

March 2008

Modern Theology and Contemporary Legal Theory: A Tale of Ideological Collapse

John Warwick Montgomery

Follow this and additional works at: https://digitalcommons.liberty.edu/lu_law_review

Recommended Citation

Montgomery, John Warwick (2008) "Modern Theology and Contemporary Legal Theory: A Tale of Ideological Collapse," *Liberty University Law Review*: Vol. 2 : Iss. 3 , Article 10.
Available at: https://digitalcommons.liberty.edu/lu_law_review/vol2/iss3/10

This Article is brought to you for free and open access by the Liberty University School of Law at Scholars Crossing. It has been accepted for inclusion in Liberty University Law Review by an authorized editor of Scholars Crossing. For more information, please contact scholarlycommunications@liberty.edu.

MODERN THEOLOGY AND CONTEMPORARY LEGAL THEORY: A TALE OF IDEOLOGICAL COLLAPSE

John Warwick Montgomery[†]

Abstract

This paper bridges an intellectual chasm often regarded as impassable, that between modern jurisprudence (philosophy of law) and contemporary theology. Our thesis is that remarkably similar developmental patterns exist in these two areas of the history of ideas and that lessons learned in the one are of the greatest potential value to the other. It will be shown that the fivefold movement in the history of modern theology (classical liberalism, neo-orthodoxy, Bultmannian existentialism, Tillichian ontology, and secular/death-of-God viewpoints) has been remarkably paralleled in legal theory (realism/positivism, the jurisprudence of H.L.A. Hart, the philosophy of Ronald Dworkin, the neo-Kantian political theorists, and Critical Legal Studies' deconstructionism). From this comparative analysis the theologian and the legal theorist can learn vitally important lessons for their own professional endeavors.

I. INTRODUCTION

Our *fin de siècle*—and, in this case, *fin de millénium*—is characterized by hyperspecialisation run riot. The computer nerd has no idea what is going on outside his software and the rest of us have no clue as to what he is up to. In academia, subject specialties operate like medieval fiefdoms, with little understanding or appreciation of what is occurring elsewhere.

[†] Emeritus Professor of Law and Humanities, University of Bedfordshire, England; Distinguished Research Professor of Apologetics and Christian Thought, Patrick Henry College, Virginia, U.S.A.; and Director, International Academy of Apologetics, Evangelism & Human Rights, Strasbourg, France. Ph.D., Chicago; D.Théol., Strasbourg; LL.D., Cardiff; Dr. [h.c.], Institute for Religion and Law, Moscow. Barrister-at-Law (England and Wales), Avocat (Paris), Member of the California, District of Columbia, Virginia, Washington State, and U.S. Supreme Court bars. Dr. Montgomery's legal specialty is the international and comparative law of human rights and he regularly pleads religious freedom cases before the European Court of Human Rights. He is a U.S. and U.K. citizen, the author of some fifty books in five languages (www.ciltpp.com), and is included in Who's Who in America, Who's Who in France, the European Biographical Directory, Who's Who in the World, and Contemporary Authors. This essay was originally presented by invitation at the symposium *Mere Theism: Liberating Theistic Scholarship* sponsored by Biola University, La Mirada, California, December 3-6, 1998, and originally printed in JOHN WARWICK MONTGOMERY, CHRIST OUR ADVOCATE (2002). Reprinted with permission.

In this paper an attempt will be made to bridge an intellectual chasm often regarded as uncrossable: the chasm between law and religion, or, more specifically for our purpose, that between modern jurisprudence (philosophy of law) and modern theology. It is the conviction of this essayist that remarkable parallels exist between these two areas in the history of ideas and that lessons learned in the one are of the greatest potential value in the other.

II. A CENTURY OF DETERIORATING THEOLOGY

In my now historic debate with the late Resigned Bishop James Pike at McMaster University, I argued that modern theology was engaging in a systematic process of self-destruction. My remarks on that occasion were captioned, "The Suicide of Christian Theology," and later comprised the first chapter of my book of that title. I there developed an analogy, "The Parable of the Engineers," to make my point: Christian theology was like a great cathedral, constructed according to the design and plan of its Architect or Intelligent Designer; but in our time the engineers, representing modern theological schools of thought, have lost confidence in the original plans and have insisted on going their own way, resulting ultimately in the collapse of the structure.

Thus did the great cathedral eventually crumble and fall, killing not only the people who had loved it but also the engineers responsible for its loss. Pathetically, there were a few engineers who, right up to the moment of final destruction, still pleaded that the only hope lay in following rigorously the original plans, that the engineers must bring their stylistic ideas into conformity with the architect's, and that deviations from their notions of style did not constitute genuine errors or contradictions in the plans. But their voices were scarcely heard amid the din of engineering teams working at cross-purposes to each other, and the deafening roar of falling masonry.

And the rain descended, and the floods came, and the winds blew, and beat upon that cathedral; and it fell: and great was the fall of it.¹

My sad tale began with the rise of destructive biblical criticism in the eighteenth century (Jean Astruc *et al.*) and the development of documentary theories in the nineteenth (Graf, Kuenen, and Wellhausen on the "true" sources of Old Testament writings—a subjective literary approach later to be applied to

1. JOHN WARWICK MONTGOMERY, *THE SUICIDE OF CHRISTIAN THEOLOGY* 26-27 (1996).

the New Testament by the advocates of *formgeschichtliche Methode*). Grounded in evolutionary self-confidence as to inevitable human progress, such dehistoricisings of biblical revelation evacuated the text of *de facto* binding force, opening the possibility (nay, the inevitability) of theologies representing little more than human opinion. In our century, the consequential development has been:

1. *Theological liberalism or modernism*: Evolving mankind is able to save itself through imitating Jesus and engaging in “social gospel” amelioration of the structures of life.

