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THE RIGHTNESS OF "THE RIGHTNESS OF THINGS"*

PAUL H. BRIETZKE**

INTRODUCTION

Pastor Neuhaus speaks with a rare fire, saying things in ways which should penetrate the groves of academe, if not the corridors of power. I am not qualified to evaluate the no doubt abundant theological merits of the lecture and will thus confine myself to examining its contributions to legal discourse. I feel free to do so because Neuhaus seeks to bring theology to the lawyers. My attempt to do justice to his arguments is spurred by the realization that justice is what they are all about, a matter which is not clarified until the lecture is almost over. Taking the brevity of the lecture and the nature of its audience into account, Pastor Neuhaus seems to have bitten off more than he can comfortably chew. On a closer reading, his arguments lack specificity, are contradictory and leave too many significant issues unresolved.

Lawyers qua lawyers are bound to regard Neuhaus' generalizations and reasoning processes with at least some suspicion. While lawyers are familiar with a syllogistic system of precedent, under which a conclusion in one case subsequently becomes the premise of another, the seemingly dialectical process by which major conclusions of the lecture are simultaneously their own premises\(^1\) suggests a perfect circularity of reasoning. This process would have to be explained and all of the premises articulated before it can be understood by lawyers such as myself. The first canon we are taught in law school is to distrust over-generalization as the locus of arbitrariness and incompetence. A "cult of professionalism" fosters among lawyers notions of a justice encompassing particular rights and duties generating specific claims and counterclaims which are dealt with as technical or administrative exercises on a case-by-case

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**Associate Professor, Valparaiso University School of Law.

1. Conclusions which are simultaneously their own premises are: God, the sense of right and wrong, and the "taken for granted reality." Neuhaus, Law and the Rightness of Things, 14 VAL. U.L. REV. 1, 3-4 (1979) [hereinafter cited as Neuhaus].
basis. This colorless and shallow view of life's riches has been rightly condemned. Jerome Frank, for example, terms it a "belated scholasticism," a "medieval prepossession" in the most exaggerated and persistent form. Analyses such as Neuhaus' must take this sense of professionalism into account, however, for it reflects fairly accurately the ways in which actors perform their roles in legal systems. More importantly, this aspect of professionalism also illustrates the ways in which complex social systems resist the reduction necessary to fit them into tidy analyses such as Neuhaus'. While the lawyers' quest for absolute legal certainty (arguably an aspect of the religious impulse at work in society) will never be fulfilled, we are certainly entitled to ask of a theory that it seek "precision in each class of things just as far as the nature of the subject admits." Further, a theory is of little practical value if concrete policy prescriptions cannot be derived from it in a fairly unambiguous fashion. This, I will argue, is an impossibility under the Neuhaus lecture.

If I may be permitted a Biblical allusion, the lecture falls into the trap of rendering unto God some of the things which are properly Caesar's. I will argue that Neuhaus fails to take adequate account of the role the state plays, for good or ill, in securing justice. More


3. J. Frank, Law and the Modern Mind 63 (1930). While it is true that lawyers are no mere mechanics, this does not necessarily mean that they exercise a "quasi-priestly role" (Neuhaus at 8) unless this role is equated with a more general one, the exercise of power. Many middle-level policy decisions fall to lawyers by default because the technical requirements of, for example, legislative drafting, judicial opinion writing and giving advice to businessmen force lawyers to make specific the often fuzzy, wishful or even deliberately misleading thinking of other social scientists, businessmen, politicians, etc. Lawyers do not often celebrate this power in public, since it lacks both sanction (under, for example, the Constitution, corporate charters) and popular accountability (to the electorate, shareholders, etc.).


5. E.g., J. Ellul, The Theological Foundation of Law 13 (1969): "Christians also belong to an earthly nation, and are subject to this nation's law, which cannot be Christian law." Later in the same paragraph, Ellul shifts to what seems to be Neuhaus' position: "Law is secular and is part of a secular world. But this is a world where Jesus Christ is King." Id.
fundamental, however, is Neuhaus' tendency toward what Garry Willis terms an "intellectual imperialism," a readiness to claim for theology any worthwhile insight gained outside of it for a different purpose and after considerable effort. Neuhaus proceeds to drown all of philosophy in a capacious theology, which then supplies all of the nonlegal underpinnings of jurisprudence. He exorciates the Legal Realists (among others), forgetting that many of them operate pre-existing canons of values which are similar to Neuhaus' in effect but derived from very different, primarily sociological, sources. Realists have replied to this sort of barracking in kind and have called for the Gotterdammerung. These silly types of demarcation disputes among disciplines generate more heat than light—an unfortunate state of affairs for justice, which needs all the friends it can get. Neuhaus seems to recognize the dangers of dispute, yet many of his arguments tend to exacerbate tensions between theologians and other friends of justice. To take the most subtle example offered by the lecture, his assertion that "[t]he exclusion of living moral tradition from the public arena dates from the wars of religion in the seventeenth century" explains too much. Can a moral tradition be "living" if it has been excluded from the "public


7. Religion is defined very broadly: it "may be ... Christianity or Buddhism, or it may be a variation of religion, such as atheism, or it may be a political program or humanitarian ideal or an aspiration to some excellence. It may be superficial or profound." Neuhaus at 2. Has Neuhaus left out any wellspring of endeavor? If so, it is caught by even broader definitions of theology as the "disciplined application of critical reason to the meaning of life [ ] the disciplined reflection upon transcendent truth and value that give significance ... to our lives." Id. at 9. This would be commonly accepted as a definition of philosophy which is both broader and narrower than theology. See, e.g., B. RUSSELL, HISTORY OF WESTERN PHILOSOPHY 13 (1961). Nevertheless, Neuhaus finds that"pursued seriously enough ... the question of meaning is the question of God." Neuhaus at 9. It also becomes the jurisprudential question, for Neuhaus' abstract, general and theoretical investigation attempts to lay bare the essential principles of law and legal systems. See, e.g., P. FITZGERALD, SALMOND ON JURISPRUDENCE 1 (12th ed. 1966).

8. E.g., J. FRANK, supra note 3, at 198-99: "[S]o far as the administration of justice is concerned, there must be a twilight of the gods; ... law cannot function at its best if it must still do the work of religion."

9. See text accompanying note 26 infra. Recriminations between law and theology since the Enlightenment are so intense precisely because they were once a "happily-married couple."

10. Neuhaus at 12-13. See, e.g., id. at 13: "[T]here are many secularists in this society who do most genuinely fear the church's ambitions to rule. Those fears must be put to rest...." Presumably, a bit of poetic license was used here, and fears
arena" for three hundred years? Are the Revolution, the Fourteenth Amendment, and arguments concerning abortion not based on "living moral tradition"?

