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Our era is one in which the law plays a far more important role than at any other time in history, for the law has insinuated itself into the control of almost every facet of man's life. If it was true over a century ago, as Chief Justice Marshall said, that "the judicial department comes home in its effects to every man's fireside; it passes on his property, his reputation, his life, his all,"[1] it is even more true today as the law has continued to proliferate its influence over an ever-widening range of human conduct. But it is precisely because the law has become such a dominant factor in life that profound questions about its nature have arisen for which the everyday conceptions of law do not provide us with adequate answers.

The dramatic events of recent history which have focused attention again upon the question of law, particularly the rise of totalitarianism, reveal not only the decisive effect of the regime of law upon human life and destiny but also the impotence of contemporary legal theory to cope with the "lawlessness" of law. Even in calmer days, Holmes argued that "theory is the most important part of the dogma of the law,"[2] a view grimly corroborated by one of the great legal minds of modern times, Gustav Radbruch, who, looking back upon the debacle of his country wrote that "the inherited conception of law, the legal positivism that ruled unchallenged among German legal scholars for decades and taught that 'law is law'—this view was helpless when confronted with lawlessness in a statutory form. For the adherents of this view any statute however unjust had to be treated as law."[3] In the very same essay in which he extolled the need for legal theory, Holmes gave a definition of law that bears all the fatal infirmities Radbruch saw in German legal positivism, for Holmes' realistic conception of law defined as "the prophecies of what the courts will do in fact, and nothing more pretentious,"[4] is just as incapable of discriminating between the "just" and "unjust" law. Lurking behind Holmes' definition of law as simply a "prophecy of what the courts will do" was a portentous theoretical premise, namely, that a legal theory is not obliged to provide any basis for determining the "justice" or the

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1. Chief Justice John Marshall, in the course of the debates of the Virginia State Convention of 1829-30, cited by Justice Sutherland in O'Donoghue v. United States, 289 U.S. 516, 532 (1933).
2. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 477 (1897).
3. Radbruch, *Die Erneuerung des Rechts*, in 2 DIE WANDLUNG 9, cited in Fuller, *American Legal Philosophy*, 6 J. LEGAL ED. 457, 483-84 (1954).
4. Holmes, *supra* note 2, at 461.

"injustice" of a law. This premise has become so fundamental in modern jurisprudence that Hans Kelsen, the most influential legal theorist of our day, argues in his major treatise that "the concept of law has no moral connotations whatsoever."[5]

The separation of law from moral and religious elements has been considered by many a great triumph of the modern scientific intellect. In this vein, Sir Henry Maine wrote that "the severance of law from morality, and of religion from law, [belongs] . . . very distinctly to the *later* stages of mental progress."[6] Even more explicitly, John Chipman Gray argued that "the gain in its fundamental conceptions which jurisprudence made during the last century was the recognition of the truth that the law of the state or other organized body is not an ideal; but something which actually exists. It is not that which is in accordance with religion or nature, or morality; it is not that which ought to be but that which is."[7] The truth of these statements lies in the fact that there is a difference between a legal order, a system of morality and a set of religious beliefs. But it does not follow from any kind of logic that the legal order does not contain elements of moral and religious beliefs. Indeed, it is because modern positivistic jurisprudence has defined law as having "no moral connotation whatsoever" that it has obscured the very meaning of law. To be sure, the object behind the formulation of the "pure" theory of law is to rid the definition of law of political and subjective ideological ingredients. That ideology moves into the content of law cannot be questioned. For example, Professor Panunzio declared in his inaugural lecture that "we must 'Fascize' the instruction of law. . . . Instruction in the theory of law is like instruction in religion."[8] And even the Marxists, whose chief criticism of bourgeois law is that it is simply the instrument of ideology, have begun to reconstruct law along ideological lines: "The Soviet Courts" writes Gintsburg, "were designed to render specific 'class justice' . . . [they] are called upon to carry out the policy of the soviet government and communist party as well as the Marx-Lenin Doctrine."[9] Recognizing that a system of law can embody ideology in its most pathological form, does it follow that legal theory must isolate the phenomenon of law absolutely from moral and religious elements? Is it even theoretically possible to define law without taking into consideration its moral and theological aspects? It is important, for scientific reasons, to be able to distinguish law from other modes by which human conduct is controlled; still, the jurist's chief concern should

5. KELSEN, THE GENERAL THEORY OF LAW AND STATE 5 (1945).
6. MAINE, ANCIENT LAW 15 (2d Amer. ed. 1874).
7. GRAY, THE NATURE AND THE SOURCES OF THE LAW 94 (2d ed. 1921); *cf.* Brecht, *The Myth of Is and Ought*, 54 HARV. L. REV. 811 (1941).
8. In Steiner, *The Fascist Conception of Law*, 36 COLUM. L. REV. 1267, 1271 30, 34 (1936).
9. *Cf.* Gsovski, *The Soviet Concept of law*, 7 FORDHAM L. REV. 1, 12 (1938).

not be the preservation of certain "scientific" presuppositions but rather a faithful analysis of the total phenomenon of law. If it is a presupposition of the science of law that only what can be physically observed[10] will have a rightful place in constructing a theory of law, then obviously there will be no place in legal theory for the concept of justice. But this does not prove that justice is not an essential element of law; it proves merely that legal science has no way of handling the question of justice—that is, that the science of law is incapable of dealing with the total phenomenon of law. On principle, the science of law is forced to distort the meaning of law because it does not ask "What is the full nature of law?" but asks instead, "With what aspects of the phenomenon of law can scientific method deal?" In this case, the scientific method is like a net which catches only some fish while the rest escape. That the ideological content of law may be "subjective" or "relative" and on that account unacceptable to everyone, particularly to the jurist or theologian, does not alter the fact that there can be no law at all without the presence of "value content." An adequate theory of law must be broad enough to deal with all the facts relating to the phenomenon of law including the fact of value. And it is precisely because it seeks to broaden the context within which law is to be studied that theology is so urgently concerned with jurisprudence.

The questions raised by theology strike at the most significant problems of jurisprudence. To formulate these problems and to indicate the intimate relation between theology and jurisprudence we need to employ some minimal definition of law. Let us assume that by the term law we mean at least that law is (1) a consciously formulated norm of behavior, (2) enforced by the power of the state, and (3) directed toward achieving certain ends.

This definition raises the three fundamental problems of jurisprudence corresponding to the three parts of the definition. To say, in the first place, that law is a consciously formulated norm of behaviour means that there is no law until some idea prescribing a specific mode of human behavior is articulated. The critical problem arises when the question is asked, where did this idea or norm for human behavior come from? Which also involves the question, what are the grounds for the "validity" of the idea which is articulated in the form of a command? That is, is law in its first aspect a matter of arbitrary government command, or is it a product of custom, or is it derived from nature, or is it in some way derived from God? These

10. *E.g.*, Kelsen argues that the "theory of the priority [i.e. *prior to positive law*] of rights is untenable from a logical point of view. . . . The fact that an individual has a right or has no right to possess a thing cannot be seen or heard or touched. . . . There can be no legal rights before there is law." KELSEN, GENERAL THEORY OF LAW AND STATE 79 (1945) (Emphasis added.)

questions provoke the first problem which has to do with the *Source of Law*. In the second place, to say that law is a norm enforced by the state raises the crucial question concerning the role of force in the phenomenon of law. Although law does not exist apart from the element of force, does this mean that the essential element, or the essence of law (Holmes' *ultima ratio*) is force? In a fundamental way this part of our definition raises the second problem, namely, what is the *Nature of Law?* In the third place to say that law is directed toward achieving certain ends is to say that law is inevitably involved in deliberating over, choosing and supporting certain values. The broad question raised here is, what is the purposive *End of Law?* Thus the theologian in jurisprudence is concerned with the problems of the source, nature and end of Law.