2. *Barthian neo-orthodoxy*: Barth recognised modernism’s naïvety in discounting human depravity—a fact brought home by the World Wars—but continued to accept biblical criticism, thereby of necessity relegating the miraculous scriptural gospel to the undemonstrable realm of “suprahistory.” (A vain but heroic attempt to retain the biblical gospel without the historicity of the biblical text: a classic case of wanting one’s cake and eating it too.)

3. *Bultmannian existentialism*: Owing to the inherent instability of neo-orthodoxy, the theologian now seeks to ground theology in personal experience alone. Biblical revelation is “demythologised” and the *Heilsgeschichte* is reduced to existential, subjective, personal encounter.

4. *Tillich’s ontological theology*: A recognition that existential experience in fact offers no solid ground for theologising, combined with a thoroughly unsuccessful attempt to substitute for it Schelling’s idealistic philosophical category of “Being itself.”

5. *Secular and death-of-God theologies*: In the face of the preceding vain and unworkable endeavours to provide non-revelational foundations for theology, together with dogmatic acceptance of the unreliability of the biblical texts, the secular theologians and death-of-Goders deconstruct theology, transforming it into little more than a new humanism.

Now we are going to argue that, in the ostensibly independent area of jurisprudence, a remarkably parallel history of ideological development (or regression, if you will) can be observed—and for precisely the same underlying reasons. Concretely, since the underpinnings of scriptural revelation were removed from natural-law theory in the 18th and early 19th centuries, jurisprudence has developed along the following lines,² paralleling in many

2. It will be noted that we concentrate here primarily on the history of modern

fundamental ways the theological history of ideas just set forth:

1. Classical positivism / Scandinavian and American legal realism
2. The jurisprudence of H.L.A. Hart
3. The jurisprudence of Ronald Dworkin
4. The neo-Kantian political theorists
5. Critical Legal Studies and jurisprudential deconstructionism

We shall now proceed to chart this history in detail, and, having done so, draw an important lesson from it.

III. THE UNNATURAL SHIFT IN NATURAL-LAW THEORY

Until the latter half of the nineteenth century, the prevailing philosophy of law in the Western world was so-called “natural-law” theory. Originating with the Greeks in classical times (Aristotle; the Stoics), it profoundly influenced the Roman world (Cicero; Seneca) and was baptised by the great theologians of medieval Christendom (Augustine; Thomas Aquinas). The essence of the Greco-Roman position was that the human race benefits from natural, built-in standards of justice and human laws need to conform to them. To be sure, the Christian theologians, while fully agreeing on the basis of biblical revelation that man is created in God’s image³ and has God’s law implanted in his heart,⁴ nonetheless recognised the inadequacy of building *simpliciter* a legal system from the conscience of mankind. Thus the Apostle Paul’s proclamation to the Stoic philosophers at Athens that a natural knowledge of God and of morality is not enough: the unknown god of natural revelation is utterly inadequate without Jesus Christ.⁵ Man, after all, is a *fallen* creature and his conscience has been corrupted along with all other aspects of his relationship with his Creator. It follows that mankind, individually and collectively, needs a *special* revelation to clarify and correct misinterpretations of the general revelation of which conscience is one aspect. That special revelation has been provided by grace alone through the Word—the living Word (Christ) and the written word (the Holy Scriptures). The Bible—as Luther would later put it, the cradle in which Christ is offered to us—thus becomes an essential source of knowledge for

jurisprudence in the common-law world rather than dealing with continental European civil-law jurisprudence (e.g., the influential position of Jürgen Habermas). In point of fact, our basic thesis could also have been illustrated from continental sources, but the symposiums time constraints made this impossible. For insights into European philosophy of law today, readers may wish to consult JAMES E. HERGET, *CONTEMPORARY GERMAN LEGAL PHILOSOPHY* (1996).

3. See, e.g., *Genesis* 1.

4. See *Romans* 1.

5. See *Acts* 17.

understanding the true content of natural law and a permanent corrective for conceptions of it based on conscience alone. Scripture corrects and perfects the knowledge of ideal law a fallen race derives from nature and conscience.

It is worthwhile for us to hear two primary-source statements of this Christian approach to natural law; they will serve as an essential point of reference for what follows. The first comes from *Doctor and Student* (full title: *A Dialogue between a Doctor of Divinity and a Student of the Laws of England*), first published in Latin *circa* 1523; prior to Blackstone's *Commentaries*, it served as the leading introduction to the law for fledgling students. The author, probably Christopher St. Germain of the Inner Temple, discusses "the law of reason, the which by doctors is called the law of nature of reasonable creatures," and then proceeds to its correction and extension by way of "the law of God":

The law of nature specially considered, which is also called the *law of reason*, pertaineth only to creatures reasonable, that is, man, which is created to the image of God.

And this law ought to be kept as well among Jews and Gentiles, as among christian men: and this law is always good and righteous, stirring and inclining a man to good, and abhorring evil. And . . . it is written in the heart of every man, teaching him what is to be done, and what is to be fled; and because it is written in the heart, therefore it may not be put away, ne it is never changeable by no diversity of place, ne time: and therefore against this law, prescription, statute nor custom may not prevail: and if any be brought in against it, they be not prescriptions, statutes nor customs, but things void and against justice.

Though the law of reason may not be changed, nor wholly put away; nevertheless, before the law written, it was greatly lett and blinded by evil customs, and by many sins of the people, beside our original sin; insomuch that it might hardly be discerned what was righteous, and what was unrighteous, and what was good, and what was evil. Wherefore it was necessary, for the good order of the people, to have many things added to the law of reason . . .

