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THREE FALLACIES OF CONTEMPORARY JURISPRUDENCE

*Frank S. Alexander **

Travelers along Interstate 84 west of Danbury, Connecticut in 1984 encountered a large sign proclaiming in bold letters, "ROAD LEGALLY CLOSED—UNDER CONSTRUCTION—PASS AT YOUR OWN RISK." Drivers observing this rather curious sign as they continued down the interstate in heavy traffic knew that the highway was indeed under construction, but what could it have meant that the road was "legally closed"? Would it mean that no laws were applicable to those who elected to "pass at their own risk"? Would it mean that there were no speed limit laws, or rules of liability in the event of an accident or insurance protection? The ease with which public officials have erected such a sign and the uncritical acceptance of the words of the sign by highway drivers reflect the dismal state of contemporary jurisprudence. An adequate theory of law requires more than simply announcing an uncertain legal conclusion to an undefined community for unknown purposes.

The thesis of this Article will be counterintuitive to many readers. It argues that we lack an adequate theory of law today in large part because we fail to address the very questions we ask about religious faith. These questions, in their most fundamental forms, deal with ontology, teleology and epistemology. The ontological question examines the authority of law in terms of one's conception of being, whether as autonomous individuals or as part of a community.¹ The teleological question inquires of the purpose or function which justifies particular laws.² The epistemological question reflects the limits, if any, to what we believe can

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1. The Oxford English Dictionary defines ontology as follows: "The science or study of being; that department of metaphysics which relates to the being or essence of things, or to being in the abstract." 15 OXFORD ENGLISH DICTIONARY 131 (1971). See *infra* notes 87-95 and accompanying text.

2. The Oxford English Dictionary defines teleology as follows: "The doctrine or study of

be achieved through law.³ These questions in turn reveal three basic fallacies in contemporary jurisprudence with which this Article will be concerned: respectively, the ontological error, the teleological confusion and the epistemological arrogance of current legal theory.

Theories of legal education and law today lack a direct inquiry into basic assumptions concerning the nature of humanity and the implications of transcendent reality. With the emergence of law as a science and the ascendance of empirical knowledge, students and practitioners of law have become curiously hesitant to acknowledge that the question of "what is law" may have something to do with the question of "what is faith."

An ontological inquiry focuses on the underlying conception of being and, in the context of law, brings into question the sources of authority of law. Conventional approaches to the study and practice of law, whether in terms of positivism or natural law, are characterized by the assumption that we are capable of ascertaining the nature of law with certainty and precision. For example, to the positivist a declaration that a road is "legally closed" can be called "law" if one can demonstrate the underlying authority of such a declaration—usually a legislative enactment or judicial opinion. In much of traditional natural law jurisprudence an immutable principle of truth can be ascertained by individuals. But in both perspectives the fact that it is *we* who enact the laws and rulings and the fact that it is *we* who are subject to the law seem only coincidental. Law today reflects only a concept of *necessary* community, not *essential* community. That is, we study the law out of necessity because we happen to live together, rather than because we find in our living together the very source, or essence, of law. This is the ontological fallacy of contemporary jurisprudence: the neglect of community as an essential source of meaning for life together.

The teleological confusion in contemporary jurisprudence is its inability to distinguish the multiple functions of law. There are strikingly few attempts today to differentiate the normative assumptions of laws which limit governmental liability for highway accidents from those laws which allocate liability between highway travelers. This confusion of functions is in turn based upon a simplistic belief in a narrowly instrumental purpose of law. Ignored, if not forgotten, is the possibility that

ends or final causes, esp. as related to the evidences of design or purpose in nature." 20 OXFORD ENGLISH DICTIONARY 149 (1971). See *infra* notes 96-100 and accompanying text.

3. The Oxford English Dictionary defines epistemology as follows: "The theory or science of the method or grounds of knowledge." 5 OXFORD ENGLISH DICTIONARY 246 (1971). See *infra* notes 101-10 and accompanying text.

certain laws may find validity in ultimate purposes involving life together as opposed to finding validity in policy goals. The individualism and rationalism embraced in contemporary jurisprudence are inherently limited, and limiting, perspectives.