THE SOURCE OF LAW

Every legal theory is constructed upon some conception of the source of law. It would appear that the question about the source of law is quite academic since everybody knows that its source is either the legislator or the official ruler. But it turns out that this question is fundamental because it is another way of asking also "what is the validity of the law?" Here again, it might be argued that there is only one kind of valid law in the strict sense of the word, and that is the law which is officially and properly enacted. Yet it is precisely the official law which can raise the most fundamental problems for man. Sir Edward Coke in Dr. Bonham's case[11] was dealing with an official act of Parliament when he argued that a law which is contrary to common right or reason is void, an argument used centuries earlier by Plato when he said that "no law or ordinance whatever has the right to sovereignty over true knowledge."[12] More recently Justice Cardozo made the same point when he wrote that "What we are seeking is not merely the justice that one receives when his rights and duties are determined by the law as it is; what we are seeking is the justice to which law in its making should conform,"[13] thus suggesting that there is a source of law prior even to the legislator or judge. This brings us directly to the central issue in jurisprudence, which is whether law is to be understood solely in its positive terms or whether the whole legal system must be viewed from some critical perspective. While theology has not spoken, and today does not speak, with a clear and

11. The Case of the College of Physicians, 8 Co. 114a, 2 Brownl. 255 (C.P. 1610). *Cf.* Plucknett, *Bonham's Case and Judicial Review*, 40 HARV. L. REV. 30, 34 (1926).

12. Also, for Plato every law had to have two parts, the substantive part and the preamble, where the preamble was to provide the rational and moral justification of the substance. See PLATO'S LAWS, 722 D-723 B (Jowrett ed. 1892); CALHOUN, INTRODUCTION TO GREEK LEGAL SCIENCE 82-83 (1944).

13. CARDOZO, THE GROWTH OF THE LAW 87 (1924).

decisive voice on this problem, it does provide a perspective for jurisprudence because of what it has to say about both legal positivism and the doctrine of natural law.

A. Positivism

The major theologians accepted certain aspects of legal positivism even though none of them absolutely repudiated the doctrine of natural law. Where they differed was in the degree to which they would invoke the natural law against the existing positive law. St. Augustine was led by his realistic interpretation of human nature to see the folly of expecting sinful man to create perfect laws and a perfect society, and Luther appeared to have an almost uncritical acceptance of the state. But there is a direct thread of thought which contains classical and Christian views about man and law running through Augustine, Aquinas, Luther, Calvin and today in Brunner and Niebuhr. In spite of the major differences in these theologians, which we shall indicate later, they stand united against the basic premise of legal positivism.

The groundwork of modern positivistic legal theory was laid by Thomas Hobbes. His notion that "there can be no unjust law" was the logical outcome of his account of the source of law. When he wrote that "laws are the rules of just and unjust; nothing being reputed unjust, that is not contrary to some law,"[14] he made it impossible for any statute to be unjust. The theoretical basis of this notion is that for Hobbes there are no moral principles which precede the law; the creation of law and of morality occur simultaneously. There is no perspective from which to criticize law, for there is no law of nature behind the positive law, only the natural law of preservation. There is in Hobbes' theory, moreover, a pessimistic view of man which is far more uncreative than the theological doctrine of sin, for it considers man so irretrievably selfish and predatory that he must be restrained by the absolute authority of the state. Hobbes' account of the lawlessness of the "state of nature" is the decisive element of his account of the source of law, for by lawlessness in this state he means not only the absence of positive law but the absence of man's awareness of an order of right. Thus, as Hobbes traces back the source of law to its origin, he arbitrarily stops with the fiction of the social contract as the starting point of all law. This had the effect of forcing a decisive breach between theology and jurisprudence for it now made man's experience of grace, his confrontation with God through the historic revelation in Christ, irrelevant for the legal system. When Christians objected that the positive law might force them to compromise their faith, Hobbes made the severe rejoinder that in that case the Christian

14. HOBBES, LEVIATHAN, c. xxvi.

must "go to Christ in martyrdom."[15] But the rigid positivism of Hobbes prevailed, was later embedded into jurisprudence by Jeremy Bentham and John Austin, and stands today as the most formidable theory of law, finding its most elaborate expression in the work of Hans Kelsen.

Like Hobbes, Kelsen is concerned with providing a theory of the source of law, for in this way he attempts to provide a clearer definition of law. The key to Kelsen's system is the word "normativism."[16] All laws are norms. If what we call a law is not a norm then it is not a law. What then is a norm? A norm is "an *impersonal command.*" From whence does this norm come? Every norm derives from another norm. That is to say, the legal system is a hierarchy of norms whose regress can be traced back finally to the "basic norm," and beyond that there is nothing. The "basic norm" is ultimately the source of all laws; it is the starting point of the norm-creating process. The basic norm is a hypothetical assumption; more specifically, it is the norm which authorizes the historically first legislator. The function of the basic norm is to confer law-creating power upon the first legislator and on all the other acts *based upon the first act.* In Kelsen's theory, everything depends upon this last statement; for, every norm, i.e., every law, is valid only insofar as it is based upon the basic norm, or, subsequently, upon some other norm which issued from the basic norm. The crucial problem then is to designate the character of the basic norm.

Kelsen likens the basic norm to the transcendental logical principles of cognition which are not empirical laws but merely the conditions of all experience. So, too, the basic norm is itself no positive rule because it has been made, but is simply presupposed as the condition of all positive legal norms. The *final* presupposition is not, for example, the first constitution, but the validity of that constitution. The final postulate is that at a given time in history there existed a condition which validated the first constitution—that condition, not itself an act or statute, is the basic norm. Thus, from the basic norm there emerges a valid and authorized constitution. From the constitution there emerge types of law, for example, the civil and criminal law. The criminal law, for example, in turn produces a specific statute; and from that statute specific decisions are arrived at by the court affecting individuals. The sequence here is from norm to norm, from law to law. For, the constitution, criminal law, statute and decision are each norms and constitute the hierarchy of norms. The only criterion for the validity of a law is that it must have been produced by some superior law in the legal hierarchy. This does not mean, says Kelsen, that laws are deduced logically from higher norms: rather,

15. HOBBES, DE CIVE c. xviii, pt. 13.
16. See Kelsen, *The Pure Theory of Law*, 50 L. Q. REV. 474 (1934).

just as one cannot know the empirical world from the transcendental logical principles but merely by means of them, so positive law cannot be derived from the basic norm but can merely be understood by it. Fundamentally, this means that norms do not in any way correspond to Reality but derive their ultimate validity simply from proper enactment. Kelsen puts this central point in these words:

> The norms of positive law are valid; that is, they ought to be obeyed, not because they are, like the laws of natural law derived from nature, God, or reason, from a principle of absolutely good, right or just, from an absolutely supreme value or fundamental norm which itself is clothed with the claim of absolute validity, but merely because they have been created in a certain way or made by a certain person. This implies no categorical statement as to the value of the method of law-making or of the person functioning as the positive legal authority; this value is a hypothetical assumption.[17]

Also, the basic norm "is presupposeed to be valid because without this presupposition no human act could be interpreted as a legal, especially as a norm-creating, act."[18]