The *law of God* is a certain law given by revelation to a reasonable creature, shewing him the will of God, willing that creatures reasonable be bound to do a thing, or not to do it, for obtaining of the felicity eternal . . . ; as been the laws of the Old Testament, that been called *morals*, and the laws of the evangelists,

the which were shewed in much more excellent manner than the law of the Old Testament was: for that was shewed by the mediation of an angel; but the law of the evangelists was shewed by the mediation of our Lord Jesus Christ, God and man. And the law of God is always righteous and just, for it is made and given after the will of God. And therefore all acts and deeds of man be called righteous and just, when they be done according to the law of God, and be conformable to it.⁶

Sir William Blackstone, who in his Vinerian lectures of 1758 at Oxford provided students of the common law in England and America with the first comprehensive textbook on the subject worthy of the name, develops precisely the same argument in discussing "the nature of laws in general":

Th[e] law of nature, being coeval with mankind and dictated by God Himself, is of course superior in obligation to any other. It is binding over all the globe in all countries, and at all times: no human laws are of any validity, if contrary to this; and such of them as are valid derive all their force, and all their authority, mediately or immediately, from this original.

But in order to apply this to the particular exigencies of each individual, it is still necessary to have recourse to reason: whose office it is to discover, as was before observed, what the law of nature directs in every circumstance of life; by considering, what method will tend the most effectually to our own substantial happiness. And if our reason were always, as in our first ancestor before his transgression, clear and perfect, unruffled by passions, unclouded by prejudice, unimpaired by disease or intemperance, the task would be pleasant and easy; we should need no other guide but this. But every man now finds the contrary in his own experience; that his reason is corrupt, and his understanding full of ignorance and error.

This has given manifold occasion for the benign interposition of divine providence; which, in compassion to the frailty, the imperfection, and the blindness of human reason hath been pleased, at sundry times and in divers manners, to discover and enforce its laws by an immediate and direct revelation. The doctrines thus

6. [CHRISTOPHER ST. GERMAIN], *THE DOCTOR AND STUDENT* 5-7 (William Muchall ed., 1874); cf. *JURISPRUDENCE: A BOOK OF READINGS* 3, 7-22 (John Warwick Montgomery ed., 1992).

delivered we call the revealed or divine law, and they are to be found only in the Holy Scriptures. These precepts, when revealed, are found upon comparison to be really a part of the original law of nature, as they tend in all their consequences to man's felicity. But we are not from thence to conclude that the knowledge of these truths was attainable by reason, in its present corrupted state; since we find that, until they were revealed, they were hid from the wisdom of ages. As then the moral precepts of this law are indeed of the same original with those of the law of nature, so their intrinsic obligation is of equal strength and perpetuity. Yet undoubtedly the revealed law is of infinitely more authenticity than that moral system, which is framed by ethical writers, and denominated the natural law. Because one is the law of nature, expressly declared so to be by God Himself; the other is only what, by the assistance of human reason, we imagine to be that law. If we could be as certain of the latter as we are of the former, both would have an equal authority; but, till then, they can never be put in any competition together.

Upon these two foundations, the law of nature and the law of revelation, depend all human laws; that is to say, no human laws should be suffered to contradict these.⁷

But, by Blackstone's time, Deistic scepticism toward revealed religion had already begun to erode the foundations of his natural-law theory. The Deists and their continental counterparts (the "*philosophes*" of the French Revolution and the so-called Enlightenment) had no problem with a natural law embedded in human conscience, but they firmly rejected the historic Christian claim to a controlling special revelation in Scripture. Characteristically, Thomas Paine's tract, *The Age of Reason*, not only sets the "Book of Nature" over against the "Book of Scripture" but devotes its entire second half to listing alleged errors and contradictions in the Bible, in an effort to destroy its credibility. The American "Founding Fathers" were deeply influenced by such thinking and based their concept of natural rights, as did the authors of the French Declaration of the Rights of Man, on general and not special revelation: "Nature and Nature's God—not the God of Scripture, the God who in Christ reconciles the world unto Himself."⁸ Result: a Deistic natural-law theory,

7. 1 WILLIAM BLACKSTONE, COMMENTARIES *41-42 (1765-69).

8. See JOHN WARWICK MONTGOMERY, THE SHAPING OF AMERICA 47 (1976). Thomas Jefferson, for example, could not stand the influence Blackstone (as an orthodox Christian and a political Tory) had on American students of the law. See EDWARD DUMBAULD, THOMAS

divorced from biblical controls.

Then, by the end of the 19th century, owing to Darwinian “naturalism” taking the ideological stage-centre, even the Deistic creator-god was dropped from the scenario, and natural-law theory became entirely anthropocentric. Mankind was supposed to manifest, on an entirely naturalistic basis, the required ethical principles—or the ability to arrive at such—which could serve as an adequate criterion for judging positive law and existing legal systems.

Needless to say, this emasculated form of jusnaturalism was entirely incapable of delivering what was expected of it. Nineteenth-century anthropologists were already pointing out the tremendous diversity of standards, ethical norms, and moral practices in the world’s cultures; how was it possible, then, to sustain the idea of a common human “conscience” adequate to judge positive legislation? Moreover, even supposing that such a common standard could be demonstrated, would that make it right? In 1903, English philosopher G.E. Moore identified as the “naturalistic fallacy” the assumption that an “is” (here, common ethical beliefs) can be regarded *ipso facto* as the equivalent of an “ought” (here, proper natural law). And the hopeless generality and lack of specificity of the humanistic natural-law principles made the viewpoint of little practical utility in the legal field. What assistance could secular natural-law theory offer to the day-to-day work of the legislator or judge when it defined true law as “the art of what is good and equitable” (Celsus) or “the abstract expression of the general will existing in and for itself” (Hegel) or “the organic whole of the external conditions of the intellectual life” (Krause)?⁹

IV. CLASSICAL LEGAL POSITIVISM OR REALISM¹⁰

Just as social-gospel modernism, based on an unjustifiable confidence in human nature, overwhelmed traditional, orthodox theology once the latter’s biblical foundations had been eroded, so in the Victorian era a new jurisprudence easily replaced a natural-law theory which no longer relied upon Holy Scripture for its ultimate justification. This jurisprudence came to be known on the European continent as legal positivism, having obvious affinities with the scientific or sociological positivism of Auguste Comte; in the common-law world (England and America) it was generally called legal realism.

