH* (1967).

52. See, e.g., *Hosea* 1: 2-9.

53. See, e.g., *Psalms* 119.

54. See, e.g., *Genesis* 39-41; 2 *Macabees* 6-9.

55. For a brief summary of these three positions, see D. TRACY, *ESCHATOLOGY: A CHRISTIAN APPROACH TO TIME AND HISTORY* 53-55 (1967). For a theology of the Old Testament in which the historico-traditional model is central, see W. EICHRODT, *1 THEOLOGY OF THE OLD TESTAMENT* (1961). For a treatment of the prophetic view of history, see A. HESCHEL, *1 THE PROPHETS: AN INTRODUCTION* 159-200 (1963); R. SCOTT, *THE RELEVANCE OF THE PROPHETS* 142-215 (2d. 1968). On the connection between prophecy and apocalyptic, see, e.g., Vawter, *Apocalyptic: Its Relation to Prophecy*, 22 *CATH. BIBLICAL Q.* 33-46 (1960). On apocalyptic generally, see M. RIST, *Apocalypticism*, in *1 INTERPRETER'S DICTIONARY OF THE BIBLE* 157-61 (1963). Among the abundant literature on this theme in New Testament scholarship, see the provocative essay of E. KASEMANN, *On the Subject of Primitiv Christian Apocalyptic*, in *NEW TESTAMENT QUESTIONS OF TODAY* 108-37 (1969).

the profound religious and ethical significance of the rabbinic teachings (haggadah and hallakah);⁵⁶ (9) the meaning and scope of the ethical teachings of Jesus;⁵⁷ and (10) the thorny problem of the meaning and scope of apostolic teaching concerning doctrine, ethics, and church polity.⁵⁸ To be sure, this decalogue of biblical themes relevant to a theological jurisprudence can be refined, expanded and contracted. Merely to state them suggests how much careful, detailed work of integration must yet occur before we have a jurisprudence which takes into account the biblical experience of law.

Secondly, if it is somewhat surprising that a Lutheran pastor gives so little attention to the scriptures in elaborating a new jurisprudence for our times, I found it no less surprising that the Law-Gospel theme of the Reformation received no mention at all in Pastor Neuhaus' address. To be sure this theme is itself rather complicated.⁵⁹ This is not the place to unravel whether there is in a *duplex*, a *triplex*, or a *quadruplex usus legis* in Lutheran confessional documents. Suffice it to say that as I understand Martin Luther's exegesis of key Pauline passages, the primary use of the law is to insure that no one can be smug or self-righteous. All of us fail against the commands of the law and therefore stand in need of the grace of redemption announced in the gospel and made available to those who believe its message. Given the strength of this view within Lutheran thought, I would hope that Pastor Neuhaus makes some attempt either to retrieve the tradition and mediate its meaning for our age or to explain why it no longer is as compelling as when it was framed.

A secondary use of the law is its political or civil function of ensuring order in society. The very fact that one use of the law is termed "theological" while the other is termed "civil or political" requires some explanation. There are hints in the centennial address that Pastor Neuhaus is not at home with this dichotomy between the theological and the political. However, the limits on the political

56. For a sympathetic treatment of rabbinic sources as the foundation of Christian thought, see, e.g., E. FISHER, FAITH WITHOUT PREJUDICE (1977). See also R. SCHNACKENBURG, THE MORAL TEACHING OF THE NEW TESTAMENT 56-89 (1965).

57. For example, do they abrogate or fulfill Torah and the prophets? Do the parables bespeak an interim ethic? Is the Sermon on the Mount equally binding on all? See generally, R. SCHNACKENBURG, *supra* note 56.

58. See, e.g., Kasemann, *The Canon of the New Testament and the Unity of the New Testament Church*, in ESSAYS ON NEW TESTAMENT THEMES 95-107 (1964).