While theology would grant much of what Kelsen has to say about the source of law, it would point out that his positivism is not based completely upon positivism, and insofar as it is, it supplies us with a grotesque conception of law. It is quite true, as Kelsen argues, that law proliferates within the structural framework of civil government, but this could mean that absolutely any act officially done has the character of "law." Since the lesser norms are not derived by logical consistency from the higher ones, there is no check on the kind of laws passed. The validity of laws rests solely upon their being properly enacted. Yet in actual fact Kelsen's system rests upon a natural law presupposition, for the basic norm, Kelsen holds, "is not valid because it has been created in a certain way, but its validity is assumed by virtue of its content. It is valid, then, like a norm of natural law, apart from its merely hypothetical validity. The idea of a pure positive law, like that of natural law, has its limitation."[19] With this admission, it seems that a considerable alteration is made in the force of Kelsen's theory. All that he can now say is that "law is law,"[20] or, once a legal order is legitimized, every law it spawns is valid. But

17. KELSEN, GENERAL THEORY OF LAW AND STATE 394 (1945).
18. *Id.* at 116.
19. *Id.* at 401.
20. Pashukanis recounts Offner's critical estimate of Kelsen's theory in the form of a caricature of a jurist addressing the legislator: "What laws you should enact we do not know. Concerning that we are not disturbed—it relates to an art foreign to us; to the art of the legislator. Enact what statutes you wish. Only when you shall have enacted some statute will we explain to you, in Latin, what statute you have enacted." Pashukanis, *Theory of Law and Marxism*, in SOVIET LEGAL PHILOSOPHY 115 (Babb & Hazard ed. 1951).

since the system rests upon some natural law-like premise, a principle of validity of a moral nature is already built into the system, however minimal this principle may be. At the same time, Kelsen retains Hobbes' fundamental notion that there is no theoretical relation between morality (or Reality) and law,[21] chiefly because there are no *mala in se,* only *mala prohibita,* since an act is a *malum* only because it is *prohibitum.*[22] Thus Kelsen desires not only to distinguish law and morality but to go further and say that while we can know something about law, as he has defined it, we cannot have any knowledge of "good" or "justice." The essence of law then becomes "coercive force"[23] resting upon the community's "monopoly of force." According to this theory any and every actual system of law has the same validity and is in every sense equally law. Thus, the term law is defined exclusively as the command of the sovereign and the scope of jurisprudence is severely limited to law as it is, dismissing the most critical problems of law as matters of politics and ideology.

B. Natural Law

From the theological point of view, the whole idea of law is incomprehensible apart from a consideration of the status of man in the nature of things. Law is made possible by man's capacity to reflect upon his responsibility to others as well as to himself. That is, man is able to transcend his own and the collective conduct and perceive the difference between the "is" and the "ought" in that conduct. This awareness of ought is the primary datum in law regardless of the form law takes. The usual distinction between positive law and natural law is at this point irrelevant for the consciousness of ought is common to both. It is not possible to conceive of a positive law which does not emerge from a conscious awareness of how somebody ought to behave. The fashioning of this awareness into a statute and its promulgation come later, but there would be nothing to promulgate without this idea of how somebody should behave. This is to say that there could be no law without the consciousness of real alternative ways for men to act. Real freedom must inhere in the nature of man, which makes possible the problems which law seeks to correct. At the same time, the ground of law lies in man's awareness of his or his neighbor's deviation from some essential structure of being or mode of conduct to which the law seeks to restore him. At this level, the matrix of law is identical with that of ethics, for the law springs from man's moral constitution.

In pursuing the source of law through the moral consciousness

21. KELSEN, GENERAL THEORY OF LAW AND STATE 5, 114 (1945); for an exception to this see KELSEN, *op. cit. supra* at 131.
22. *Id.* at 52, 78-79.
23. *Id.* at 36.

theology seeks to go beyond the usual treatments of legal positivism to some more fundamental source. It is perfectly true that the law as it emerges from his moral consciousness is affected by man's concerns and involvements in his particular society and community, by time and place. That is, custom has a great influence upon the formulation of law as well as ethics. But it is also a fact that custom itself comes under criticism, for man can transcend the current custom by grasping some higher responsibility than the current law may embody. Thus, custom may lie behind positive enactment as a source of law, but it cannot, as Savigny and Puchta thought, the fundamental source of law.

The essential insight of theology regarding the source of law is that it lies in the very ordering agency of reality. While man possesses vast freedom in conduct, neither his nature nor the nature around him is without some essential form. The ground of man's value and his rights as a person derive from his embodying some mode of purpose. And the coming together of man in society is not a product of man's decision alone but the necessary consequence of his nature. Just why man, whose nature is explained in terms of purpose and a natural need for society, needs law to bind him in brotherhood is seen in theology not only as the consequence of his ignorance but also in the peculiar recalcitrance that is made possible by his essential nature, his freedom. The explanation of how man emerges and continues to exist is the clue to the source of law, for man cannot be understood when disengaged from the ground of his being. Every school of theology is at one on this matter though great differences ensue when particular explanations are made.

St. Augustine is the pivotal theologian of law for he is at once the source of Christian natural law theory as well as the tradition, particularly characteristic of the Reformation and some contemporary theologians, which condemns the presumptuousness of natural law doctrine. That St. Augustine affected such diverse traditions is explained chiefly by the fact that he brought together in a peculiar balance the classical Greek view of natural law and the biblical view of God's grace. Thus St. Augustine posed the problem so urgent for contemporary man, which is to understand the relation between the necessities of contingent history and the life which God's grace raises as a possibility. More specifically, like St. Paul, St. Augustine admitted man's capacity to know what his duty to his fellow man is through natural reason, but pointed out that no static rational ethical norm can do justice to the infinite modes in which human beings encounter each other. This meant that Augustine saw the limitations of positive morality and positive law when viewing man in his essential nature, namely, in his capacity to love. But Augustine did not on that account consider law and love as unrelated, as though the spheres of nature and grace bear

no relation to each other. The intimate relation between love and law in the human sphere is the consequence of the coalescence of these modes in God. In human history this means that there is a constant tension between the positive law and the demands of love, between jurisprudence and theology. Neither man nor any of his institutions ever overcome the critical force of the judgment of love; but likewise, the redemptive power of love affects not only man but also his institutions. It is quite instructive that while St. Augustine took a very realistic view of the state, it was not the state he had in mind when he spoke of the *civitate terrana,* just as it was not the church he had in mind when he spoke of the *civitate Dei;* this suggests that since the *civitate Dei* is within society the higher ethic of love can have some bearing even upon the structures of law if those fashioning it love God.

From Augustine, Aquinas lifted chiefly the rational element of law, taking as his starting point Augustine's statement that "that law which is supreme Reason cannot be understood to be otherwise then unchangeable and eternal."[24] From this, Aquinas built a very neat doctrine of the source of law where the human, positive law, if it is valid, comes from the natural law, while the natural law is derived from the eternal law. By eternal law, Aquinas meant God's eternal reason which orders the whole universe. By natural law he meant that part of the eternal law which man's reason can grasp and which pertains to his life and institutions. By human law he meant the positive law, which is necessary because man does not automatically behave in such a way as to fulfill his nature. But Aquinas went so far as to say that if the positive law was contrary to the natural law, it did not have to be obeyed, for then it "was not a law, but a perversion of law."