**NATURAL LAW**

The "living moral tradition" forming the backbone of the lecture is most definitely natural law, and Neuhaus' failure to make any reference to this concept is most peculiar. The most likely explanation is that the appellation "natural law," as opposed to the diverse ideas it encapsulates, is unpopular among theologians; among Catholics since the Second Vatican Council, and among Protestants since the eighteenth century, despite the qualified acceptance of natural law concepts by Luther and Calvin. From a legal vantage point, Neuhaus' arguments amount to nothing other than a theory of natural law (an "ideology" in the eyes of many historians and political scientists) because they fall within the core meaning of commonly-accepted natural law definitions. His assertions reflect a faith in a standard of values rather than logical demonstrations of their content. Neuhaus expects these values, which may be characterized as "imminent in existential facts and independent of human will," to exercise a censorial power over positive laws. In other words, Neuhaus, like natural lawyers, seeks to discover the ultimate measure of right and wrong, the pattern of the good life in the permanent underpinning of law and in its relation to justice. There is certainly no shortage of these kinds of theories of justice, and it is the abundance of contradictory solutions they offer that of a more diffuse religious influence over public affairs are what is being discussed. No one expects a modern nation-state to revert to the kinds of governmental organizations of which churches seem capable, the Papal States or Calvin's Geneva. Many non-Christians examine carefully the stands taken by churches on secular issues, rather than rejecting them out of hand because of their religious inspiration. See text accompanying notes 73-77 infra.

11. P. SIGMUND, NATURAL LAW IN POLITICAL THOUGHT 180 (1971). While secular interest in natural law also flagged after the Enlightenment, a modest revival has occurred since World War I, as a result of declining socio-economic stability, the expansion of governmental activities an increased awareness of the limitations of empiricist social science, and the kinds of motives that led to, for example, the adoption of the Universal Declaration of Human Rights. A natural law "tradition" is described in the text because diverse speculations coexist uncomfortably under this generic label: as "nine different meanings can be found attributed to 'nature' and no less a number of meanings to 'law,' we have (without adding the meanings of the two words 'natural law' as a single symbol) about eighty-one possible meanings." J. STONE, HUMAN LAW AND HUMAN JUSTICE 213 (1965).

12. Id. at 76, 80, 213. See, A. d'ENTREVES, NATURAL LAW 108-09 (2d ed. 1970); E. PATTERSON, JURISPRUDENCE 30, 333-34 (1959).
most limits the influence of natural law.\textsuperscript{13} Wittingly or not, Neuhaus' analyses embody almost all of these contradictions without attempting to overcome them.\textsuperscript{14} An acute theoretical confusion results, and the reconstruction of a coherent theory of justice based on the lecture becomes impossible.

\textit{Deriving an "Is" from an "Ought"}

The distinction Neuhaus makes between concrete or positive laws (\textit{lex, loi, Gesetz, Legge}) and the abstract law (\textit{jus, droit, Recht, diritto}) is of considerable antiquity. The values underlying positive laws can be ascertained with relative ease by studying the history of legislation and the common law. But where are the values underlying “The Law” to be found? Pastor Neuhaus flirts with divine revelation as the source of “The Law” at several junctures,\textsuperscript{15}

\begin{itemize}
\item 14. See text accompanying notes 16-44 \textit{infra}.
\item 15. Catholic doctrine by and large holds that natural law is discoverable from the essential order of created nature. Catholicism finds the basis for this doctrine in St. Paul's teaching that the unaided conscience could arrive at moral truths. This teaching permitted the synthesis of Christian doctrine and non-Christian philosophy by, for example, Aquinas. In contrast, many Protestant theologians (for example, Erik Wolf) emphasize the insufficiency of man’s reason and the weakness of will which result from sin. Justice thus comes from God seizing man and making him just through justifying mercy. For Karl Barth, for example, the Scriptures are a more certain source of religious knowledge than reason. J. Ellul, \textit{supra} note 5, at 27; P. Fitzgerald, \textit{supra} note 7, at 17; P. Sigmund, \textit{supra} note 11, at 181; J. Stone, \textit{supra} note 11, at 194, 214. For Julius Stone such “theories depend on a kind of theological anthropology and theological ethics, transmitted by revelation. . . . [A]cceptance of revelation establishes the reality of natural law; but there is by the same token nothing for discussion with anyone who rejects it.” \textit{Id.} at 195. Cf. J. Messner, \textit{The Postwar Natural Law Revival and its Outcome}, 4 \textit{Nat. L.F.} 101, 104 (1959).
\end{itemize}

Compared to the conventional views of Protestant theologians, the position Neuhaus announces is rather equivocal: “People distinguish between particular laws and what they call ‘the law.’ It is the latter that \textit{partakes} of a numinous, even a divine \textit{character} that, like religion, is binding.” Neuhaus at 5 (emphasis supplied). Causal links are not established among these assertions. Further, law and religion may both be “binding,” but the sources of their “bindingness” may be totally different. See text accompanying notes 52-55 \textit{infra}. Discussing his definition of law as a giving of expression to an “ultimate meaning,” Neuhaus finds this same purpose in Christian theology: it

works with the data of God’s self-revelation in the life, death and resurrection, and promised return of Jesus whom we call the Christ. \textit{But} there are many ways of doing theology other than the Christian way.

And, again in Christian theology, the ultimate meaning of anything is to be found in the end of that thing. \textit{[It]} is revealed—\textit{if} the Christian gospel
but he moves off quickly to find a "sense" of right and wrong embedded in "moral sentiments." These deeply humanistic concepts stand in sharp contrast to the divine revelation that is "a kind of extreme positivism in which God plays God, instead of man playing God.""14 Neuhaus' theory of moral sentiments leaves unresolved two of the major antinomies of philosophy: whether an objective or subjective ultimate meaning is to be found and whether it is sought through intuition or exercises of intellect.

Arguing at the outset that positive law is but tenuously connected to life, Neuhaus nevertheless feels on safe ground while appealing for individuals to use their life experiences to bolster "The Law.""17 Pastor Neuhaus is an attractive experiential "model," but I am unable to forget Hume's brilliant demonstration that everything we know can be stated without introducing the "self" that is nothing but a bundle of perceptions (in the absence of divine revelation). The intuitive sense of right and wrong Neuhaus relies on in others, which seems to reach for the best result automatically, may be attractive precisely because it erects into a theory our inarticulateness about justice. The many things wrong with basing a theory of justice on the secular experience of individuals are summarized by Iris Murdoch as "the self-assertive movements of a deluded selfish will which because of our ignorance we take to be autonomous.""18

Pastor Neuhaus does admit that a few deviants will have ideas of justice different from his, which he then attributes to us,"19 but he seriously underestimates the range of opinion on the subject. Individuals differ widely in the amount of information available to them, in cognitive and evaluative acumen and experience, in the amount of time devoted to thinking about particular matters, and in

But now we are getting ahead of ourselves.

Neuhaus at 9 (emphasis supplied). The structure of this argument is one of fairly strong assertions of divine revelation which are immediately qualified by an "if" and the "but." This syntax makes it difficult to determine the extent to which divine revelation forms the basis of his "theory" of justice.

16. J. Stone, supra note 11, at 214.
17. Neuhaus at 1.
19. See Neuhaus at 4; text accompanying notes 36-38 infra.
perceptions of the implications of their feelings. All of us are influenced heavily by erratic and divergent patterns of culture and language, both on an international scale and within the United States. At the very least, Neuhaus should have qualified his appeal to experience in terms of what we should desire if our impulses are in harmony with reason.20 Even a localized version of the grand moral consensus he seeks seems unlikely.