59. See, e.g., D. BONHOEFFER, ETHICS 303-19 (1963); G. EBELING, LUTHER: AN INTRODUCTION TO HIS THOUGHT 110-40 (1970); T. McDONOUGH, THE LAW AND THE GOSPEL IN LUTHER: A STUDY OF MARTIN LUTHER'S CONFESSONAL WRITINGS (1963).

use of the law and on the power of the prince are not as clearly delineated as they ought to be. For example, Neuhaus speaks of a person who thinks a particular rule silly or unfair but obeys nonetheless when told "but that's the law."⁶⁰ Neuhaus knows well that blind or mindless obedience to lawless authority is no virtue. Indeed, his evangelical witness on behalf of life during the time of the war in Southeast Asia spoke more powerfully than any of his writings on the limits of obedience to governmental authority. One would hope, though, that Neuhaus would give greater priority and even a sense of urgency to the duty to disobey unjust (for that reason illegal?) commands of the sovereign.

From the time of the Peasants' Revolt, Lutheran leaders have tended to accentuate the power of the secular legal authority, usually justifying this posture by reference to *Romans 13*.⁶¹ In our time, Lutheran pastors like Bonhoeffer and Neuhaus have led the way in illustrating that resistance can be a religious virtue. Bonhoeffer's execution by the Nazis deprives us of the mature reflection of that heroic figure on the meaning of the virtue of resistance. Neuhaus now owes it to us to offer us his version of this virtue, and perhaps to warn us when it can become a vice.⁶²

Thirdly, I was disappointed with the rather casual way in which Pastor Neuhaus seemed to dismiss as reductionist ideologues those who, in my judgment, have provided penetrating socio-

60. Neuhaus at 6.

61. See, e.g., Luther, *Secular Authority: To What Extent It Should be Obeyed* in 3 WORKS OF MARTIN LUTHER 231-71 (1930) [hereinafter cited as WORKS]; *An Admonition to Peace: A Reply to the Twelve Articles of the Peasants in Swabia*, in 4 WORKS 219-44 (1931); *Against the Robbing and Murdering Hordes of Peasants*, in 4 WORKS 248-54, (1931).

In the last piece the use of scripture is dubious from an evangelical perspective. For example, in a burst of invective Luther urges the princes to "offer the mad peasants to come to terms, even though they are not worthy of it." But should the princes' terms not be acceded to, the princes are reminded by Luther that they "are battling not only against flesh and blood, but against spiritual wickedness in the air," and are enjoined to "stab, smite, slay" the rebellious peasants. Like crusaders given papal promises of eternal rewards for slaughtering infidels, the princes of Germany were told by Luther: "If you die in doing it [slaying and smiting the peasants], well for you! A more blessed death can never be yours, for you die in obeying the divine Word and commandment in *Romans xiii*, and in loving service of your neighbor, whom you are rescuing from the bonds of hell and of the devil." *Id.* at 253-54.

For a different perspective on *Romans 13* and a contrast with *Revelation 13*, see O. CULLMANN, *THE STATE IN THE NEW TESTAMENT* (1956); W. STRINGFELLOW, *CONSCIENCE AND OBEDIENCE: THE POLITICS OF ROMANS 13 AND REVELATION 13 IN LIGHT OF THE SECOND COMING* (1977). See also K. BARTH, *CHURCH AND STATE* (1939).

62. See, e.g., B. HARING, *A THEOLOGY OF PROTEST* (1970).

economic analyses of the American legal system and of the distribution aspects of justice in our society.⁶³ This comment may be reading far too much into Neuhaus' rejection of "psychological and other explanatory systems."⁶⁴ But the absence of class analysis in his address prompts me to refer explicitly to those who have analyzed the structures which predetermine the outcome of the distributive question, to suggest that many, if not most, of these scholars are neither Rawlsian nor vulgar Marxists, and that—in any event—Marxists have no monopoly on this kind of economic analysis.⁶⁵

In offering this criticism, I am keenly aware that I am telling Pastor Neuhaus nothing he does not already know from years of service among the poor. But it bears repeating that the law as a system, and not simply in a few particular instances, operates in dramatically different ways for rich and poor. And it simply will not do for those of us who follow heir to the tradition of Amos and Micah either to ignore manifest social and economic injustice as we construct a new jurisprudence, or to diminish the magnitude of our common task with the unverified and unverifiable assertion that "millions [which millions?] took comfort" in the callous comment of millionaire John Kennedy that "Life is unfair."⁶⁶

IMPLICATIONS OF THE JURISPRUDENCE OF PASTOR NEUHAUS FOR LEGAL EDUCATION

It should be clear by now that the jurisprudence of Pastor Neuhaus contains a generous overlay of theology admixed with his philosophy of law. It should likewise be clear that I do not take issue with the attempt to work out a theological jurisprudence but only suggest that Pastor Neuhaus or others now elaborate that project in greater detail.