Behind this Thomistic doctrine of natural law lies a very optimistic theory of knowledge which assumes that the human intellect can begin by abstracting the notion of being from objects experienced and arrive at the notion of an ultimate Being. Moreover, through the device of analogy, the intellect can understand the nature of God and can conclude that man and God differ only in that their mode of existence differs. That is, God's essential nature is rational and so is man's, which means that man knows what God knows but not as much, since man is finite and contingent. Man's natural reason can "participate" in God's reason, and insofar as God's reason is the eternal law, man has a direct knowledge of that law which in its limited human form is natural law. Thus man possesses the equipment for a natural morality and a natural justice. He is able to perceive the purpose and order in institutions. A careful reading of Aquinas' *Treatise on Law*

24. AQUINAS, SUMMA THEOLOGICA, Ia, IIae, Q. 91, art. 1.

indicates that he took into consideration the ambiguities of the human mind caused by self-interest and laziness and indicated the role of God's grace in the full understanding of law. Nevertheless, the outcome of this theory of natural law was the constantly treacherous experience of ascribing to contingent cases ultimate and immutable solutions. But this is not an argument against natural law as much as it is a limitation or perversion of it.

Calvin took a fundamentally different view of man's rational capacity, having in mind the more biblical insights of St. Augustine. "Human reason," said Calvin, "neither approaches, nor tends, nor directs its views toward this truth, to understand who is the true God, or in what character he will manifest himself to us."[25] He argued that "the mind of man is so completely alienated from the righteousness of God, that it conceives, desires, and undertakes everything that is impious, perverse, base, impure and flagitous: that his bent is so thoroughly infected by the poison of sin, that it cannot produce anything but what is corrupt. . . . The mind always remains involved in hypocrisy and fallacious obliquity."[26] Of the Biblical doctrine that God created man in his image, Calvin says that "although we allow that the Divine Image was not utterly annihilated and effaced in him, yet it was so corrupted that whatever remains is but horrible deformity."[27]

Yet, this did not mean that Calvin entirely repudiated the doctrine of natural law. He could write that: "We perceive in the minds of all men general impressions of civil probity and order. Hence it is that not a person can be found who does not understand that all associations of men ought to be governed by laws, or who does not conceive in his mind the principles of those laws."[28] What Calvin did was to shift the focus from man's reason to his conscience (a somewhat ambiguous move since he speaks of "conscience which has been engraven on the minds of men"). The distinctive view of Calvin here seems to be that natural law is not constructed by human nature expressing itself rationally, but that it is a law imposed from without by God. Hence Calvin says, "our conscience does not permit us to sleep in perpetual insensibility, but is an internal witness and monitor of the duties we owe to God, shows us the difference between good and evil and so accuses us when we deviate from our duty."[29]

The distinction between the Thomistic and Calvinistic theories of natural law is a distinction between two theological interpretations of the source of law. The first is God as Eternal Reason and the other is

25. CALVIN, THE INSTITUTES OF THE CHRISTIAN RELIGION, bk. II, c. 2, § 18.
26. *Id.* at bk. II, c. 5, § 19.
27. *Id.* at bk. I. c. 15, § 4.
28. *Id.* at bk. II, c. 2, § 13.
29. *Id.* at bk. II, c. 8, § 1.

God as Creative Will. In the first, there is a more static conception of the eternal rational forms which the human reason can grasp in some measure, whereas in the second the dynamic will of God is known through faith. This distinction lies at the difference between contemporary theologians who write about law. Niebuhr does not, in spite of his criticism of it, deny the essential premise of natural law theory, for he does not deny that in the last analysis we look to our understanding of God to understand the nature of man. What Niebuhr does say is that we cannot derive a valid natural law which rests solely on the rational capacity of man, even though this human reason talks about God, for the limitations of human reason create limitations of our understanding of God. Nevertheless, Niebuhr does see some essential universal structure in the human moral constitution when he says that: "The practical universality of the prohibition of murder, for instance, in the moral codes of mankind is just as significant as the endless relativities which manifest themselves in the practical application of the general prohibition. There are essential universal principles of justice. . . ."[30] Moreover Niebuhr says "it is important to recognize the validity of principles of justice, *rationally conceived,* as sources of criticism for the historical achievements of justice." He considers Karl Barth's notion that without the introduction of the Ten Commandments as guides the moral life of man would possess no valid principles of guidance to be "as absurd as it is unscriptural."[31] Furthermore, Niebuhr's conviction that the positive legal order is always under the judgment of the higher ethics of love as we know it through God's revelation is an additional confirmation of the perspective of natural law. This is to say, the doctrine of natural law is misconceived if it is taken to mean only a system of ideal law which natural reason fabricates. This is true not only because the distinction between reason and revelation is not as simple as it is frequently made out to be,[32] but because whether the conception of a higher law is based upon reason or revelation, in either case a perspective has been achieved for understanding the true ground of law. Brunner raises the question "on what . . . is the deviation of the Christian law of nature from the rational Law of Nature based, since both claim to be based upon reason?" And in answer he holds that:

> in actual fact the so-called law of nature is a concept of the law of nature which has been modified by faith in the Bible, therefore it is not really a law of "Nature," but of "creation," and its difference from the law of nature points to the fact that faith and revelation must come to the assistance of reason, in order to discover what is truly rational. The

30. 2 NIEBUHR, THE NATURE AND DESTINY OF MAN 254 (1943).
31. *Ibid.*
32. *Cf.* TILLICH, BIBLICAL RELIGION AND THE SEARCH FOR ULTIMATE REALITY 1-10 (1955).

> absolute Law of Nature, therefore, is based upon the fiction of a natural reason, which in reality is a reason which is instructed by the Christian belief in God, and by the Christian anthropology which arises from this.[33]

But again, for Brunner to shift the source of law to creation instead of Reason does not alter the residual natural law premise in his theology, for to say, as he does, that the ground of law rests ultimately upon God's "allocation" of all elements into essential relationships and that man can know the structure of these relations (whether through reason or revelation) is to affirm that nature embodies, in some form or another, the norms for law. The natural law premise in its simplest form is that man's knowledge of the essential structure of nature yields the norms for law. To view nature from the point of view of God's creative act is nevertheless to have a view of nature, and the notion of law which flows from it is a doctrine of natural law. It is just as risky to think we know the ultimate norm of justice by analysing the created orders as it is to think we can derive them rationally. At the same time, Brunner's emphasis upon the notion that man's nature bears the capacity to be addressed by God in the I-Thou encounter contains a Christian rationalism and the natural law premise. To be sure, Brunner explicitly states that we cannot know "in advance" what is the command of God, but when we do know it, we have something to say about human dignity, rights, freedom and equality, and we know these, for the most part, dynamically instead of in static form.

It must be acknowledged that between the severe positivist for whom the source of law rests chiefly in proper enactment, and the Christian theologian for whom the source of law exists in the creative and redemptive nature of God, there is the possibility of the rational, enlightened, view of law. There can be no quarrel with Pufendorf's notion that even if there were no God there would be a natural law, for this theme of rationalism accords with the theological insight that the human reason is not irrevocably perverse in spite of its constant tendency to divinize historically relative standards. It must always be borne in mind, too, that the triumph of legal positivism at least to some extent rests upon the nominalism or voluntarism of such theologians as Ockam and Luther. But the theologian would insist that the rationalist is asking man to believe in his interpretation of the source of justice which can be a wide variety of things, such as the moral sentiment, custom, or the economic order. The question of the essence of law is therefore left obscure. While the theologian cannot offer a detailed system of law, he does see the phenomenon of law more creatively because he sees it as related to the essential nature of man and bearing a close relation to God's purpose for man in crea-

33. BRUNNER, THE DIVINE IMPERATIVE 631 (1948).

tion. And to understand the source of law in this way has a great deal to do with how we shall view the nature of law.