In a similar vein, Neuhaus' assertion of a free choice when giving "our yes or no to the moral sense that is the foundation of the law"21 stands rebutted by much of twentieth century social thought. He stands on somewhat firmer ground here than elsewhere, however; the positive law as we know it could never reject free will in favor of determinism.22 Even so, this does not mean that determinist arguments can be ignored when framing conceptions of "The Law." Subjectively and intuitively, we live our lives as if free will exists, as if we have something to say about what we are doing. Much of modern psychology demonstrates, albeit imperfectly, that what we see as voluntary choices are no more than conscious rationalizations of unconscious choices. Most of the values and assump-

20. See M. Ginsberg, On Justice in Society 19 (1965); J. Stone, supra note 11, at 320; Barton and Mendlovitz, The Experience of Injustice as a Research Problem, 13 J. LEGAL EDUC. 24, 25 (1960); Knight, On the Meaning of Justice, in NOMOS VI: JUSTICE 1, 11-12 (C. Friedrich and J. Chapman, eds. 1963). Knight contrasts "erratic" cultures with the biological evolution that produced a "practically uniform" human species. Id.

21. Neuhaus at 5. While free will is at "the center of any life worth living," id. at 2, critical judgments based on the exercise of a free will may have little practical effect: "We can withhold our subjective acknowledgement or assent from the reality to which our moral sense points, but we cannot, without abandoning the world of reasonable discourse, refuse to recognize the empirical fact of the law as it makes its appearance in every society." Id. at 5. Presumably, some distinction is intended between this "reality" and a "prevenient reality." Id. The latter is a decidedly ambiguous concept (see, e.g., note 52 infra); in 2 SHORTER OXFORD ENGLISH DICTIONARY 1666 (1975), "prevenient" is defined as "coming before," "anticipatory" and "expectant," as well as "the grace of God which precedes repentance and conversion, predisposing the heart to seek God." The latter I take to be the meaning of Neuhaus' (arguably redundant) "prevenient grace." Id. at 2. Is "prevenient reality" a theologian's pun?

22. Much of modern law, contracts, tort and criminal law in particular, could not exist if we were unable to infer a free choice (for example, intention) from certain acts, in the absence of insanity, duress, etc. Injustice is felt where penalties are imposed in the absence of fault; public opinion favors strict liability only in those areas where moral condemnation is not an issue. The "natural" rights of Englishmen, stemming from transactions involving the exercise of free will, have been embodied in the U.S. Constitution. See Alphacell Ltd. v. Woodward [1972] 2 All E. R. 475, 483 (per Dilhorne, Vct.); P. Stein & J. Shand, supra note 13, at 130-33; Diamond, With Malice Aforethought, in A SOURCEBOOK of the CRIMINAL LAW of AFRICA, 10, 11 (R. Seidman, ed. 1966).
tions on which our choices are based have been internalized prior to our reaching the age of intellectual consent. Freudians and many neo-Freudians view individual judgments as influenced heavily by instincts which are incompatible with the requirements of civilized life. Many sociologists have discovered large numbers of what they term alienated and anomic individuals, whose anxiety, isolation and purposelessness prevent them from making rational judgments about right and wrong. Building on these arguments, Sartre writes of the fundamental absurdity in recognizing the necessity for moral commitment while knowing that such a commitment is meaningless.23

The possibility of a coherent moral consensus thus approaches the vanishing point under contemporary theories of psychology and sociology. Organized religion has played and will continue to play a major role in the formation of attitudes, in giving life meaning and in reducing anomic and alienation. Neuhaus does not emphasize these religious influences, however. He merely terms the kinds of theories "reductionist and finally trivializing"24—precisely the criticisms that can be levelled against his lecture. For example, he trivializes "psychological and other" explanations of "The Law" as "a residual 'father image' or the after-glow of traumatic punishment experienced during potty training."25 Those who would disagree with Neuhaus (Freud, Robert Merton, Sartre, Hans Kelsen, Bentham, et al.) are variously labelled "handicapped," solipsistic sophomores, and individuals with deplorable personal deficiencies subject to "poverty, if not perversity, of mind."26 This kind of name-calling detracts from rather than adds to the weight of argument and constitutes the least attractive aspect of the lecture.

**Individuals in a Moral Universe**

Isolated individuals must obviously be brought together before their beliefs can have much of an impact on justice, yet the ways in

23. R. MERTON, SOCIAL THEORY AND SOCIAL STRUCTURE 162 (1957); Seeman, On the Meaning of Alienation, in SOCIOLOGICAL THEORY 510, 515 (L. Coser & B. Rosenberg eds. 1969); P. SIGMUND, supra note 11, at 212. See Brietzke, The Chilobue Murders Trial, 17 APR. STUDS. REV. 361, 369-70 (1974); Markse, Kofran & Vago, The Significance of Natural Law in Contemporary Legal Thought, 24 CATH. LAW. 60, 74 (1978). See also Knight, supra note 20, at 18: "Human limitations and subservience to habit assure that what is must always be the main content of what ought to be—despite all complaint and grumbling."


25. Id.

26. Id. at 3, 5. Arguably, the dean of Legal Realists—Jerome Frank—would agree with these assertions.
which Neuhaus assembles them pose all but insuperable difficulties. Somehow a very firm bridge has to be built between the moral experience that is essentially a matter for the individual and the legal experience that exists only within society and which purports to pursue the common weal.\textsuperscript{27} The picture Neuhaus initially conveys of litigious individuals who, for example, increasingly subject the "intimacies of marriage" to "the calculus of contract,"\textsuperscript{28} is not flattering and tends to negate the existence of the moral consensus he subsequently discovers. On these matters he takes law too seriously; a more relevant and useful description (devised by legal sociologists and Realists, whom he disdains) is that law is but one of the background assumptions which generate mutual expectations. When law comes to the fore, it is as an effect rather than a cause of dispute. The "proximate" cause of the re-emergence of marriage-related contracts, for example, is the collapse of the sanctity of marriage among some groups, a contemporary theological concern which illustrates an erosion of the bindingness of some of the moral obligations on which Neuhaus relies.\textsuperscript{29} The increase in American religiousness\textsuperscript{30}—high in comparison with that of the English but comparable to that of, for example, the Germans—is likewise the effect, not the cause, of increased social conflict. Once again, we must not exaggerate the influence of law on American society; at most law serves to move delicately balanced matters off dead center.\textsuperscript{31} While the individualism of the disputes underlying much of American litigation may be a good thing from the standpoint of social stability, it nevertheless reflects a disensus concerning distributional issues: who is to get what, when, where and how. Although Neuhaus largely ignores them, the distributive aspects of justice are of primary concern to most Americans. It is at the pressure points in the distributional process, the junctures at which litigation most often occurs, that convincing appeals to a sense of right and wrong have their greatest effect.\textsuperscript{32}

\textsuperscript{27} See Del Vecchio, \textit{cited} in A. D'Entremessous, \textit{supra} note 12, at 84.
\textsuperscript{28} Neuhaus at 1.
\textsuperscript{29} \textit{Id.} at 2.
\textsuperscript{30} The increase in American litigation has lagged behind population increases and the growth in the potential reach of the law, largely because litigation has always been expensive relative to prevailing incomes. Friedman, \textit{Law, Order and History}, 16 S. D. L. REV. 242, 253 (1971).
\textsuperscript{31} J.W. Hurst, \textit{Law and the Social Order in the United States} 80 (1977).