One of the distinct advantages of working out such a theological jurisprudence would be the stimulation it would offer to those of us engaged in legal education at universities affiliated with a Christian church. I doubt that if we took such a jurisprudence seriously we could continue doing business as usual.

63. See, M. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860* (1977). See also J. AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA* (1976).

64. Neuhaus at 4.

65. See, e.g., *GOD'S CALL TO PUBLIC RESPONSIBILITY* (G. Forell & W. Lazareth eds. 1978); F. PERELLA, *POVERTY IN AMERICAN DEMOCRACY: A STUDY OF SOCIAL POWER* (1974).

66. R. NEUHAUS, *supra* note 24, at 137.

Since Pastor Neuhaus has already sketched the framework of this sort of legal theory, it is well to inquire as to implications in his views for the way we operate our law schools. To summarize, Neuhaus has insisted that jurisprudence be personalist and communitarian, grounded in the experience of history and open to a yet undisclosed future. I would maintain that this view has significant consequences for our admissions procedures, for what we do with students while they are with us, for our placement offices, and what our alumni and alumnae do as lawyers after they leave us.

Admissions

Currently the vast majority of American law schools place an extraordinary amount of reliance on the Law School Aptitude Test (LSAT). Like other mechanistic measurements of fitness for entrance in the American definition of the good life, this test has scored poorly in its ability to discern the talents of members of racial minorities long excluded from professional schools.⁶⁷ Hence law schools throughout the country began in the 1960's a formal, if unconscious, assault on the LSAT. This was true at least with respect to race. Through our affirmative action programs, we began saying, and rightly so in my opinion, that there are other important data about the persons who apply to our schools for admission than the numbers crunched by the Educational Testing Service at Princeton.

Perhaps Neuhaus exaggerated in his claim that "the litigious life is no life at all,"⁶⁸ for once the professional schools acknowledged their dangerous deviation from mechanistic determinants, lawyers discovered flaws in the underlying argument in support of affirmative action and in the design of specific programs. They presented these points of view in major litigation, notably by Marc De Funis and Allan Bakke.⁶⁹ The mathematics of the *Bakke* case is somewhat complicated. However, I think it is fair to say that the upshot of the lawsuit is that five Justices of the Supreme Court are of the view that a professional school at a state university may take the race of an applicant into account, but that its affirmative action program should not be designed—and few are—as foolishly as that at the medical school of the University of California at Davis.

67. See, e.g., Sandoval, *Why the LSAT Does Not Test Chicanos*, 6 TEX. S.L. REV. 31 (1979).

68. Neuhaus at 1.

69. *Regents of University of California v. Bakke*, 438 U.S. 265 (1978); *De Funis v. Odegaard*, 82 Wash. 2d 11, 507 P.2d 1169 (1973), *dismissed as moot*, 416 U.S. 312 (1974). See also *Steelworkers v. Weber*, 99 S. Ct. 2721 (1979).

If this is a fair reading of the Court's holding, two further points should be made. First, because there was no clear decision on the Title VI claim brought by Allan Bakke, the case does not formally control the admissions policies of independent universities. Dallin H. Oaks, the president of the largest church related university in the country (Brigham Young University) made this point recently:

Scholarly comments and public debate about the *Bakke* case have also ignored the essential difference between public and independent institutions. This voluminous literature generally seems to assume that the *Bakke* decision governs the admission practices of all of higher education. But *Bakke* involved a public institution, and independent colleges and universities should have greater latitude in student admissions. An independent institution not receiving any direct assistance from tax appropriations should be free to have preferential admissions—even the kind of quotas the *Bakke* case outlawed for the University of California—to benefit racial and other minorities, if they choose to do so. The *Bakke* case does not hold to the contrary. Granted, this kind of latitude may be abused in some instances. But if private parties lack the freedom to make wrong decisions, they lack freedom indeed.⁷⁰