Unwilling to consider the fundamental importance of community to law, and confusing the multiplicity of functions of law, contemporary jurisprudence further blinds itself by a self-righteous exclusiveness of method: a false epistemology. The ability of legal philosophers, judges and legislators to provide *an* answer carries with it the strong assumption that the answer provided is the *ideal* answer. For an unsuspecting traveler, an official announcement of a change in legal rights and liabilities suggests little of the propriety or soundness of such a change; yet we believe that simply by posting the sign we accomplish the correct result. A view of the nature and function of law which contains an implicit conviction that law, or laws, can yield the right solution is intolerant of ambiguity and insistent upon certainty. The hubris which characterizes so much of our attitudes towards the efficacy of law is the third fallacy of contemporary jurisprudence: that of a self-righteous and intolerant epistemology.

The impoverishment of contemporary jurisprudence is due to these three fallacies: the ontological error, teleological confusion and an intolerant epistemology. Each of these fallacies, however, is not unique to postmodern legal thinking. Rather, they are the natural consequences of the individualism and rationalism shaping American law. A reformulation of law which avoids these errors is possible through an appreciation of the theological debates over individual autonomy and rationalism in the early Enlightenment period. Two such controversies in particular, Arminianism⁴ and Socinianism,⁵ provide close parallels to the dilemma confronting jurisprudence and legal scholarship today.

By approaching the study and practice of law with a richer awareness of the theological contexts of law in history, one begins to understand more fully the nature of our present confusion. A theory of law which contains the additional perspectives of theological possibilities and limitations will radically reorient our perceptions of the nature and function of law.

An example of the inadequacies of contemporary jurisprudence involves the current legal response to the new phenomenon of commercial pregnancy contracts.⁶ Although the law as a social institution has had

4. See *infra* notes 42-60 and accompanying text.

5. See *infra* notes 61-75 and accompanying text.

6. See *infra* notes 76-86 and accompanying text.

considerable experience resolving disputes concerning written contractual relationships, legal responses to these new and unique situations indicate that that experience seems better suited for generating easy and ready answers than substantively acceptable solutions. The novel possibilities and difficulties which commercial pregnancy contracts present to our culture, and in particular our culture's understanding of the nature and function of law, are challenges that require a fundamental rethinking of the very manner in which we understand law.

Part I of this Article establishes the parameters of the thesis and explores the characteristics of contemporary theories of law. In this context, the debate provoked by Critical Legal Studies is examined in order to indicate the need to ask of law various theological questions. Part II probes the nature of the ontological, teleological and epistemological questions in the theological controversies that helped shape the Enlightenment, from which so much of our legal and intellectual heritage is derived. The final part of this Article suggests a framework through which basic theories of law and their assumptions might be reordered.

I. THE LOSS OF NORMATIVE FOUNDATIONS OF LAW

In its efforts to ascertain the assumptions upon which law is founded, contemporary jurisprudence has created a descriptive instead of a normative or critical vernacular. "Morals," "values," "standards," "principles," "institutional prejudices" and "veil of ignorance" are neutral terms denoting the hesitancy to engage in critical inquiries that may well strengthen the foundations themselves. Current efforts to probe such assumptions of law have one deficiency in common: contemporary theories of the nature and function of law share an absence of any direct inquiry into basic assumptions concerning the nature of humanity and the possibility of transcendence.

Legal scholarship in this century is pervaded by a defensiveness that reveals the renunciation of the relevancy of theological questions to law. For decades "Natural Law" has been a term of derision cast at those who open their investigations of the nature of law to the possibility of transcendent qualities.⁷

7. Though theories of natural law received some attention in legal scholarship in the 1930's, the serious development of natural law theories was confined to variations of a Thomistic analysis. See, e.g., C. HAINES, *THE REVIVAL OF NATURAL LAW CONCEPTS* (1930). See also Comment, *Jurisprudential Aims of Church Law Schools in the United States*, 13 *NOTRE DAME LAW*. 163 (1938). For an excellent summary of the perspectives and debates of legal realism, natural law and positivism during the middle years of this century, see E. PURCELL, *THE CRISIS OF DEMOCRATIC THEORY* 159-78 (1973).