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An examination of the two major examples Neuhaus offers on this topic is relegated to a footnote because I hope to have shown by now that his conception of justice assumes a consensus that is definition, however, the individuals' sense of right and wrong is only appealed to where differences of opinion exist. Taking the goals of liberty and equality—over which so much American ink has been expended—into account, is it "right" or "wrong" to, for example, use public funds to finance the abortions of the poor? Reasonable minds can differ because they do differ. Such examples could be multiplied endlessly, and it is difficult to see how, in the absence of divine revelation, a communal sense of right and wrong based on appeals to individual experience can be anything more than a weighted index of these contradictory attitudes. See text accompanying notes 39 and 72 infra.

33. Neuhaus at 4-5, draws a parallel between someone who would "explain away" moral sentiments (the "experience of having offended" against the law) and the "person who insists my experience of a Mozart piano sonata is not an encounter with beauty but with a neuro-chemical response to physical vibrations. . . ." Setting aside the bubble-like fragility of this analogy (and the fact that Pastor Neuhaus and I do agree on one thing—Mozart), how can Neuhaus conclude that his rhetorical critic displays a "poverty, if not perversity, of mind"? Id. The experience of beauty is arguably no less subjective than that of justice and, to judge from record sales, radio station programming, etc., Mozart's is definitely a beauty for a tiny minority in the United States. We might term this group intellectuals of pretense or substance, or precisely the group to whom Neuhaus' elegantly-phrased, sonata-form arguments would appeal. He does make a plea for less elitist "worldviews" at the conclusion of the lecture. Id. at 11-12; see also text accompanying notes 62-63 infra. However it is difficult to see how his lecture could form the basis for them.

Even more interesting is Neuhaus' proof that we offend against the Law when we break a law, based on Berman's "all embracing moral reality [see note 21 supra], a purpose in the universe, which stealing offends." Neuhaus at 2. True it is that all societies acknowledge the concept of ownership; they diverge widely when we examine the kinds of subject matter to which ownership attaches, however. The major means of production cannot be privately owned in communist party states, and many thefts become offenses against the state that hardly amounts to Berman's "purpose in the universe." In a few "primitive" societies, individuals may only own privacy (some would not consider this a proprietary right) and their own name. When the U.S. income tax was first introduced, it was widely deemed a taking without consent; today, it is accepted widely. As "a purpose in the universe," then, the prohibition of stealing becomes so general as to be both meaningless and dangerous. Using the kind of reasoning Berman adopts, any particular law or concept (for example, Charles Reich's "new property") can be assimilated into universal law, particularly as state actions influence individual perceptions of right and wrong. The ease with which this can happen is illustrated by the ways in which Giorgio Del Vecchio accommodated the laws of Fascist Italy within his libertarian theory of justice. Similar things could happen to Neuhaus' arguments in less scrupulous hands for, as we shall argue, they have a close affinity to Del Vecchio's. See text accompanying note 57 infra. See W. FRIEDMANN, LEGAL THEORY 188-89 (5th ed. 1967); Honore, Ownership, in OXFORD ESSAYS IN JURISPRUDENCE 107 (A. Guest, ed. 1961); Mead, Some Anthropological Considerations Concerning Natural Law, in INTRODUCTION TO JURISPRUDENCE 144, 146 (D. Lloyd, ed., 3d ed. 1972).
broader and deeper than the one attainable in this, or any other, worldly society. It is more accurate to speak of individuals sharing a sense of injustice rather than of justice: personal confrontation with certain conditions all but universally provokes anger where an established serial order of entitlements is not respected or the serial order is clearly irrelevant. Only an exceedingly incomplete sense of justice can be derived from these subjective judgments reached in the heat of anger. Injustice is only a particular instance in which a wider justice is not achieved.\textsuperscript{35}

Presumably one of Pastor Neuhaus' responses to my criticisms would be that he has succeeded in linking, in a "relational" way, the changing and localized moral sentiments of individuals with an immutable, \textit{a priori} rightness and wrongness. He argues that the bond or obligation we affirm, or want to affirm "is \textit{not at our disposal}; \ldots it is \textit{prior to} our being possessed by it; to it we hold ourselves accountable because to it we are accountable." This "prevenient reality" is an instance of "seeing what we had not seen before but had been there all along \ldots [the] 'taken for granted reality' without which the world is inexplicable." The "sense of right and wrong turns out to be the premise of all other meanings." It is "inseparably connected to an awareness of prevenient obligation, whether or not \ldots expressed in explicitly religious terms."\textsuperscript{36} The overall tenor of

\textsuperscript{34} It is difficult to ascertain the putative reach of Neuhaus' arguments. While he frequently uses what are universals \textit{ex facie} and, at other junctures, speaks in terms of justice in Western societies, we find out near the end of the lecture that we are contemplating "this society's sense of right and wrong." Neuhaus at 12. Thus, in order to be fair, I have evaluated the lecture with reference to America's experiences; there would be little sympathy abroad for the individualistic thrust of his arguments.


\textsuperscript{36} Neuhaus at 2, 3, 5, 6 (emphasis supplied). See id. at 7; Markse, \textit{et al.}, \textit{supra} note 23, at 62. On the weaknesses of this line of reasoning, see note 21 \textit{supra}; text accompanying note 1 \textit{supra}.

The ways in which Neuhaus links individual sentiments with immutable sentiments may amount to a natural law with a "changing content." Basic principles remain constant but their detailed application depends on the circumstances of time and place: for example, slavery was permissible in ancient Greece but not in 20th century America. If this is what Neuhaus intends, the basic principles are never delineated adequately and the relevant social differences may be congruent with difference in individual moral sentiments. See P. FITZGERALD, \textit{supra} note 7, at 21.

Further, immutable \textit{a priori} premises can only lead to conclusions of the same type; the exercises in logic which Neuhaus offers thus have little practical bearing on the predetermined outcome of his arguments. I am unable to resist the temptation to add a "joke" concerning what "had been there all along" and about a philosopher, a
his arguments suggests that Pastor Neuhaus' immutable *a priori* premises stem from an empirical source: his personal sense of right and wrong.7 We are thus stuck between a philosophical rock and a hard place. On the one hand, Pastor Neuhaus' subjectivities masquerade as an objective "moral police" inclined to "invest mere likes and dislikes with the authority of moral law"8 to overcome rival moral judgments. On the other hand, the rejection of objective truth has the effect of making "the majority for practical purposes . . . the arbiters of what to believe.9

The immutability and objectivity claimed for Neuhaus' "preven-
tient reality" is quickly watered down by linking it to the sen-
timents of individuals through the subjective and evanescent by-
products of relational experiences: gratitude, resentment, shame and
guilt.40 These are, by definition, the products of faith or intuition rather than the intellect. Shame and guilt are futile feelings41 commonly cited as evidence of psychological maladjustment when they appear in excess. Neuhaus ignores many significant relations and relational experiences.42 For example, the notion of corrective justice is based on a relational *history* among individuals and groups, a history of injuries and inequalities which forms the basis for compel-

d theologian and a lawyer. The philosopher enters a coal shed at midnight, looking for a black cat he believes does not exist. He doesn't find it, nor does the theologian who believes, however, that the cat is there. The lawyer goes into the coal shed, extracts two black cats he has concealed in his coat pockets and emerges triumphantly to face a press conference.