Secondly, the *Bakke* decision was limited to the race factor in the admission program. If, for example, a religiously affiliated law school were consciously to adopt a policy of giving preference to those whose religious commitments are clear, the school would not be precluded from doing so by the *Bakke* case or, indeed, by any existing federal statute or administrative regulation.⁷¹ I do not think it would be a wise policy for such a school to exclude from its company all persons who do not share the faith commitments of the sponsoring religious body. For even in matters of religion there is much to be gained in the contrast of sharply opposed views. For that very reason, it strikes me as foolish for a religiously affiliated law school to maintain the pretense of being distinctive if it fails to care about

70. Address by Dallin H. Oaks, entitled *Government Regulation of Higher Education*, before the Pennsylvania Association of Colleges and Universities (Sept. 11, 1978).

71. See E. GAFFNEY, JR. & P. MOOTS, *THE GOVERNMENT AND THE CAMPUS: FEDERAL REGULATION OF RELIGIOUSLY AFFILIATED HIGHER EDUCATION* ch. III (to be published in 1980).

the religious perspectives of those in its company. The director of research at Valparaiso University has made this point tellingly in the context of his evaluation of Lutheran higher education:

It is necessary for a college to maintain its reputation and sense of mission and this should not be sacrificed for numbers of students. Limiting enrollments consistent with institutional mission will allow an institution to maintain a distinctive purpose. Some institutions already have a limited Lutheran enrollment. In fact, in some cases, Lutherans are a relatively small minority. Apparently some institutions view their Lutheran affiliation as nominal. The data suggest there are a number of institutions which have from 30 to 60% Lutheran students. These institutions are at a critical juncture in their history. If Lutheran affiliation is to permeate the lifeblood of an institution, it will be necessary to retain a solid core of Lutheran students. . . . While non-Lutherans should never feel excluded on a campus, nevertheless, the Lutheran spirit of scholarship, inquiry, and quest for moral and social implications of issues should never be compromised. If an institution is to be distinctive and unique, it must foster and support essential characteristics which make it unique.⁷²

Curriculum and Campus Life

The construction of a viable theological jurisprudence would likewise call for serious rethinking about what we do in the three or four years that students spend in our law schools.

In the wake of Watergate, there was a rush in the law schools to the quick fix of new courses on legal ethics. Although laudable in intent, this movement would undoubtedly have greater impact if the courses were taught by trained ethicists prepared to criticize wherever necessary the received ethics and rules of etiquette of the bar. Similarly, I imagine that after the publication of Professor Berman's programmatic essay,⁷³ and after Pastor Neuhaus has completed the work he has begun so well, there will appear in law school catalogues a crop of courses entitled "Law and Religion." Once again such a development would be desirable. But it might be more important for law schools willing to take Neuhausian

72. G. GREINKE, *SURVIVAL WITH A PURPOSE: A MASTER PLAN REVISITED* 63 (1978).

73. H. BERMAN, *THE INTERACTION OF LAW AND RELIGION* (1974).

jurisprudence seriously to focus their attentions on attracting to their faculties some of the increasing number of persons with dual competence in law and theology. In this manner the religious and ethical components of law could be highlighted in many of our course offerings and not relegated to the fringe of the curriculum.