JEFFERSON AND THE LAW 9-10 (1978).

9. Cf. JOHN CHIPMAN CRAY, *THE NATURE AND SOURCES OF THE LAW* 88-89, 96-99 (Roland Cray ed., 2d ed. 1963).

10. For an introduction to the modern schools of legal thought discussed in this paper, the reader without training in law or jurisprudence may wish to consult Part II of *A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY* (Dennis Patterson ed., 1996).

The most important influence in the rise of this new movement was utilitarian philosopher and social reformer Jeremy Bentham, who in turn provided the oft-regarded “father of legal positivism,” John Austin, with many of his ideas. Bentham wrote a lengthy critique of Blackstone’s *Commentaries* in which he declared that Blackstone’s “natural and imprescriptable rights” were but “nonsense on stilts.” “From the law of nature,” cried Bentham, “come imaginary rights—a bastard brood of monsters.”¹¹ Law is not some absolute, eternal set of principles established in the heavens and known to all men through conscience; it is, in Austin’s words, simply “a creature of the Sovereign or State.”¹² Law, then, is the commands of the sovereign—no more, no less.

On the European continent, the Scandinavian legal realists of the twentieth century (Hägerström, Olivecrona, Ross) unfurled the Bentham-Austin banner. Alf Ross, the most influential of the three, asserted in the preface to his work *On Law and Justice* that “the fundamental legal notions must be interpreted as conceptions of social reality, the behaviour of man in society, and as nothing else.” He went on to “reject the idea of a specific *a priori* ‘validity’ which raises the law above the world of facts” and to embrace a “relativistic spirit” in jurisprudence. He believed that he was casting aside “*ought*-propositions” in favour of simple, empirical “*is*-propositions.” Law for Ross could be analogised to a game of chess—indeed, reductionistically understood merely in terms of such social game-playing:

This analysis of a simple model is calculated to raise doubts as to the necessity of metaphysical explanations of the concept of law. Who would ever think of tracing the valid norms of chess back to an *a priori* validity, a pure idea of chess, bestowed upon man by God or deduced by man’s eternal reason? The thought is ridiculous, because we do not take chess as seriously as law—because stronger emotions are bound up with the concepts of law. But this is no reason for believing that logical analysis should adopt a fundamentally different attitude in each of the two cases.¹³

11. JEREMY BENTHAM, *Anarchical Fallacies*, in 2 THE WORKS OF JEREMY BENTHAM 501-02 (John Bowring ed., 1838-43); cf. JOHN WARWICK MONTGOMERY, HUMAN RIGHTS AND HUMAN DIGNITY 82 (1995) [hereinafter HUMAN RIGHTS AND HUMAN DIGNITY].

12. 2 JOHN AUSTIN, LECTURES ON JURISPRUDENCE: OR, THE PHILOSOPHY OF POSITIVE LAW 550-51 (Robert Campbell ed., 1873); cf. R.A. EASTWOOD & G.W. KEETON, THE AUSTINIAN THEORIES OF LAW AND SOVEREIGNTY (1929); WILFRID E. RUMBLE, THE THOUGHT OF JOHN AUSTIN (1985).

13. ALF ROSS, ON LAW AND JUSTICE ix-x, 18 (1958).

The most famous of the continental legal positivists and the one who most fully took that philosophy to its logical conclusion was the Austrian jurist Hans Kelsen. He maintained that each legal system is unique and logically uncriticisable from the outside or from the standpoint of any other legal system. A legal system (*Stufenbau*) will necessarily have a fundamental root principle grounding it (the *Grundnorm*) and one cannot subject that basic norm to any higher standard. In Kelsen's own words: "The search for the reason of a norm's validity cannot go on indefinitely like the search for the cause of an effect. It must end with a norm which, as the last and highest, is presupposed."¹⁴ Law thus constitutes a "coercive order" and is—literally—a law unto itself. The "first cause" is not a transcendent God but rather a necessitarian ultimate norm of the human legal system.

American legal realism put (as might be expected) a practical twist to the notion that law is entirely comprehensible humanistically and sociologically. Philosophical utilitarians and pragmatists William James and John Dewey indirectly assisted the development of the jurisprudential realism of Oliver Wendell Holmes, Jr., and Karl Llewellyn. Holmes coined the famous adage that the law is nothing more pretentious than "the prophecies of what the courts will do in fact."¹⁵ For Llewellyn, law is always "in flux" and a "means to social ends," and since the society changes faster than the law, the law must constantly be reexamined to determine how far and how effectively it is in fact fitting the society. The formal literature of the law (the opinions of the higher courts, the law reports) are, in his view, after-the-fact "rationalisations," for legal decisions in reality are made by the weighing of social needs.¹⁶

What have been the consequences of legal positivism or realism as a philosophy of law? It has contributed mightily to unprincipled court decisions such as *Roe v. Wade* which are little more than attempts to identify the social forces in the contemporary society and pander to them: Pilate pragmatically releasing Barabbas and giving over our Lord to be crucified because of the pressure of the crowd.¹⁷

14. HANS KELSEN, *THE PURE THEORY OF LAW* 194 (Max Knight trans., 1970); cf. JOHN WARWICK MONTGOMERY, *THE LAW ABOVE THE LAW* 32 (1975).

15. Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 460-61 (1897).

16. KARL LLEWELLYN, *JURISPRUDENCE* 55 (1962); *THE COMMON LAW TRADITION: DECIDING APPEALS* 35-45 (1960).

17. See JOHN WARWICK MONTGOMERY, *SLAUGHTER OF THE INNOCENTS* (1981); John Warwick Montgomery, *The Rights of Unborn Children*, 5 SIMON GREENLEAF L. REV. 23 (1985-86), and reprinted in MONTGOMERY ET AL., *CHRISTIANS IN THE PUBLIC SQUARE: LAW, GOSPEL AND PUBLIC POLICY* 175-212 (1996) [hereinafter *CHRISTIANS IN THE PUBLIC SQUARE*].

Even more appalling is the fact that without a higher standard to judge legal systems from the outside, legal positivism can do nothing in the face of the atrocities brought about by legal systems such as the Stalinist or the Nazi whose *Grundnorm* and total social fabric are fundamentally flawed. Indeed, just as the two World Wars of our century dealt the deathblow to the old religious modernism, so those same evidences of institutionalised human depravity cut the ground from under positivistic jurisprudence. As the great Belgian philosopher of law Chaim Perelman succinctly put it:

This conception of juridical positivism collapses before the abuses of Hitlerism, like any scientific theory irreconcilable with the facts. The universal reaction to the Nazi crimes forced the Allied chiefs of state to institute the Nuremberg trials and to interpret the adage *nullum crimen sine lege* in a non-positivistic sense because the law violated in the case did not derive from a system of positive law but from the conscience of all civilized men. The conviction that it was impossible to leave these horrible crimes unpunished, although they fell outside a system of positive law, has prevailed over the positivistic conception of the grounding of the law.¹⁸

V. HART AND DWORKIN

The weaknesses of classical legal positivism have understandably led to energetic efforts at refining or redoing that jurisprudence to make it less problematic and vulnerable to criticism. In many respects, the work of H.L.A. Hart, Ronald Dworkin, and the neo-Kantian political philosophers such as John Rawls and Alan Gewirth remind us of the endeavours of Barth, Bultmann, and Tillich to create a meaningful theology after the collapse of the old modernism while still maintaining its position that the Bible is incapable of serving as a trustworthy historical revelation.

H.L.A. Hart, late professor of jurisprudence at Oxford, recognised that the Austinian-Benthamite command theory of law was inadequate. He therefore saw the need to talk about a “minimum content of natural law”: on semi-sociological premises, he argues that all law must take into account five basic facts about human nature: human vulnerability, approximate equality of strength and intellect, limited altruism, limited resources (e.g., food, shelter),

18. Chaim Perelman, *Can the Rights of Man Be Founded?*, in *THE PHILOSOPHY OF HUMAN RIGHTS: INTERNATIONAL PERSPECTIVES* 47 (Alan S. Rosenbaum ed., 1980); see also John Warwick Montgomery, *Law and Justice*, in *GOD AND CAESAR* 319-41 (Michael Bauman & David Hall eds., 1994), and reprinted in *CHRISTIANS IN THE PUBLIC SQUARE*, *supra* note 17, at 133-50.

and limited understanding and strength of will.¹⁹

It will be observed, however, that these five considerations are purely descriptive, not normative, and thus are not the equivalent functionally of traditional natural-law theory. What happens, for example, when one of the facts (say, human vulnerability) *conflicts* with another (say, limited resources)? Which *ought* to prevail? Without genuine, extrinsic norms, Hart cannot tell us.

Hart correctly sees that the Austinian notion of all law being direct commands is in fact hopelessly simplistic. Many genuine laws do not function that way at all (e.g., in the realms of constitutional and procedural law). He therefore stressed that not only is there a direct application of law by way of what he calls "primary rules," but also there are "secondary rules" which determine ultimately what goes into the system and whether and how the system can be changed. Hart identified three kinds of "secondary rules": the rule of change; the rule of adjudication; and—most important—the rule of recognition, by which decisions are made as to what is and what is not a true part of the legal system.

But though Hart was a practical English thinker, lacking Kelsen's Germanic, metaphysical temperament, he remained a positivist to the end: his rule of recognition has the same ultimate limitation as Kelsen's *Grundnorm*. The rule of recognition at the root of a given legal system stands above and beyond extrinsic criticism. One can criticise the lesser rules in the system for their lack of conformity with that rule, but since each legal system exists *sui generis*, there is no way to question the system's rule of recognition itself. To use Hart's own analogy, it is like the standard metre bar in Paris, by which all metre sticks are measured: there is no sense in asking if *it itself* is of the right length.²⁰

And so Hart's rehabilitation of classical command-theory remains hobbled by its fundamental notion that no eternal principles exist to judge legal systems, making them of necessity relativistic and their foundations arbitrary. One thinks of Karl Barth—desperately trying to restore the essential themes of sin and grace to a denuded modernistic theology, but unable to succeed in principle because he could not bring himself to reject modernism's higher criticism of the Bible.²¹

The most recent attempt to refine, and indeed go beyond, classical positivism has been offered by Ronald Dworkin, an American who is H.L.A. Hart's successor as professor of jurisprudence at Oxford. Dworkin takes Hart's positivism a step further. He says: to understand a legal system, you cannot

19. H.L.A. HART, *THE CONCEPT OF LAW* 181-207 (1961).

20. *Id.* at 105-06.