37. See text accompanying notes 18-21, 23-26 infra.
39. B. Russell, *supra* note 7, at 94. This majoritarian approach has been repudiated in part for America by the First Amendment. See note 32 *supra*; text ac-
companying note 72 infra.
40. Neuhaus at 3-4. These moral sentiments "are inherently relational. That is, they do not exist in a vacuum; the experience is related to someone or something beyond itself . . . It is . . . related to something that is religious, having to do with the religare, with a network of bindingness of which our obligations are part." Id. at 4.
41. "No good has ever come from feeling guilty. . . . The guilty do not pay atten-
tion to the object but only to themselves, and not even to their own interests, which might make sense, but to their anxieties." Hardin, *The Tragedy of the Com-
mons*, in *Economic Foundations of Property Law* 2, 8 (B. Ackerman ed. 1975)(quoting
Paul Goodman).
42. *E.g.*, the "intercorporate mode of doing business," the many interventions of
government, and the development of closed, well-to-do residential communities.
ling claims to redress. Those relations which generate the experiences Neuhaus does discuss, family relations for example, have been in a constant state of flux since about World War I. In sum, Neuhaus' natural law asks us to base our notions of justice on a murky higher reality we are allowed to see but dimly through our artificially truncated relational experiences. His method of pursuing justice requires more than acts of faith; it requires us to repudiate reason. As such it could hardly fulfill the role Neuhaus gives it as a tool of critical reason.

Justice and History

Lest my evaluation of Neuhaus' natural law appear to be entirely negative, let me add that while much of his analysis is rooted too firmly in the America of 1979, he also gives the broad historical sweep of the pursuit of justice a valuable emphasis. This is a needed corrective to theories such as Rawls' and to the preoccupations of American lawyers, who have little interest in legal history or in legal systems other than their own. The dynamic and contingent elements revealed by a historical perspective do, however, convert his a priori immutable ideal of justice into a loose approximation of that which a particular society is capable at a given stage of development. The meaning of justice changes over time and the ways in which it is sought changes its meaning; gone is the possibility of a mechanical Categorical Imperative which grinds out the correct result after a penny's worth of general principles is inserted.

Pastor Neuhaus uses his historical perspectives to sketch a developmental theory of justice, invoking "the 'oughtness' of things

44. J. ELLUL, supra note 5, at 26, comments on the "inconsistency" from the theological viewpoint of "believing in, while not being able to define, a common principle."
46. A development model does not purport to describe a particular sequence of events or to predict a specific future. Rather, it is a theory of institutional constraint and response whose intellectual function is to identify potentials for change in a specific range of situations. Although the model may . . . roughly approximate the broad sweep of history, this is not the main point. . . . [The model] is helpful if it successfully identifies characteristic stresses, problems, opportunities, expectations and emergent adaptations. . . .
in order to bring the 'isness' of things under judgment." He finds that the "anticipatory" quality of law is such that "the 'now' is at best only a preview of the promised 'not yet'."47 This is a noble attempt at bridging the chasm between fact and value that has be-devilled law and the other social sciences ever since David Hume and a subsequent empiricist tradition raised it to a first principle. Unless what "is" can be evaluated in terms of what "ought" to be, critical theories of justice remain impossible. We can determine whether a particular result is efficient (in the economist's sense) but not if it is good or just.48 Law is a particularly useful means of syn-

[P]atterns [of social change] involve both disorganization and reorganization, the attenuation of the old and the emergence of the new. They are developmental, however, in that some states or stages are assumed to be "prior" to others, often in time, but more significantly in importance and function. . . .

A key function of developmental models . . . is to help diagnose the capacities and weaknesses of institutions, and assess their potentials for the realization of values.


47. Neuhaus at 7, 11.

48. Whether true or false, Hume's skepticism arguably illustrates the bankruptcy of eighteenth century reasonableness. In any event, he cheerfully ignored his own precepts when writing about social problems like any other enlightened moralist of his time.

At the very least, values such as honesty, integrity, judiciousness, caution and conscientiousness are a necessary part of any worthwhile scientific (or social science) inquiry. Even in the natural sciences, rigid is/ought distinctions cannot be maintained: values (including maximizing the profits of research institutes) determine what is studied, how scientific resources are allocated and which ideas attract the commitment of the scientific community. In this sense, science is less scientific than Neuhaus seems to assume. In any event, to equate social "science" with natural "science" is to illustrate the logical fallacy of the ambiguous middle.

Lawyers cannot repeat experiments to verify hypotheses, and the principles they create decide cases—while scientific "cases" are part of the material from which a scientific principle is drawn. Legal principles change in response to changed moral or policy considerations, as well as to perceived changes in fact situations. Lawyers reason by analogy and choose from among competing analogies, while scientists cannot use analogies. Among jurists, only a portion of the analytical positivists aim at a "scientific" jurisprudence, and these persons are immune to any form of natural law argument anyway.

Social life is too complex and too vulnerable to human and environmental forces for social science analyses to be as precise as those of the natural sciences. To eliminate value judgments is, in any event, to eliminate social science: since it studies human behavior, social science must be concerned with the value judgments people make. Black people know racism to be cruel and the unemployed view the economy as harsh and unjust. This knowledge affects their actions and the thought and actions of others, but not necessarily in the ways Neuhaus suggests. This knowledge must thus
theorizing "is" and "ought" over time. For, as Jerome Hall notes, "the value and the factuality of law coalesce in the specified ongoing condition as it moves toward its goal." On this view, whether or not society circumvents or stops short of achieving justice—a concrete but frequently reformulated "ought," chosen carefully from among many other "oughts"—depends on the pull of the "ought" against the inertia of fact, the "is." Ideally, a developmental theory would also incorporate a pragmatic evaluation; the "can," of the social, political and economic resources (broadly defined) available to be mobilized to achieve justice in a particular place and time. As soon as a society moves beyond subsistence, distributional issues begin to revolve around socially—as opposed to biologically—determined needs and desires. Things and rights which almost everyone else has become a psychological necessity for the underprivileged in their battle to escape degradation.

While much of history is apparently indifferent to any pattern of right and wrong, law and morality are becoming increasingly interdependent in the West. Legal changes rely increasingly on legislative fact-finding inquiries and on conceptions of well-being and the other purposes law (and American legal education) "ought" to advance. Whether law does as much as it "can," given America's level of development, is a very different matter which is beyond the scope of this comment. As it is I have gone far beyond Neuhaus' formulations to outline a process characterized by tension and conflict rather than the consensus he assumes. Instead of constituting a "prevenient reality," competing values are in a constant state of

be incorporated into social science analyses; the only danger is that it will displace rather than complement careful observations of what actually happens.


49. J. Hall, Comparative Law and Social Policy 82-83 (1963). See J. Robinson, supra note 48, at 123; Selznick, supra note 48, at 19; E. Schur, supra note 13, at 202: "The legal system is at once an embodiment of high ideals and a means by which men can deal with the quite mundane and often messy problems that arise in everyday living." Cf. P. Stein and J. Shand, supra note 13, at 238 (quoting Neil MacCormick): "[P]rinciples express the underlying purposes of detailed rules and specific institutions, in the sense that they are seen as rationalizing them in terms of consistent, coherent and desirable goals. Thus legal principles are the meeting point of rules and values."

possibly becoming a reality in American society. Formulations of these values should be based on past experiences and serve to anticipate the future as well; there is no hard evidence that ours is the acme of civilization. While Neuhaus tends to overemphasize present experience, he also takes a more dynamic view of justice than is found in the older theories of law and theology, with their emphasis on a minimum of change and a maximum of static perfection. Finally Neuhaus neglects the fact that it is through political processes that fact and value have intermingled throughout history. 51 Having, as Neuhaus might argue, smuggled the state into my evaluations, I will move on to explore his other major theme.