Two other theological considerations suggest that reform of our law schools should not be confined to faculty recruitment and curriculum design, but should permeate the way we treat one another on our campuses. First, Christians are persons whose innermost vision is supposed to be enlightened so that they know the great hope to which they are called (*Ephesians* 1:18). Pastor Neuhaus intimates this theme of hope by referring to the yet undisclosed future as the ground for living under the law and for working for its reform. When the theme of Christian hope is more fully elaborated, attitudes about the future must be sharpened. On the one hand, Christians cannot smugly pretend to know more about the details of the future than do their non-Christian companions, for that would be to deny the "not yet" of divine revelation. On the other hand, the paradox of the Christian interpretation of history is that the final reality, the eschaton, has already broken in upon us proleptically in the person of Jesus of Nazareth.⁷⁴ To paraphrase the English title of the *Festschrift* for Rudolf Bultmann's eightieth birthday,⁷⁵ we Christians should be engaged in the task of remembering our future. Or to employ the language of various interpreters of the parables of Jesus, our hope is grounded in a "realized eschatology,"⁷⁶ or, more accurately, in an "eschatology in the process of realization."⁷⁷

If this fundamental aspect of Christian theology were taken seriously in church related law schools, perhaps we would not be populated with as many legal Eeyores whose pessimism about the universe is adorned with the name of "realism." To be sure, biblical hope is not to be confused with a naive, Whiggish view of history as ineluctable progress. The eminent paleontologist, Pierre Teilhard de

74. See, e.g., C. BRAATEN, *THE FUTURE OF GOD: THE REVOLUTIONARY DYNAMICS OF HOPE* (1969); R. FULLER, *THE MISSION AND ACHIEVEMENT OF JESUS* (1954); W. PAN-NENBERG, *JESUS: GOD AND MEN* (1968); E. SCHILLEBEECKX, *GOD, THE FUTURE OF MAN* (1968).

75. J. ROBINSON, *THE FUTURE OF OUR RELIGIOUS PAST: ESSAYS IN HONOUR OF RUDOLF BULTMANN* (1971). The original German title was less suggestive: *Zeit und Geschichte* [Time and History] (1964).

76. See, e.g., C.H. DODD, *THE PARABLES OF THE KINGDOM* (1958).

77. See, e.g., J. JEREMIAS, *THE PARABLE OF JESUS* (1963).

Chardin, described the hopeful attitude I have in mind, when he stated to the Congress of Science and Religion in New York in 1941:

Whether from immobilist reaction, sick pessimism or simply pose, it has become "good form" to deride or mistrust anything that looks like faith in the future.

"Have we ever moved? Are we still moving? And if so, are we going forward or back or simply in a circle?"

This is an attitude of doubt that will prove fatal if we do not take care, because in destroying the love of life it also destroys the life-force of Mankind. . . .

[H]owever bitter our disillusionment with human goodness in recent years, there are stronger scientific reasons than ever before for believing that we do really progress and that we can advance much further still, provided we are clear about the direction in which progress lies and are resolved to take the right road.⁷⁸

If hope is to be found in the minds and hearts of those who make up the communities of our law schools, the greatest of gifts, love, cannot be absent. Put plainly this means that academic in-fighting, destructive pettiness and jealous rivalry ought not to be found among us, let alone rewarded. To the extent that such envy permeates our faculties (perhaps to the amazement of Professor Rawls), we ought not be surprised when we discover a destructive spirit of competition among our students which manifests itself in terms of stolen notes, fraudulent puffery to employers (half of a class reporting they made the top ten percent), or banal theft of law review articles zipped out of their covers.

To be sure the spirit of love need not be the spirit of Cromwellian leveling (small chance that Cromwell would be described in terms of love by an Irishman!). Some sense of competition will and should remain among us. But it should take the form of a call for each to excel by achieving his or her greatest potential, not to

78. P. TEILHARD DE CHARDIN, SOME REFLECTIONS ON PROGRESS, in *THE FUTURE OF MAN* 64 (1964). The frontispiece of this volume is an excerpt from a letter from Teilhard to Mme. George-Marie Haardt: "The whole future of the Earth, as of religion, seems to me to depend on the awakening of our faith in the future." Neuhaus must either demonstrate that the dynamic view of nature proposed by Teilhard and other scientists is somehow wrong, or he must correct his own view of nature as static. I suspect that Neuhaus' view of nature is but a convenient rhetorical device to enable history to emerge as the more significant category. See text accompanying note 31 *supra*.