THE NATURE OF LAW

Because the law is enforced by the coercive power of the state, it is frequently held that the essence of law is force. The relation of force to law is obscured both in theology and in jurisprudence. For the theologian, this relation is ambiguous because he views the source of law as God who is understood in terms of love, and even though love in this context has no sentimental connotations, its spontaneity seems to be in flat contradiction to force. Some theologians, Barth for example, have therefore concluded that the Christian norm of love cannot provide law with any insight because the law is essentially a regime of force which can bear no creative relation to love. Moreover, the Christian ethic of love is considered by many to be relevant only in personal relations and cannot be translated into a collective standard. In jurisprudence, on the other hand, the necessity of defining the specific nature of law, in order to be clear about the rules of society, leads the jurist to argue that law is essentially those rules which have behind them the force of the state. Thus Kelsen argues that "if we do not conceive of law as coercive order, then we have lost the possibility of differentiation of law from other social phenomena. . . ."[34] This makes force the essence of law, for again, as Kelsen argues, "The statement, a certain social order has the character of law, is a legal order, does not imply the moral judgment that this order is good or just. There are legal orders which are, from a certain point of view, unjust. Law and justice are two different concepts."[35] This would mean that fascist, nazi or communist law are equally law simply because they possess the essential element of law, namely, force.

When Holmes said that the *"ultima ratio"* of law is force, he had in mind not only the notion that force is the ultimate arbiter between inconsistent views, between dictatorship and democracy, for example. It appears that he also meant that law is by its nature a matter of force, particularly because he was "so skeptical as to our knowledge of the goodness or badness of laws."[36] Holmes' skepticism led Sir Frederick Pollock to reply that "If you deny that any principles of conduct at all are common to and admitted by all men who try to behave reasonably-well, I don't see how you can have any ethics or any ethical background for law."[37] But this is precisely the question legal realism and positivism provoke, namely, whether law is "essentially" a matter of force or whether its essence lies in justice.

34. KELSEN, GENERAL THEORY OF LAW AND STATE 26 (1945).
35. *Id.* at 5.
36. 1 HOLMES-POLLOCK LETTERS 163 (Howe ed. 1941).
37. *Id.* at 275.

A. Law As Force

The question at issue is not whether force is part of the phenomenon of law, but the theoretical question of whether law is to be defined, as it is in much modern jurisprudence, as force.

The impossibility of creating a coherent theory of law in terms of force is illustrated by soviet jurisprudence. The struggle for law in Russia today is really a struggle for some basis for a legal theory. The marxist premise, which holds that legal principles are only "economic reflexes," led to the conclusion that "law is but the will of [the economically dominant] class made into a law for all,"[38] a conclusion which meant a complete revolt against the very idea of law. This attack upon law was based not only upon a revolutionary psychology couched in such phrases as that "marxism declares a merciless war against bourgeois legal concepts."[39] Even the calm theoretical task of marxist jurists led Pashukanis to write that it was not the intention of the communists to replace bourgeois law with soviet law. Rather, Pashukanis argued that "the withering away of the categories of bourgeois law (exactly the categories, and not of this or that particular rule) can under no circumstances mean their replacement by some new categories of proletarian law. The withering away of law in general, that is, the gradual disappearance of the juridical element from human relations . . . ."[40] is what marxism seeks to achieve, or predicts will happen. Goichbarg wrote that "we refuse to see in law an idea useful for the working class." This breakdown of legal theory had the practical consequence that "from November 1917 to 1922, law was formally lacking."[41]

Marxism is quite right in dispensing with legal theory as well as with pretentions of legality in practice if the essence of law is conceived of as force. This follows from the elementary logic that if you define law as force, you define not law but force. To be sure, the marxist analysis rests upon the notion that law like morality, is ideology. Ideology in this connection is the pretention that the interests of the economically dominant class, which are determined by the relations of production, rest on eternal or ultimate moral principles. To say that law is simply the embodiment of ideology caused by the class struggle means, however, that in a classless society there would be no law since there would, then, be no dominant class seeking to exert its will over another class.

The soviet jurists have become aware of the need for some theory of law to overcome this simple negation of law. But from the positivistic

38. MARX, COMMUNIST MANIFESTO 28 (Henry Regnery Co. 1950).
39. Gsovski, *The Soviet Concept of Law*, 7 FORDHAM L. REV. 1, 4 (1938).
40. *Cf.* Pashukanis, *Theory of Law and Marxism*, in SOVIET LEGAL PHILOSOPHY 122 (Babb & Hazard ed. 1951).
41. SCHLESINGER, SOVIET LEGAL THEORY 79 (1945).

premises from which they start and with their identification of law with force, their jurisprudence is still incapable of producing a theory of law. "Even today" writes Rudolph Schlesinger, "it is more difficult in the USSR than elsewhere to establish a clear-cut distinction between administration and legislative acts,"[42] which means that soviet legal theory cannot differentiate between law and an arbitrary command. The re-instatement of soviet law today does not mean the abandonment of the concept of law as force. The development of a system of courts does not rest upon any concept of fundamental human rights: "[T]he so-called private rights in Soviet Law are not *actual rights of private persons,* but, *rights established by the state.*"[43] The courts are set up not to defend private rights but to provide the government with an organ of power "completely under the control of the vanguard of the working class." If the law is force and the courts are simply the agency of the "vanguard," why, asks Professor Berman, "erect this elaborate structure of rights and procedures?" Because, in the words of Krylenko, "a club is a primitive weapon, a rifle is more efficient, the most efficient is the court."[44] Hence, early marxism led to the theoretical repudiation of the category of law. The current reinstatement of law rests upon no new Soviet theory but rather is consistent with the early marxism, for soviet law is self-consciously based upon class interest as indicated in a statute which reads: "when passing a decision upon a case, the People's Court shall apply the decrees of the workers' and peasants' government."[45] Decree has replaced law. Thus, even though Pashukanis is discredited now as the theorist of law, the Soviet government still follows his principle: "We need the utmost elasticity," said Pashukanis, and so "we do not have a system of proletarian law."[46] Insofar as there is "law," it rests upon force, which is to say that soviet law is lawless, chiefly because, as Lenin has said, the soviet system is a "power unrestrained by any law and based upon force and not law."[47]

Thus, soviet experience gives us a good example of the breakdown of legal theory and the impossibility of deriving a satisfactory conception of law from the "imperative theory" of law which identifies law with force. Actually, however, not even the soviet legal system is totally insensitive to the considerations of justice. Even though it is true that every system of law is affected by the ideological element which causes groups to define justice in terms of their self-interest, it is also true that there can be no law in the true sense of the word which does not consider justice as its essence.

42. *Id.* at 60.
43. *Id.* at 95.
44. BERMAN, JUSTICE IN RUSSIA 28 (1950).
45. Gsovski, *supra* note 39, at 20.
46. *Id.* at 31.
47. *Id.* at 17-18.