LEGITIMATION CRISIS

Neuhaus considers a vital issue at various junctures in the lecture: Crises in government legitimacy, if they are not resolved, may result in fundamental changes in government and in life as we know it. Given the temper of the times, many writers on public affairs are addressing this problem. Compared to the best of their work, Neuhaus' descriptions and solutions are not particularly perceptive. He takes an overly-legalistic view of the problem and arguably mystifies the "awe and majesty" of law that turns out to have nonmetaphysical and rather mundane origins. He equates religion with laws we are bound to acknowledge. This equation can exist only at a very high level of generality, for law and religion have very different sources of bindingness and acknowledgement. A life without freely-accepted obligations may be unpleasant but, contra Neuhaus, it is not necessarily "in bondage to chaos." Chaos is contained through obligations imposed by individuals, groups and the State. At best life is a compound of freedom and necessity. 52

51. Cf. G. DEL VECCHIO, JUSTICE 155 (A. Campbell ed. 1953) on "the historical life of the law." "Like Saturn in the old fable, our consciousness seems to devour its own children. Having produced solutions to the problem of justice, it straight-away finds in them argument to restate the problem as against themselves, seeking further and independent solutions." Del Vecchio then goes down a Hegelian road which most American lawyers would not travel: "law is the object of a qualitative progress of phenomena from mere formless matter to progressive organization and individualization. The aim is perfect autonomy of the spirit." Id. W. FRIEDMANN, supra note 33, at 188. His principles of justice are not merely evaluative; they are bound to realize themselves in history, ultimately through a universal world law.

52. See Neuhaus at 2, 5-6, 9; J. ROBINSON, supra note 48. Neuhaus argues "that the origins and sustaining force of law are indeed obscure and mysterious. There is nothing more unrealistic . . . than the proposal that laws are created or obeyed apart from a communal consensus of what is right and wrong . . . inseparably connected to an awareness of prevenient obligation . . . ." Neuhaus at 6.
The Causes of Crises

Neuhaus does not define the contentious concept of legitimacy, which I take to denote a faith or trust in law and individuals, organizations and procedures sufficient to make claims to obedience seem self-evident. To the extent that these claims seem self-evident, fewer of the resources used to secure compliance need be deployed. These resources, which are both a cause and effect of legitimacy over time, include: law, of course; revolution, the Constitutional Convention for example; charisma, Washington as the Father of his Country; political leadership, Roosevelt during the Depression and the War; the approved exercise of discretion fettered but loosely by law, the Manhattan Project; ideology, anything plausibly defined as part of The American Way during the 1950s; coercion, federal troops implementing Southern school integration; and public participation in decision-making, community-level minority programs during the 1960s and 1970s. Neuhaus' bald assertion, "if law is not also a moral enterprise, it is without legitimacy or binding force," ignores the sources of legitimacy I have listed and many others too. My list, such as it is, enables us to focus more precisely on the causes of contemporary legitimation crises: the resources which bolster legitimacy are manifestly in short supply, in large part because they have been foolishly dissipated by incompetent politicians and bureaucrats. Consider for example the Vietnam War and the energy "war." Vast amounts of human, political and economic resources are squandered in largely futile attempts to convince the public of the existence of crises deemed self-evident by Presidents and bureaucrats. As a consequence, the goodwill on which every regime hopes to trade is dissipated.

While Neuhaus adopts the fundamental assumption that we are a nation of laws and not men, most Americans have little cause to make this distinction. The authority of the law is seen to be linked closely to the authority of those who make and apply it. If they are perceived as immoral, incompetent or not popularly accountable (e.g., the Warren Court), the authority of the law suffers accordingly. Immorality is the only one of these three criteria addressed by

Neuhaus' line of reasoning leads me to conclude that "prevenient obligation" is "obscure and mysterious"—a conclusion abundantly confirmed by other arguments deployed by Neuhaus. See, e.g., note 21 supra.


Neuhaus, and then only in a cosmic sense, which for example, ignores the venality of politicians and bureaucrats. As Neuhaus argues, citizens like to see their affairs handled in a moral fashion. But the public seeks more: decisions which are quick, precise, mechanical and objective. Most Americans balance rationally the sometimes irrationally-perceived losses—privacy, free enterprise, etc.—and gains from contacts with various levels of government. Many of these contacts are not directly regulated under law; in Chicago, Mayor Richard Daley’s political machine merely made blatant what often remains latent in much of governmental activity. If people feel themselves to have gained on balance from government, they will take care to avoid endangering the overall system while grumbling about and seeking to change particular outcomes. Another aspect of the legitimation crisis, then, is that greater numbers of people now find themselves holding the short end of the government stick. If Pastor Neuhaus’ sense of right and wrong has anything to do with contemporary delegitimating processes, it is as an exceedingly pragmatic and self-interested right and wrong.

The connections between his two major themes, legitimation crises and the impact of the moral sentiments of individuals, are left obscured by Neuhaus. His phrase “however much our ideas may be socially constructed and conditioned” leaves the most important question unanswered: to what precise extent are they socially conditioned? His assertion that “law is preeminently a social phenomenon” is a truism. The only guidance we received is a brief statement to the effect that law is by definition “trans-subjective”—a rubric adopted in Giorgio Del Vecchio’s theory of justice, which is similar to Neuhaus’. While Neuhaus does take limited account of the state’s role in promoting justice and legitimacy, smaller groupings such as the NAACP or the Sierra Club are totally ignored—as they are in Roscoe Pound’s theory of justice, for example. Each group has a moral sense which is both different in kind from

55. Neuhaus at 5.
56. Id.
57. Id. In a Kantian and Hegelian vein Del Vecchio held that man as an intelligent being comprehends and even transcends nature. Each of us possesses the “eternal seed of justice,” which is both idea and sentiment or what I have termed the admixture of intellect and intuition used by Neuhaus. The essence of Del Vecchio’s justice is “inter-subjectivity,” the simultaneous consideration of several subjects on the same plane. Friedmann, supra note 33, at 186-88. Such a process requires that individuality be overcome through a “projection of the ego in form of the alter, the subordination of self to a trans-subjective standard.” G. DEL VECCHIO, supra note 51, at 158 (emphasis supplied).
that of individual members and greater than the sum of its parts. The latter is a major reason for organizing the group in the first place, to make more effective the pursuit of members' interests through the pluralistic political bargaining that, for good or ill, molds the face of American justice. Fierce competition among single-issue pressure groups can cause democracy to give way to the kind of syndicalism that paved the way for Italian and Spanish Fascism. This is presumably the kind of change in government that worries Neuhaus. Without assistance from independent groups, on the other hand, the individual is deprived of much fellowship and stands naked in front of the state—one of the preconditions to authoritarianism. In the West, the law takes a formally cool but neutral approach to most groups, ignoring their potential roles in securing genuine participatory democracy, legitimacy and justice. It is surprising that Neuhaus should also ignore this potential, for he has a laudable reputation as a participant in group struggles for social justice.