21. JOHN WARWICK MONTGOMERY, *Karl Barth and Contemporary Theology of History*, in JOHN WARWICK MONTGOMERY, *WHERE IS HISTORY GOING?* 100-17 (1972).

even stop with *rules*; you must go on from rules, primary and secondary, to *principles*. What does he mean by “principles”? Rules, he notes, are all-or-nothing, whereas the principles behind the rules “incline” toward particular legal results. Illustration: the legal *principle* that no-one must profit from his or her own wrong. That is *not* all-or-nothing. Why? Because of the *rule* of adverse possession (often wryly called “legal theft”)—the rule that says that if you can occupy in an open, uninterrupted, and hostile manner for a sufficient length of time a particular piece of land under the conditions the common law sets forth, you may obtain the legal title or interest to it. In such an instance, you *will* profit from your own wrong. So, behind the rules there lie general principles, inclining to but not forcing particular legal consequences.

And where, pray tell, do these fundamental principles come from? Here, Dworkin introduces the ideal judge—a kind of Platonic philosopher-king in judicial garb. Judge Hercules develops the needed principles in the course of his judicial activity. Writes Dworkin:

You will now see why I call our judge Hercules. He must construct a scheme of abstract and concrete principles that provides a coherent justification for all common law precedents and, so far as these are to be justified on principle, constitutional and statutory provisions as well.²²

How does the godlike Hercules find these essential principles? Dworkin offers the following (may we say: hopelessly inadequate) account:

We could not devise any formula for testing how much and what kind of institutional support is necessary to make a principle a legal principle, still less to fix its weight at a particular order of magnitude. We argue for a particular principle by grappling with a whole set of shifting, developing and interacting standards (themselves principles rather than rules) about institutional responsibility, statutory interpretation, the persuasive force of various sorts of precedent, the relation of all these to contemporary moral practices, and hosts of other such standards.²³

The net, to put it mildly, is thrown very widely here—with no more assurance that true principles will be preserved from the sociological *vox populi* than we found in American legal realism.

Dworkin argues for “law as integrity,” and by this he means even-handedness and consistency of application. He points out that we would never

22. RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 116-17 (1977).

23. *Id.* at 40-41.

stand for “checkerboard” legal approaches such as resolving the pro-life, pro-choice conflict by making abortion criminal for pregnant women born in even years but not for those born in odd years.²⁴ Agreed: but Dworkin gives us no adequate, principled answer as to whether abortion *per se* is right or wrong.²⁵ And one can have even-handedness and consistency in the most damnable legal systems. Nazi law was quite even-handed and consistent: *all* Jews were to wear the yellow star and *none* of them could, for example, hold a position of public trust.²⁶

Dworkin’s philosophy of law, in spite of its merit in providing insights well beyond those of the positivists and realists who preceded him, still leaves us without the substantive criteria needed to judge the adequacy of any given expression of positive law. He sees that traditional positivism fails in that respect, and he clearly longs for more solid, principled grounds for legal decision-making. His amorphous principles, however, and the mystical functioning of his ideal judge, Hercules, remind us a bit of Rudolf Bultmann, whose reaction to Barthian inadequacies was to turn what should have been a theology of objective, revelatory truth (Luther’s “the entire gospel is *extra nos*”) into a confused mess of existential, subjective pottage.²⁷

VI. THE NEO-KANTIANS, CLS, AND JURISPRUDENCE DECONSTRUCTED

In the face of existential theology’s inability to arrive at any objective principles, Paul Tillich went back to Schelling and rationalistic ontology in his vain search for extra-biblical theological foundations. Similarly, the most influential political philosophers and rights analysts of our time (John Rawls, Alan Gewirth) have attempted to develop along neo-Kantian lines a substitute for discredited natural-law theories and inadequate positivisms.

24. RONALD DWORKIN, *LAW’S EMPIRE* 176-224 (1986). A further collection of Dworkin’s essays is published under the title *Freedom’s Law*. RONALD DWORKIN, *FREEDOM’S LAW* (1996).

25. See Dworkin’s treatment of the abortion issue in his book, *Life’s Dominion*. RONALD DWORKIN, *LIFE’S DOMINION* (1993). I have critiqued his non-solution in my article *New Light on the Abortion Controversy?* See John Warwick Montgomery, *New Light on the Abortion Controversy?*, 60 NEW OXFORD REV. 24 (1993).

26. See, e.g., *LES LOIS DE VICHY* (Dominique Rémy ed., 1992); VINCENT DE MORO-GIAFFERI & PIERRE COT, *LE DROIT NATIONAL-SOCIALISTE*, préface de Pierre Cot (1936); INGO MÜLLER, *HITLER’S JUSTICE: THE COURTS OF THE THIRD REICH*, (D.L. Schneider trans., 1991); EDITH ROPER & CLARA LEISER, *SKELETON OF JUSTICE* (1941); RICHARD H. WEISBERG, *VICHY LAW AND THE HOLOCAUST IN FRANCE* (1996).

27. Cf. JOHN WARWICK MONTGOMERY, *Luther’s Hermeneutic vs. the New Hermeneutic*, in JOHN WARWICK MONTGOMERY, *IN DEFENSE OF MARTIN LUTHER* 40-85 (1970).