The theoretical problem here is created because of the notion that the phenomenon of law has to be defined as it exists at any specific moment. And since the particular notion of justice a system of law may embody at that moment may be a very questionable notion of justice indeed, the illicit conclusion is drawn that the essence of law cannot be justice because there is no agreed upon essential justice. But law is a dynamic phenomenon just as the life of man is. We could not consistently hold, as it is in some quarters, that man is not essentially a moral being just because no man has ever attained perfect righteousness. The question of morality would never arise unless the actual behavior of man deviated from some basic rightness in human conduct and relations. Similarly, the need for law would never arise unless the relations between people and things at any time disturbed some essential order. We have already discussed the difficulty of discerning the content of this essential order, but it is instructive that every system of law struggles to clarify that order. At this point, soviet law actually takes on the character of natural law since it presumes to use the law to create the "right" relations between all the factors of production. But if instead of looking at the law in static terms only we see it as a process for achieving purposes, the intimate relation between law and justice becomes apparent. Then the idea of justice becomes just as central to the nature of law as the idea of the good is to the nature of man. And it is precisely because the law in some way seeks to help man achieve the good that the law itself needs to be informed by the good, that is, justice. Moreover, the understanding of the element of force in the phenomenon of law is clarified when we conceive of law as justice.

B. Law As Justice

Theologians have frequently looked upon "the powers that be" without asking whether they were just, for those powers, after all, "are ordained of God."[48] Moreover, theologians have been able to justify the coercive power of the state in its most ruthless forms on the grounds of man's sinfulness. Yet the fateful passage in the *Book of Romans* makes it clear that the power of the state is to be obeyed not solely because it is power, "but also for conscience' sake." That is to say, power is put into the context of conscience, or justice. The biblical view nowhere amounts to calling law sheer power. It does legitimize power, but only power which follows the contours of justice. Power is less than love, and law is less than love, just as the existential status of man is less than his essential nature. But these all bear a relation to each other. For, as we indicated in the previous section, the source of man, like the source of law, is the creative power of God. The law can

48. Romans 13:1.

be interpreted as an extension of God's creative power for it has the effect of fashioning man by ordering his conduct. Both creation and law are means through which power or force bring form into being. Creation achieves the initial form of all things whereas law seeks to restore aspects of creation to its essential form and norm from which it has deviated. Besides restoring behavior to its essential norm, which may indicate a static view of human nature, the law also seeks to lead conduct in the direction of fulfilling man's potentialities, thus raising conduct to an ever higher level of possibility, that is, closer and closer to the requirements of love. Thus, theology views law as part of the act of creation, and like creation, law has behind it the element of power; but the power behind law, like the power behind creation, is limited to the bringing into being of essential form—in neither case is power arbitrary.

It is illuminating to see how closely the curriculum of a modern law school mirrors this theological interpretation. For theology holds that the original justice is man's spontaneous right relation to man and things as well as to God. Thus, the first edition of the law lies in God's creative act wherein He forms man to live the life of love. The second edition of the law is the Decalogue, which is a more specific (but less dynamic) elaboration of the life man ought to live. Whereas the life of love would lead man to relate himself properly to his fellow man, his actual prideful life obscures his duty and the specific instuctions of the Commandments become necessary. Subsequently the "secular" law follows the general direction of these commandments, though now deprived of their theological basis. For example, "Thou shalt not steal" is expanded into the more intricate Law of Property, "Thou shalt not bear false witness" lurks behind the Law of Contracts, "Thou shalt not kill" lies behind part of the Criminal Law, "Thou shalt not commit adultery" still represents a fundamental element in the Law of Domestic Relations. That is, law as we know it in the actual legal system is involved in the process of creating the kind of relations God intended in His creative act. The law is misconceived, however, if it is seen simply as force; its essential nature is involved in working toward relations consonant with man's essential nature. To be sure, the coercive aspect of law cannot create the life of love, but its function is chiefly to bring to bear those conditions which will make love possible and at least to restrain behavior which would obstruct the possibility of mutuality and love.

Again, however much we may see in Augustine the spirit of realism, we nevertheless see in his theology the comprehensive unity between the ethics of love and the phenomenon of law. His great concern for justice in government led him to say that, "if . . . a commonwealth be an estate of the people, and that they be no people that are not united

in one consent of the law; nor is that a law which is not grounded in justice; then it must needs follow, where no justice is, there no commonwealth is."[49] That is, the "rule of law" requires not bare force but justice. And Augustine defined justice not solely as a corrective act but rather in a way that provides a perspective for curbing totalitarian law on the one hand and abetting man's higher ethic on the other. Hence, taking justice to mean the act of distributing to everyone his due, Augustine felt the "what is due" can best be designated in religious terms. Consequently, Augustine did not begin with what man owes to man, but with what he owes to God. For Augustine, justice is incomprehensible if it is limited merely to the relations between man and man—the primary relation is between man and God. (This, I take it, is the ground of our objection to totalitarian "law" even today.) Thus, "If man serve not God, what justice can be thought to be in him? Seeing that if he serve not him the soul has neither lawful sovereignty over the body nor the reason over the affections."[50] What is more, collective justice is impossible apart from this individual justice. "Now if this justice is not found in one man, no more then can it be found in a whole multitude of such like men. Therefore, amongst such there is not the consent of law which makes a multitude a people."[51] Again, referring to actual law, "What justice is that which takes man from the true God?"[52] Augustine clearly saw the relevance of the ethics of love to the collective life of man and indeed saw it as the essence of justice. Love is the perspective for the fashioning and criticizing of law. The law derives its character as law from its being bound by love. Without the ethics of love, Augustine held that there could be no true orderliness since nature would be disturbed by man's willfulness. Without love there could be no justice for there would be lacking a cogent motive, and pattern, for man to render to other men their due. But most important of all, without love as a gift of God's grace man could not love the proper things properly. Love therefore becomes the essence of the law, and indeed love is the New Law. Lest this be considered too idealistic and too remote, we need only consider the bearing of love on law by referring to the moral force this ethic generated against the laws of racial segregation. And lest we consider this ethic irrelevant to the collective life of man, we need only reflect on the fact that its repudiation made possible the laws of segregation. This is not to say that theology wants to re-write the whole law. It does say that the essence of law is justice and that the ethics of love bears directly upon the formation of law as well as on the intimate conduct of man. Even Calvin could say that "all

49. AUGUSTINE, THE CITY OF GOD, bk. XIX, c. 21.
50. *Ibid.*
51. *Ibid.*
52. *Ibid.*

nations are left at liberty to enact such laws as they find to be respectively expedient for them; provided that they be framed according to that perpetual rule of love."[53]

THE ENDS OF LAW

The most characteristic feature of law is that it is freighted with *purpose*. No system of law, however, has an unambiguous vision of the purpose it attempts to achieve. But likewise there can be no law or system of law which does not attempt to achieve certain values or goals. The concept of purpose is complex, for law seeks to achieve many kinds of purposes, and frequently it seeks to achieve these simultaneously. The complexity arises from the fact that in every instance the object of the law's concern is man, but man is at once an individual and a member of society and also bears a relation to things. There are values which are personal while other values are collective or social and the law must consider both types. The value of individual freedom, for example, needs to be viewed alongside the value of social order, and inevitably there will be some serious interaction between these different values. Moreover, there is the value of stability in the law, a value which affects chiefly the judicial process where a steady continuity in the law provides a desirable predictability. At the same time, both the individual as well as the community can gain new values from a periodic reconception of the law's purpose. This is the reason Justice Cardozo warned against the danger of depriving the judicial process of its "suppleness of adaptation to varying conditions"[54] and Justice Douglas argued that in constitutional law "stare decisis must give way before the dynamic component of history."[55] The variableness of the law's purpose, however, does not mean either that the law is not to be understood chiefly in terms of the purposes it seeks to achieve or that the concept of purpose is hopelessly relative.