In *Moral Man and Immoral Society*, Niebuhr effectively rebuts the position taken by Neuhaus and many others, that a society and its state can live up to the sense of right and wrong applied to individuals. Niebuhr argues that, while the lesser of two evils will often be chosen by a state, it remains an evil nonetheless. From this vantage point, the application of principles of justice becomes as problematic as the application of precedents supplemented by the juries and courts of equity that occasionally attempt to do justice, beyond the point to which law can be stretched. This kind of imperfect pliability, encompassing the having and sharing of purposes and experiences, makes the concept of the Western liberal democratic state the best worldly approximation of the religious and philosophical ideal Neuhaus seeks. This concept of the state encompasses the essence of the old idea of reason without its elitist rationalism. Contra Neuhaus, the legitimation crises he describes are those of an all-too-imperfect realization of such a state, rather than

59. J. Stein & P. Shand, * supra* note 13, at 52. The idea derives originally from Aquinas: see, e.g., J. Stone, * supra* note 11, at 52. See also B. Russell, * supra* note 7, at 189: "It is impossible to organize an orchestra on the principle of giving to each man what would be best for him as an isolated individual. The same sort of thing applies to the government of a large modern state, however democratic."
crises of law *per se*. American and Western European governments lack the political leadership and administrative capacities needed to cope with the near-collapse of many non-governmental sources of authority, which hitherto helped to legitimate governmental activities. Most significant in this respect is the erosion of the practical recognition accorded *laissez faire* and the declining influence of what John Dewey termed the "cultural matrix" of authority. This declining influence bodes ill for Neuhaus' theories, since the "matrix" is composed of the parents, schools and churches that form the basis of Neuhaus' "relational experiences." When individuals and groups no longer act as though they believe in *laissez faire*, each economic crisis is rapidly and inevitably transferred to the political arena where government is seen to be paralyzed once again under the pressure of events it cannot control. A major cause and effect of these legitimation crises is that much of the economic individualism that characterized nineteenth century America has disappeared: political and economic systems based on private property have been transformed into the unlegitized administration of a quasi-public power by large corporations.⁶²

*The Cures for Crises*

Neuhaus adverts to these kinds of issues while discussing an ill-defined "cultural crisis." If the "worldviews" he mentions but does not describe are as "popularly accessible" and "vibrant" as he suggests,⁶³ they could hardly be excluded from the public arena. The marketplace of ideas is fairly efficient. This can easily be demonstrated if a broader geographical perspective than Neuhaus' is adopted: consider the influence of such "worldviews" as Christian

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This revolt [against authority] . . . is a more or less natural or logical result of instrumental attitudes about government, power and law. Traditional props of authority have worn away. [Individuals and groups] feel entitled to use every instrument of power that is at hand, and to reach out for those that are not. Our ideology, in many ways, leaves us defenseless against erosion of authority. [If every group did reach out for power, if no group remained satisfied with a subordinate position, the level of social tension and turmoil was bound to escalate. . . .]

⁶³. Neuhaus at 12.
democracy, social democracy, Leninism and Castroism. The main "worldview" Neuhaus considers (and properly rejects) is that of John Rawls, whose theory of justice led Kenneth Boulding to observe that "the discourse of philosophers is like the stars; it sheds so little light because it is so high."\textsuperscript{64} I would also apply this criticism to Neuhaus lecture; at the very least, it fails his own accessibility/vibrancy test by directing its appeal primarily to intellectuals (although his audience should feel flattered).

Legitimacy has been a rebuttable presumption in the West ever since Aquinas provided the tools by which it could be rebutted. Politicians have long attempted to maintain and bolster their legitimacy through discursive justification, pragmatic politics, canny political manipulation, coercion and terror. A realistic theory of justice and/or legitimacy must take account of all these tactics. An unjust state is still a state, the essence of a state being power. Even so, a state cannot maintain itself in the long run if it persistently ignores claims to justice. The positive side of this coin is that it encourages the daily exercise of power in ways designed to legitimate power; order must be maintained, of course, but it must also be a good order which is prompted by fears for the regime's future and the consequent need to win support for good government. This is yet another link between the "is" and the "ought," described as subsisting between arbitrary commands and rational authority by Jerome Hall and between efficacy and morality by Lord Lloyd. The negative aspect of the interdependence of justice and legitimacy is that (the unlamented "Emperor" Bokassa and Idi Amin excepted) even despots know better than to display a consistent caprice. They lack the power to do other than permit broad areas of individual freedom, and they cloak arbitrariness in regularized forms of law and administration.\textsuperscript{65} This tendency for essences to diverge from appearances in a seemingly random fashion makes fiendishly difficult the practical application of the critical reason Neuhaus proposes. Is,

\textsuperscript{64} Boulding, Book Review, 7 J. ECON. ISSUES 667, 667-68 (1973) (statement tentatively attributed to Bacon).

for example, a particular rule of the British Welfare State oppressive, liberating or a hopelessly complex mixture of conflicting currents?

It is unlikely that Pastor Neuhaus would give much thought to a liberation through the state. In his theological view, state virtue consists mainly of the avoidance of "sin" rather than in doing any of those positive things he seems to associate with "the pretensions of the modern state." Like Rawls, Neuhaus confuses justice with the narrower concept of liberty. In politics, it no longer suffices to leave persons at liberty: once laissez faire has been rejected, no one will acquiesce voluntarily in a social system deemed to distribute power and property unjustly. From the standpoint of legitimacy, the relevant concept is not Neuhaus' justice simpliciter but what Frank Knight terms a justice expanded to cover all forms of social idealism. The partly-conflicting values of Western society—order (to which Neuhaus does not refer), justice and personal freedom—must be pursued simultaneously while being held in a delicate balance. The utilitarian values that Neuhaus terms an inhibition of his "critical reason" help to coordinate and to stabilize attempts to pursue these goals efficiently. There are also peculiarly legal values, such as a unified and consistent legal system, which seek to ensure that like persons or circumstances can be treated alike. There are still other values which cannot be pursued because they either provoke acute controversy or, like love and mercy, are clearly beyond the ability of law to achieve. Like H.L.A. Hart's "minimum content" of natural law, Neuhaus' arguments optimistically require us to love each other as we love ourselves.

In the last few paragraphs, I have tried to show that the causes and cures of legitimation crises are much broader and deeper

66. I have cast my example onto foreign soil because for some, an American Welfare State approaches a contradiction in terms. Neuhaus at 12.
67. Knight, supra note 20, at 1-3. See E. BODENHEIMER, supra note 45, at 116-17 (quoting Emil Brunner, a Swiss Calvinist); C. FRIEDRICH, supra note 45, at 192; B. RUSSELL, supra note 7, at 189-90; J. STONE, supra note 11, at 333. Cf. P. STEIN & J. SHAND, supra note 13, at 142: "The principle of personal freedom must... always be combined with that of equality, so that everyone in the community is equally able to do what he wants, but only to the extent that everyone else may do likewise." A noble prescription, but difficult to apply.
68. R. DIAS, supra note 18, at 671, 672-73; P. STEIN & J. SHAND, supra note 13, at 1, passim; Neuhaus at 7, 12.
70. See R. DIAS, supra note 18, at 669; M. GINSBERG, supra note 20, at 213-14; P. STEIN & J. SHAND, supra note 13, at 2, 257; Neuhaus at 5; note 48 supra.
than Neuhaus would have us believe. His views stem at least in part from the implicit adoption of a superficial model of law based on litigation under private (as opposed to public) laws. This model causes him to neglect many significant ongoing social relations71 and to overemphasize the role of the courts in the legal system and in the state (a tendency shared by many lawyers). For example, the Supreme Court's role in securing governmental legitimacy is at best tangential: the breadth of the Court's power lacks popular or constitutional sanction or accountability. It is, however, simply not true that, as Neuhaus argues, "courts persist in systematically ruling out of order the moral traditions in which Western law has developed."72 Courts constantly seek these "traditions" within one of their most effective (but admittedly secular) digests, the Constitution; to go further would be to violate one or more of the canons of the First Amendment that judges are sworn to uphold. As Justice Frankfurter remarked, dissenting in Barnette, "only in a theocratic state . . . [can] ecclesiastical doctrines measure legal right and wrong."73