get ahead by leaving the corpses of our brothers in our wake.⁷⁹

Placement and Alumni-Alumnae

Finally, the jurisprudence of Pastor Neuhaus has consequences for the way we run our placement offices. Since the obvious purpose of legal education is to get people out of law schools into the practice of law (save for the desparate remnant of odd ones like myself who choose to go back to law school in a very special form of law practice), what our alumni and alumnae do when they leave us should be a matter of no small concern. Many in the current generation of law students seem to have fixed univocal views on the kind of practice in which they will engage. To be sure, our students are not kids who can be cajoled or coerced about their career choices. But at minimum we ought through our placement offices to try to expand our students' horizons about the many kinds of legal practice. This must include some form of service to the unrepresented and the under-represented, in which they might find genuine satisfaction. And we surely ought never to reinforce the current craze for the fastest and biggest buck, lest we lose our very souls in the bargain.

CONCLUSION: THE DUTY TO RESIST

I began this essay with a comparison between Richard John Neuhaus and his fellow pastor, Dietrich Bonhoeffer. At one point I noted that the early Bonhoeffer limited his concern for German Jews to those who were baptized Christians. Anyone familiar with the life of Bonhoeffer knows that throughout the 1930's he was a leader in the Confessing Church which challenged Lutheran complicity in the doings of the Third Reich. In 1939 he left the relative security of a theological position in America to return to his troubled homeland in order to participate in courageous resistance to the "law" and "order" of the Third Reich. He was executed in 1944 by the Gestapo, largely because his concern for Jews and all persons of good will was enlarged considerably beyond his position in 1933.⁸⁰

Pastor Neuhaus included in his centennial address a foreboding prediction:

79. See P. TILlich, LIFE AND ITS AMBIGUITIES, in SYSTEMATIC THEOLOGY 80-81 (1963).

80. See E. BETHGE, *supra* note 1; A. DUMAS, DIETRICH BONHOEFFER: THEOLOGIAN OF REALITY 38-76 (1971); W. SHIRER, THE RISE AND FALL OF THE THIRD REICH 374, 1017, 1024, 1072 (1960).

Unless [the public space of American law and Politics] is democratically filled by the living moral traditions of the American people, it will surely be filled, as has so tragically happened elsewhere, by the pretensions of the modern state. As the crisis of legitimacy [of law] deepens, it will lead—not next year, maybe not in twenty years, but all too soon—to totalitarianism or to insurrection, or to both.⁸¹

If Neuhaus is correct, then our law schools should not be generating lawyers who comply with all dictates of the state out of misplaced reliance on *Romans* 13. On the contrary, we must begin now the complicated task of correcting misunderstandings of that word of the Lord, and we must not rest until we have trained persons as hard-headed as Pastor Neuhaus and as bold as Pastor Bonhoeffer, who wrote the following poem in his prison cell:

Guilt. I hear a trembling and quaking,
 a murmur, a lamentation outbreaking,
 hear anger within men's spirits rending.
 In myriad voices maz-ily blending
 a dumb choir
 assails God's ear:
 We, hunted by men and abused,
 made defenceless and then accused,
 unbearably burdened and losers
 of all, we are yet the accusers.
 We accuse all those who forced us to sinning,
 who let us share in their guilt winning.
 Into witnessing of injustice surprised us,
 and then as partners in guilt despised us.
 Our eyes upon outrage had to gaze
 until we were lost in guilt's dark maze;
 then they locked our mouths up fast,
 dumb as dogs we became at last.
 We too had learned to lie before long,
 and adapted ourselves to public wrong
 and when the defenceless were felled by force,
 we took it all as a matter of course.
 And what within our hearts still flamed
 remained unspoken and unnamed;
 we checked our blood's insurgent flow,

81. Neuhaus at 12.

and trampled out the inward glow. . . .
Brother, till after the long night
our dawn arise,
let us withstand.⁸²

82. Bonhoeffer, *Prison*, 1 UNION SEMINARY Q. REV. 6-8 (1946). For a moving account of one Christian community's solidarity with the Jews in occupied France and of that community's united resistance to lawless authority, see P. HALLIE, LEST INNOCENT BLOOD BE SHED: THE STORY OF THE VILLAGE OF LE CHAMBRON AND HOW GOODNESS HAPPENED THERE (1979).