A. "Purpose" As a Decisive Element in Law

The concept of purpose is the key concept which differentiates the theory of legal positivism from natural law theories. But ideas of purpose are so dominant in law that even the juristic theories which would repudiate the assumptions of natural law are bound by the purposive element, a good example of which is found in Jeremy Bentham.

Bentham leveled a devastating attack upon the theory of natural rights, implying that it is not the purpose of law to protect such nonexistent rights:

> All this talk about nature, natural rights, natural justice and injustice

53. Calvin, *op. cit. supra note* 25, at bk. IV. c. 20 § 15.
54. Landis v. North American Co., 299 U.S. 248, 256 (1936).
55. Douglas, *Stare Decisis*, 49 COLUM. L. REV. 735, 737 (1949).

> proves two things only, the heat of passions, and the darkness of understanding . . . . "Property the creature of law?—Oh, no—Why not?—because if it were the law that gave everything, then law might take away everything: if everything were given by law, so might everything be taken away.
>
> The case is that in a society in any degree civilized, all the rights a man can have, all the expectation he can entertain of enjoying anything that is said to be his is derived solely from the law.
>
> . . . . Till law existed, property could scarcely be said to exist. Property [as well as all other rights] and law were born together and die together.[56]

Not the protection but the *creation* of rights is the way Bentham saw the function of law. But even though Bentham would add to the state's monopoly of the administration of the law the other monopoly of the creation of law, he could not thereby divest the law of its purposive aspect. Indeed, he accentuates this purposive element, for now whatever values society will achieve derive from the purposive ideas of the legislator. Since rights and duties spring first from the law, the law is the matrix of purpose, both individual and collective. That is, Bentham assumes that the way man ought to behave is determined not by "nature" or "natural justice" but by the law. But to argue this way is to assume that the law is some abstract machine independent of the rational consciousness of man. Bentham held that human reason could not produce any natural rights, only a "bastard brood of monsters."

Actually, Bentham's theory of law is a natural law theory, for the law, as he sees it, derives its guidance from the nature of man. The end of law, or the purpose of law is for Bentham not just any end (even though he argued that "push-pin is as good as poetry"); though the law creates the norms of behavior, the legislator is guided by the nature of man in fashioning the law. This is a rational theory of law, for it presumes that the nature of man can be known and that the essential element in human nature is universal. Moreover, Bentham achieved his great influence upon both legal theory and practice by insisting that jurisprudence must rest upon his conception of man, i.e., upon utilitarianism. For, to describe law in terms of utilitarianism is to provide a "language [which will] serve as a glossary by which all systems of positive law might be explained, while the matter serves as a standard by which they might be tried."[57] For one who follows in the tradition of Hobbes and the empiricism of Hume, it is also noteworthy that Bentham should say that: "There is no form, or colour, or visible trace, by which it is possible to express the relation which constitutes property [or any other rights]. It belongs not to physics, but to meta-

56. BENTHAM, THE LIMITS OF JURISPRUDENCE DEFINED 84 (Everett ed. 1945).
57. HALEVY, THE GROWTH OF PHILOSOPHICAL RADICALISM 63 (1928).

physics: it is altogether a creature of the mind."[58] Thus, the purpose of law is to satisfy the nature of man, a nature which can be understood rationally and a nature from which the "ought" for law can be lifted. While Bentham enumerates the purposes of law as being "to provide subsistence, to aim at abundance, to encourage equality and to maintain security,"[59] the whole enterprise is reducible to the simple formula of maximizing pleasure and minimizing pain. For, Bentham argues that "nature has placed man under the empire of pleasure and pain" and that "we owe to them all our ideas, we refer to them all our judgments, and all the determination of our life."[60] The purpose of law, then, is to order the conduct and relations of men in such a way as to minimize pain and maximize pleasure and thus achieve the greatest happiness of the greatest number. That is, the purpose of law is dictated by the nature of man.

Bentham's thought illustrates the impossibility of thinking about law without having some conception of the ends of law. Moreover, the ends of law are in every case determined by our conceptions of human nature. Thus, juristic systems which begin by denouncing morals and by refusing to allow the relation between law and morals frequently end simply by substituting a new morality. Not only is this true in Bentham's case, it is also true in soviet law, whose function, says Golyakov, is "the fundamental remaking of the conscience of the people."[61] The question then is no longer *whether* the doctrine of man is fundamental in determining the purposive element in law, but rather *what* conception of man is to be used.

B. Theology and the Ends of Law

Few theologians would insist that the purpose of law should be deduced entirely from the Christian interpretation of man. Aquinas argued that the function of law is to achieve the "common good," for he followed Aristotle's notion that "lawgivers make men good by habituating them to good works." Earlier, Augustine had seen in the positive law the agency whereby the disruptive behaviour of anarchic man was subdued, for "when the power to do hurt is taken from the wicked they will carry themselves better being curbed."[62] In a similar way, Luther looked to law chiefly as the means of achieving a minimal order. But Calvin looked to law for far broader purposes, saying that:

> civil government is designed as long as we live in this world, to cherish and support the external worship of God, to preserve the pure doctrine

58. *Id.* at 47.
59. *Cf.* FRIEDMAN, LEGAL THEORY 115 (3d ed. 1953).
60. BENTHAM, PRINCIPLES OF MORALS AND LEGISLATION, c. 1 (2d ed. 1830).
61. *Cf.* Gsovski, *supra* note 39, at 16.
62. AUGUSTINE, CITY OF GOD, bk. XIX, c. 21.

> of religion, to defend the constitution of the church, to regulate our lives in a manner requisite for the society of man, to form our manners to civil justice, to promote our concord with each other and to establish general peace and tranquility.[63]

Calvin goes much further than any contemporary theologian would seem to follow him, for here he almost accords to the civil law the function of perfecting human life; in another place he had said more explicitly that "the law inculcates a conformity of life, not only to external probity, but also to internal and spiritual righteousness."[64] On the whole, Karl Barth presents a view closer to Luther's than to Calvin's, though he can be identified with neither since his chief insight here seems to be almost this: theology does not look for the law to be shaped to fit the Christian view of man—it only asks that the state give the church the freedom to preach the gospel.[65] Even Emil Brunner who has self-consciously sought to formulate a distinctively Protestant theology of law resists, in the end, any attempt to use the Christian ethics of love as the basis of the law, for, again, he sees law as dealing with impersonal relations while love is the ethics of personal encounter. At this point he resembles the Reformers for whom, as he has said, "the connection between justice and love was not made clear . . . ."[66] This negative drift in theology regarding the purpose of law led Ernst Troeltsch to comment that in the past the Church has sought to Christianize the state in such an indirect way that "all that this 'Christianization' amounted to in the end was that everything was left outwardly as it had been before."[67]

A more creative relation between the Christian view of man to the purposes of law must be asserted. We have argued that the whole concept of law gets its deepest meaning when understood in the context of man's full nature when viewed in relation to how man ought to live as required by his essential nature. The purpose of law must be affected by the purpose of man, for the functioning of law will have a concrete bearing upon the conduct and even the motives of man. The law can determine at many points whether there will be any possibility for man to live according to his essential nature. If the theological view of man has no bearing upon the law, then it has no bearing upon the life of man. It is true that the law deals chiefly with the outward acts of man whereas the ethics of love strikes at the inner life. Nevertheless, it is intolerable to hold that for the purposes

63. 4 CALVIN, *op. cit. supra* note 25, at bk. IV, c. 20, § 2.
64. *Id.* at bk. II, c. 8, § 6.
65. BARTH, AGAINST THE STREAM *passim* (1954); *cf.* 2 NIEBUHR, NATURE AND DESTINY OF MAN 279 (1943); also, ELLUL, LE FONDEMENT THEOLOGIQUE DU DROIT 81 (1946).
66. BRUNNER, JUSTICE AND THE SOCIAL ORDER 263 n. 5 (1945).
67. 1 TROELTSCH, THE SOCIAL TEACHING OF THE CHRISTIAN CHURCHES 159 (1931).

of law, man's essential nature must be considered as governed chiefly by self-interest, while for the purposes of personal ethics his nature should be defined in terms of love. On this point, Bentham was clearer and more consistent than those theologians who do not build their theory of law upon man's essential nature, for he brought about a specific reformation of the law of England simply by insisting that the law should conform to the ethical nature of man.