Both Rawls and Gewirth have given expression to treating persons as equals in terms of variant interpretations of Kantian universalizability. Gewirth has followed Kant more literally: he has argued that ethical reasoning, as such, is marked by a certain phenomenology—namely, in reasoning ethically, an agent abstracts from her or his particular ends, and thinks in terms of what general requirements for rational autonomy the agent would demand for the self (so idealized) on the condition that the requirements be consistently extended to all other agents alike. Rawls's argument is more abstract but to similar effect: we start not from the particular agent, but from the concept of rational persons who must unanimously agree upon, while under a veil of ignorance as to who they are, the general critical standards in terms of which their personal relations will be governed. For Rawls, the veil of ignorance performs the same function as Gewirth's abstraction of the agent from her or his ends (in thinking ethically, one respects higher-order capacities of personhood, not lower-ends which happen to be pursued); and, the contractual agreement is the functional equivalent of Gewirth's universalization (what all persons would agree to comes to the same thing as what any person, suitably idealized, would demand for one's self on the condition that it be extended to all alike). Now, importantly, both these theories appeal to consequences in arguing that certain substantive principles would be universalized (Gewirth) or agreed to (Rawls). Thus, Gewirth has argued that the universalizing agent would assess the necessary substantive or material conditions for rational autonomy and would universalize those conditions; the consequences of universalization thus importantly determine what would be universalized. Correspondingly, Rawls's contractors consider the consequences of agreeing to certain standards of conduct as part of their deliberations.²⁸

For Rawls, human beings placed under the 'veil of ignorance' as to their special advantages will, by rationalistic necessity, arrive at his two fundamental Principles of Justice (embracing civil and social rights) and thus establish a rationally-sound political and legal order.²⁹ In Gewirth's case, this same result is supposedly achieved by a modern argument paralleling Kant's assertion of his Categorical Imperative ("act only on that maxim which you can will to be a universal law"): human beings, as purposive agents, require freedom and well-being to function, so they must rationally concede such freedom and well-being (i.e., fundamental civil and social rights) to others as well. Result: a just legal

28. David A.J. Richards, *Human Rights and the Moral Foundations of the Substantive Criminal Law*, 13 GA. L. REV. 1395, 1411-12 (1979).

29. See JOHN RAWLS, *A THEORY OF JUSTICE* (1972); JOHN RAWLS, *POLITICAL LIBERALISM* (1993); John Rawls, *Reply to Habermas*, 92 J. PHIL. 132 (1995).

and political order.³⁰

Robert Paul Wolff, author of one of the most penetrating examinations of Rawls's philosophy, identifies the central fallacy in all such rationalisms.

Even if Rawls's theorem can be established, the self-interested moral skeptic may still decline to make a once-and-for-all commitment, even to a principle chosen from self-interest. Fidelity to principle is not, after all, deducible from bare formal rationality.³¹

This strikes equally at Rawls and at Gewirth—and likewise at Robert Nozick³² and at all others relying on neo-Kantian rationalistic assumptions. People simply do not have to act rationally; they do not have to exercise “fidelity to principle” even when the principle can be shown to be formally logical.

Why is this? Because of original sin: the radical self-centredness which fallen mankind displays. Unregenerate people generally refuse to function under a “veil of ignorance” or on the basis of a rational principle of universalisation or “generic consistency” when the result would be to their own selfish disadvantage. Like the secular natural-law thinkers of the eighteenth century upon whom Rawls and Gewirth try to improve (note, for example, Rawls's use of Enlightenment contract-theory as a model), the modern neo-Kantians blissfully disregard the fact of human depravity. Their political and ideological structures thus lack the very necessitarian character for which they were built. As jurisprudential towers of Babel, they not only do not reach to heaven; they produce confusion of thought.³³

And when in an intellectual discipline even the most ambitious efforts to reach solid ground fail—what then? The history of contemporary theology offers a pregnant illustration. When Tillich's “Being itself” collapsed into either pantheism or analytical meaninglessness (your choice!), the direct consequences were “secular theology” and the death-of-God movement.³⁴ And in philosophy of law, the conspicuous lack of success of the neo-Kantian

30. ALAN GEWIRTH, *THE COMMUNITY OF RIGHTS* 16-20 (1996).

31. ROBERT PAUL WOLFF, *UNDERSTANDING RAWLS: A RECONSTRUCTION AND CRITIQUE OF “A THEORY OF JUSTICE”* 20 (1977).

32. Cf. ROBERT NOZICK, *THE NATURE OF RATIONALITY* (1993).

33. For a more detailed critique, see *HUMAN RIGHTS AND HUMAN DIGNITY* *supra* note 11, at 92-98, 182-84. Deryck Beyleveld's herculean effort to vindicate Gewirth's principle of generic consistency is, sad to say, a failure, for it ignores the impact of human depravity on all rationalistic moral systems. See DERYCK BEYLEVELD, *THE DIALECTICAL NECESSITY OF MORALITY* (1991).

34. John Warwick Montgomery, *A Philosophical-Theological Critique of the Death of God Movement*, in *THE MEANING OF THE DEATH OF GOD* 25-69 (Bernard Murchland ed., 1967).

thinkers to provide an adequate foundation for jurisprudence—against the background of the failures of secular natural-law thinking and the amorality of legal positivism—has produced the deconstructivist Critical Legal Studies movement.

CLS, as it is popularly known, appeared on the American law school scene in the 1970s; it has since become an important influence in British legal education as well. The two most noteworthy advocates of the position are Roberto Unger and Duncan Kennedy, whose emphases and concerns, while differing in certain respects, are fundamentally the same.³⁵ These thinkers build upon the pragmatic, social orientation of American legal realism, and carry to a far greater extreme Llewellyn's view that formal legal judgments are little more than rationalisations of social practice. For CLS, the law is to be viewed from the standpoint of radical skepticism: all legal judgment is a matter of choosing one set of values over another. That being so, the purpose of legal activity is not a search for principles of justice embedded in and developed by the legal tradition, but the conscious advancement of a political vision. The law is inherently indeterminate; its literature has no single and objective meaning, being capable of virtually any interpretation; legal principles are contradictory; indeed, the law, in the final analysis, is but a tool generally serving the interests of the powerful and the maintenance of the status quo. So convinced advocates of CLS will follow the approach of critical neo-Marxist Antonio Gramsci³⁶ and endeavour to destabilise the liberal legal culture in favour of those it sees as oppressed. Indeed, even the Rule of Law itself and civil or human rights are suspect and must not be accepted uncritically—for these ideals encourage the fiction that people are in fact treated equally under the law, whereas in our modern "liberal" societies the law actually functions as a lid on the garbage can of an inequitable social system favouring those who control it.