CONCLUSION

There is a role for theology and organized religion to play in the pursuit of legitimacy and justice which is different from, but no less significant than, the one mapped out by Neuhaus. Churches and theologians should teach the duty to educate ourselves in self-control, rather than rely on the illusion of a spontaneous self-control emanating from the individual experiences that Neuhaus links to an a priori, immutable rightness and wrongness through relational experiences. As things stand, theological arguments in support of justice and legitimacy would attract some while repelling others; bridges must thus be built, by Christians and non-Christians alike, spanning the "is" and the "ought." Historically, natural law has reflected the constant concern of theologians to find a common ground between Christians and non-Christians.74 This jus inter gentes, rather than a new "worldview" or jus gentium, is what is needed. Theologians must deal creatively with that which is Caesar's: practical politics, the facts of power, the psychology of individuals in their everyday life, etc. Ignoring the facts of political life can only result in an impotence in public matters.

71. See MacNeil, supra note 42.
72. Neuhaus at 12.
74. See J. Ellul, supra note 5, at 10; J. Stone, supra note 11, at 320.
If organized religion wishes effectively to influence events which have a bearing on justice and legitimacy, pragmatic policies must be pursued through self-confessedly political organizations. Pastor Neuhaus' repudiation of temporal power for the churches\footnote{Neuhaus at 13. See note 10 supra.} may have great symbolic value, but it is an unrealistic stance for several reasons. As any Soviet or Czech dissident can testify, the evaluation of government's performance on the basis of moral criteria is regarded as an intensely political act. It is so regarded in this country too, where, contra Neuhaus,\footnote{See Neuhaus at 13.} religious belief is privileged: certain "dissident" acts and omissions (refusals to salute the flag, the Jonestown cult's interferences in United States foreign relations) are immune from state interference under the First Amendment if they are colorably grounded in religious belief. Neuhaus' characterization of problems as amenable to legal, rather than political or economic, solution is another deeply political stance. There are distinct limitations on resolving complex issues solely through the technical exercises in a normative tradition that account for so much of legal activity. These limitations are not given sufficient weight by Neuhaus. Any Congressman could tell Pastor Neuhaus that the churches are far from being dismissed from the public arena.\footnote{Z. Bankowski & J. Mungkin, Images of Law 33, 36-37, 39 (1976); L. Friedman, supra note 48, at vii; Shklar, supra note 2, at 34, 36; Neuhaus at 13.} True, churches often ignore political issues or abstain from intervention, but not to decide is to prefer the inertia of the "is"—to choose the status quo—since the power to influence change is manifest.

The major limitation on the political power of organized religion is the existence of the same types of dissensus found among other organizations which cross-cut society; it can be seen, for example, in the creation of a "conservative" Evangelical Law Reform Movement in opposition to the "liberal" National Council of Churches. One means by which this dissensus can be softened is provided by the Christian democratic theories of Jacques Maritain. These have been fairly successful in Europe on politics, and they seek to advance the kinds of meliorist policies Neuhaus seems to favor.\footnote{See P. Sigmund, supra note 11, at 188-90; P. Stein and J. Shand, supra note 13, at 64-66. A distributive justice which is based on either works or need seems to provoke intense opposition in the West. Some type of equity, which reduces the extremity of result from applying either criterion, is thus called for. Id.} The choice of the means to justice and legitimacy remains open in America for the foreseeable future, however. Fuller, Hart and

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Neuhaus would have us rely on the empathy and benevolence of politicians and administrators who, once displays of hypocrisy are discounted, tend to respect theological or other criticisms only to the extent that it is in their perceived best interests to do so. Political self-interest is not the loftiest of promptings to justice; it is, however, the only realistic one where a state, which has the power to intervene extensively in daily life, is run by persons who offer regular demonstrations of the severe limitations on their altruism. As Rousseau remarked, "[e]verything conspires to take away from a man who is set in authority over others the sense of justice and reason." 79 Frederick Douglass, the Black abolitionist, voiced the essence of the matter in 1857: "power concedes nothing without a demand. . . . Find out what people will submit to and you have the exact amount of injustice and wrong which will be imposed on them." 80 In other words, rendering into the state its legitimacy (in the narrower sense of a voluntary but revocable submission to authority) must be made the quid pro quo of government's fulfillment of just demands. This notion can be traced from the Old Testament prophets, through early Christianity and to Locke's social contract and his "appeal to Heaven." In modern times, Del Vecchio has termed this "historical life of the law" the "revindication of natural law against the positive law which denies it." 81 The first token of the legitimacy of such a venture has remained the same throughout history. It is a willingness to accept the stern duties Del Vecchio's "revindication" imposes: "sacrifice and, in extreme cases, martyrdom." 82 These duties are one possible meaning of the trans-subjectivity Neuhaus mentions, 83 but they are unlikely outcomes of

79. Rousseau, quoted in B. Russell, supra note 7, at 673. See C. Friedrich, supra note 45, at 92 (citing David Hume); N. Mouzelis, Organization and Bureaucracy 129 (1977); B. Russell, supra note 7, at 622; P. Stein & J. Shand, supra note 13, at v.

80. Douglass, quoted in Carim, Violence and Social Change, New Internationalist, Jan. 1977, at 17. Cf. B. Russell, supra note 7, at 700: "To frame a philosophy capable of coping with men intoxicated with the prospect of almost unlimited power and also with the apathy of the powerless is the most pressing task of our time."

81. G. Del Vecchio, supra note 51, at 158. See Viner, The Intellectual History of Laissez Faire, 3 J.L. & Econ. 45, 47 (1960); note 51 supra.

82. G. Del Vecchio, supra note 51, at 158.

83. Not by supine acquiescence in the established order nor by waiting idly for justice to fall from on high do we truly conform to the vocation of our juridical consciousness. This vocation calls us to an active and unceasing participation in the eternal drama which has history for its theatre and for its theme the struggle between good and evil. . . .

Id. at 176.
putting his individualistic notions of justice to work in individualist America. Persons like Martin Luther King, those who have a vision of social justice and the will to work for it selflessly, are all too rare.

I hope to have paid the lecture the sincerest form of respect, that of taking it seriously. Pastor Neuhaus has helped to give us an awareness of the intensity and many-sidedness of judgments about justice and legitimacy, matters too wide and deep for a single mind to encompass. He does not pretend to be learned in the law, and he articulates the views of many intelligent "laymen" in an informed and impassioned way. To corrupt H.L.A. Hart's evaluation of the work of Holmes and John Austin, 84 Neuhaus is seldom clearly wrong, but when he is right he is not right clearly.

84. "Like our own Austin, . . . Holmes was sometimes clearly wrong; but again like Austin, when this was so he was always wrong clearly." Hart, Positivism and the Separation of Law and Morals, 71 HARV. L. REV. 593, 593 (1958).