Thus, various forms of utilitarianism and pragmatism have supplied the law with its value content chiefly because theology has rather consistently disengaged its more important insights from the theoretical treatment of law. It seems far more consistent to hold that human institutions, insofar as they are the products of human acts, come under the same kind of critical judgment as the individual does. As the redemptive quality of love seeks to transform human life, so also its force can affect institutions. And this is peculiarly true in the case of law inasmuch as the law can so specifically abet or frustrate the demands of Christian love. The idea of love is no more abstract and void of content than the notion of "pleasure and pain." Moreover, creative love is far more clearly a standard of "ought" than is the pleasure-pain calculus. To say that men tend to seek their own pleasure does not mean that they "ought" to. Yet, Bentham and Mill not only made happiness the standard, they even went so far as to give to the legislator the task of defining the contents of this happiness, thus making the law the instrument for moralizing man. Moreover, the ethics of self-interest, which at first expressed itself in individualism and a *laissez-faire* attitude by the government, gradually resulted in collectivism since the government now undertook to educate man to his self-interest and to create the conditions of his happiness. While it would take us too far afield to elaborate in detail how the ethic of love could clarify the ends of law, some indication can be given of how love becomes relevant to the ends of law.

Since the ends of law grow out of a general view of what man is striving for, the standard of Christian love, when defined and expressed in its full nature would provide a basis for the more specific ends of law. If the essential nature of man is love, which on the collective scale means brotherhood, then love provides a very specific insight into the manner in which society ought to be organized. This is not a utopian idealism but the concrete ethics of mutual concern. Its power flows from the conviction that brotherhood or fellowship is not only a primary need of man but that the ethics of love alone can produce it in its most creative form. What this means for the law is that the end of law must not be simply *order,* for order can turn out to be established disorder when considered from the point of view of how man ought to be related to his fellow man. Whenever the law divides

races or groups against each other and creates a condition which fragments the human community, the end of law is as sinful as the motives which lie behind its formulation. Moreover, the ethics of love has the effect of treating men as persons and not simply as things or objects to be manipulated. Thus, the impact of Christian love is to clarify the nature of social order so as to create those conditions which make brotherhood possible. The law cannot put the quality of love into the behavior of men, but it can create conditions which can make the ethic of love impossible. When Christian ethics becomes operative in the legal sphere, as it did during the rise of modern liberal democracy, it acts as a fundamental restraint upon power and control chiefly through its theological element. The law, when it recognizes that man possesses a purpose which he derives not only from nature or the state but from God, is limited in what it can legitimately impose upon man. Totalitarian law would thus be thoroughly inconsistent with Christian ethics, for it would claim from man an allegiance which can be rendered legitimately only to God; it could also seek to force him to break the bond of fellowship with his neighbor, an act the Christian ethic would have to criticize. The ethic of utilitarianism could not supply the basis for resistance or criticism, for on principle the government would have the right to define the meaning of happiness. But no government can consistently alter the essence of the Christian ethics, for it can never define love as hate, or fellowship as discrimination. *Actually,* the government can do all these things—its laws can and do violate the ethics of Christian love. But when the law is conceived, as is the life of man, as a dynamic unfolding and a constant striving toward ends and purposes, deflected by sinful deviations and demonic idolatries, it becomes all the more necessary that the full force of the judgment of love as well as its redemptive power should be brought to bear upon the legal order as well as the individual—they cannot be abstracted from each other. Thus, the theology of law would insist that the concept of *order* can be abstract and ambiguous and can be achieved in ways which would do violence to the essential nature of man and therefore needs to be reconceived from the perspective of creative love.

Similarly, if the law seeks to achieve the goal of *freedom,* the intricacies of such an end as freedom need to be clarified. For, like order, freedom can mean many different things, as implied in such varying notions as *laissez-faire* and "the truth shall make you free." Freedom, primarily, is the presupposition of both law and ethics. In this sense, freedom means that men are capable of alternative modes of behavior. This is a metaphysical notion characterizing the nature of man's being. It is metaphysical freedom which is the presupposition of law, for the law assumes that human behavior is indeterminate—that man

faces and makes real choices. It is the function of law, like the function of ethics, to order behavior or make it determinate. Now if it is one of the ends of law to make possible human freedom, this freedom, as an end of law, must differ from the freedom which is the presupposition of law, for this latter freedom already exists before the law comes into being and could not therefore be the product of law; one does not legislate anarchy, for anarchy exists before the law. Freedom, which the law seeks to bring into being, must therefore be something quite different from mere *laissez-faire*. It must be a structured or responsible freedom. When Christian love informs the jurist, he views freedom as a mode of behavior which tends to increase rather than decrease the scope of fellowship or community. It is a mode of behavior which has a genuine concern for the neighbor and not only for the self. Indeed, the specific impact of the ethics of love here is to reconceive the meaning of freedom, shifting the focus from self-interest to a genuine concern for the other, treating the other not only as a means but as an end, not as a thing but as a person. The argument here is not so much that the law must be in every sense "Christianized," but that because law inevitably drives towards ends, these ends must be clarified not alone by pragmatic concerns and utilitarianism but also by a more adequate ethics of creative love.

To be sure, there are some limitations upon the efficacy of law. The jurist can shape the law to follow close upon the lead of morality. But while the law can secure freedom it cannot make men use it wisely or responsibly, it can regulate marriage but cannot make partners love or forgive each other, it can uphold legal rights but cannot thereby exhaust the full moral relations between parties. As Ames once said, "The law does not compel active benevolence between man and man. It is left to one's conscience whether he shall be the good Samaritan or not."[68] Moreover, no formulation of justice ever escapes the further and constant criticism love brings to the law. This limitation upon law is inevitable, for theology sees man's moral predicament as a virtually permanent condition. There is no moment in time when man achieves perfection, for, as long as he lives, he faces the possibility of choice and in the process of expressing his freedom he invariably insinuates his selfish interests into his behavior. Thus, the actual laws even Christians create partake of the stubborn sin of pride even while raising conduct to a higher level. Moreover, the law cannot reach into the sensitive seat of motive, but must stop short of this final moral dimension. Yet this limitation of law is the outcome of the limitation of man. Everything depends, then, upon how we deal with this human limitation. Earlier theories made what appears to be an unwise deduction here, for because of the weakness of human nature

68. Ames, *Law and Morals*, 22 HARV. L. REV. 97, 112 (1908).

they legitimized arbitrary force and refused to see the relevance of the power of love upon the legal order. To admit the perversity of man does not alter the higher possibility to which man is called. It is no wonder that the biblical view is that love is the fulfillment of the law, for by this it means to say that the fulfillment of law follows upon the fulfillment of man's essential nature.