The affinities of CLS with radical Marxism are obvious; less apparent is its dependence on Herbert Marcuse's "critique of pure tolerance," an important theoretical source of the student revolutionary movements of the 1960s.³⁷ One

35. On CLS, see *THE CRITICAL LAWYERS' HANDBOOK* (Ian Grigg-Spall & Paddy Ireland eds., 1992); *CRITICAL LEGAL STUDIES* (Peter Fitzpatrick & Alan Hunt eds., 1987); MARK KELMAN, *A GUIDE TO CRITICAL LEGAL STUDIES* (1987); *POST-MODERN LAW: ENLIGHTENMENT, REVOLUTION AND THE DEATH OF MAN* (Anthony Carty ed., 1990); ROBERTO M. UNGER, *THE CRITICAL LEGAL STUDIES MOVEMENT* (1986); Tibor R. Machan, *How Critical Is Critical Legal Studies?*, 1 *ACAD. QUESTIONS* 54-64 (1988).

36. For a careful treatment of Gramsci's life and ideas, see ALASTAIR DAVIDSON, *ANTONIO GRAMSCI: TOWARDS AN INTELLECTUAL BIOGRAPHY* (1977).

37. JOHN WARWICK MONTGOMERY, *Marcuse*, in *THE SUICIDE OF CHRISTIAN THEOLOGY*, *supra* note 1, at 209-12; see also John Warwick Montgomery, *The Marxist Approach to Human Rights: Analysis & Critique*, 3 *SIMON GREENLEAF L. REV.* 1 (1983-84).

could, of course, engage in systematic critique of CLS's self-defeating deconstructivism, pointing out, as has legal philosopher J.W. Harris, that "the thought of vanguard lawyers armed with real destabilisation power conjures up nightmare visions of re-education camps."³⁸ But all we wish to do here is to emphasize that CLS in the realm of jurisprudence functions precisely as do "secular theology" and the death-of-God movement in the theological sphere: it constitutes an intellectual and spiritual dead-end. Beyond it there be not even dragons, only silence. For the theory has cannibalistically eaten up the very subject-matter which it was supposed to explain and justify.

Is there a common cause for these parallel deteriorations in modern jurisprudence and contemporary theology? To me it seems quite evident that the two spheres share at least one common feature. Both theology and law purport to deal with values: theology, with a transcendent God, the same yesterday, today, and forever, whose eternal will mankind needs to know and obey for everlasting felicity; law, with genuine and inalienable standards of justice. But in neither case can the relativistic human situation give rise to the absolute values sought. Out of flux, nothing but flux. Theology, therefore, necessarily engages in a process of self-destruction when it leaves aside the only verifiable revelation God has ever provided to a sinful race, the Holy Scriptures. To build a theology on any other foundation than that of God's Word is to build on sand.

And legal philosophy has an equal need for the God of the universe to declare, once for all and uncontaminated by human sin and fallibility, the true principles for the ordering of human society so that law can be conformed to justice and righteousness. By setting biblical revelation aside, natural-law theories destroyed themselves, and no amount of human speculation since has been able to rectify the loss.³⁹ A fallen race will not find or be able to sustain intelligent jurisprudential design without listening to the Intelligent Designer. But listening how? and where?

God, who at sundry times and in divers manners spake in
time past unto the fathers by the prophets, hath in these last

38. J.W. Harris, *Legal Doctrine and Interests in Land*, in OXFORD ESSAYS IN JURISPRUDENCE: THIRD SERIES 197 (John Eekelaar & John Bell eds., 1987).

39. This applies also, sadly, to John Finnis's original rethinking of natural-law theory. See JOHN FINNIS, *THE FUNDAMENTALS OF ETHICS* (1983); JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* (1980). Although a Roman Catholic Christian, Finnis's reconstruction of natural-law theory takes place within the secular, humanistic frame of reference: special revelation is not appealed to and Finnis declares that his work "offers a rather elaborate sketch of a theory of natural law without needing to advert to the question of God's existence or nature or will." See *NATURAL LAW AND NATURAL RIGHTS*, *supra* at 49, 371-410.

days spoken unto us by his Son, whom he hath appointed heir of all things, by whom also he made the worlds; who being the brightness of his glory, and the express image of his person, and upholding all things by the word of his power, when he had by himself purged our sins, sat down on the right hand of the Majesty on high Unto the Son he saith, Thy throne, O God, is for ever and ever: a sceptre of righteousness is the sceptre of thy kingdom.⁴⁰

40. *Hebrews* 1:1-3, 8; cf. JOHN WARWICK MONTGOMERY, LAW AND MORALITY: FRIENDS OR FOES? AN INAUGURAL LECTURE (1994); John Warwick Montgomery, *Law and Christian Theology: Some Foundational Principles*, 2 CHRISTIAN LEGAL J. [Canada] 24-31 (1993), reprinted in CHRISTIANS IN THE PUBLIC SQUARE, *supra* note 17, at 117-32; and JOHN WARWICK MONTGOMERY, LAW AND MORALITY: FRIENDS OR FOES? AN INAUGURAL LECTURE (1994).