Contemporary jurisprudence is in disarray not because it lacks a coherent theory of natural law. Rather, the unwillingness of much contemporary legal scholarship to acknowledge the relevancy of fundamental theological propositions to theories of the nature and function of law restrains a sense of the fullness of law.⁸

A. Loss of Normative Foundations: What of Law and Morals?

In a series of addresses given sixty years ago entitled "Law and Morals," Roscoe Pound concluded that jurisprudence had made little if any progress in understanding the common foundations of law and morals over the centuries, despite the advent of rationalism.⁹ In his criticism of the ultimate futility of historical and analytical schools of jurisprudence, Pound suggested that both approaches simply constructed their own methods of determining and justifying the content of law. Whereas historical jurisprudence idealized history, analytical jurisprudence was self-justifying in its application of scientific methodology to law.¹⁰ The problem with the study of law and morals of the 1920's, Pound concluded, lay not in the recreation or rediscovery of a body of natural law containing the "eternal immutable law of nature,"¹¹ for that was the fatal error of late seventeenth and eighteenth century jurisprudence. The hope for comprehension of law and morals, Pound suggested, may lie in a creative natural law:

Already there is a revival of natural law—not of the natural law that would have imposed upon us an idealized version of the law of the past as something from which we might never escape, but of a creative natural law that would enable us to make of our received legal materials, as systematized by the legal science of the last century, a living instrument of justice in the society of today and of tomorrow. Such a natural law will not

8. The recent works of John Finnis, J. FINNIS, *NATURAL LAW AND NATURAL RIGHTS* (1980), Harold Berman, H. BERMAN, *THE INTERACTION OF LAW AND RELIGION* (1974); H. BERMAN, *LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION* (1983), Thomas Shaffer, T. SHAFFER, *ON BEING A CHRISTIAN AND A LAWYER* (1981), and others stand as significant exceptions to the dominant theories in post-World War II jurisprudence. As exceptions, however, these writings confirm the need to develop a coherent conceptual framework which permits the questions we ask of religious faith to be asked of law. The new *Journal of Law and Religion* is a major exception to the dearth of legal scholarship on questions of law, religion and ethics. See Vogel, *A Survey and Commentary on the New Literature in Law and Religion*, 1 J. L. & RELIGION 79 (1983); Morden, *An Essay on the Connections Between Law and Religion*, 2 J. L. & RELIGION 7 (1984).

9. R. POUND, *LAW AND MORALS* 11-12 (1926).

10. *Id.* at 41-42.

11. *Id.* at 33.

call upon us to turn treatises on ethics or economics or sociology directly into institutes of law. But it will not be content with a legal science that refuses to look beyond or behind formal legal precepts and so misses more than half of what goes to make up the law. . . . It will not be content with a jurisprudence that excludes the ends of law and criticism of legal precepts with reference to those ends.¹²

Whether one agrees with Dean Pound's optimism that a creative natural law provides the key to understanding law and morals, the study of law in the last sixty years has made little progress in ascertaining the fundamental sources or content of law. The only significant changes in theories of law and justice today from those Pound had before him are an increased skepticism, sophisticated complexities and a renewed emphasis on objective verification. Leading legal scholars recently reflected these significant changes in their debates about the ambiguity of the term "equality" as a legal concept.¹³ Even to pose this question suggests how far we have come toward an empiricist mode of thinking.

Ronald Dworkin has suggested that any theory of law and justice falls into one of three typologies: a goal-based theory (such as utilitarianism's focus on maximizing happiness), a right-based theory (emphasizing, for example, fundamental rights expressed in a social contract) or a duty-based theory (such as Kant's concept of categorical imperatives).¹⁴ In developing these alternative typologies, Dworkin states that the common feature of right-based and duty-based theories is that the individual is of central importance.¹⁵ In both, moral rules and codes of conduct are indispensable. "Duty-based theories treat such codes of conduct as of the essence, whether set by society to the individual or by the individual to himself."¹⁶ "Right-based theories are, in contrast, concerned with the independence rather than the conformity of individual action."¹⁷ Dworkin also suggests, almost in passing, that a duty-based theory could sup-

12. *Id.* at 82-83.

13. Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537 (1982); Burton, *Comment on "Empty Ideas": Logical Positivist Analyses of Equality and Rules*, 91 YALE L.J. 1136 (1982); Westen, *On "Confusing Ideas": Reply*, 91 YALE L.J. 1153 (1982); Chemerinsky, *In Defense of Equality: A Reply to Professor Westen*, 81 MICH. L. REV. 575 (1983); Westen, *The Meaning of Equality in Law, Science, Math, and Morals: A Reply*, 81 MICH. L. REV. 604 (1983).

14. R. DWORKIN, *TAKING RIGHTS SERIOUSLY* 169-77 (1977).

15. *Id.* at 172. In contrast, "[g]oal-based theories are concerned with the welfare of any particular individual only in so far as this contributes to some state of affairs stipulated as good quite apart from his choice of that state of affairs." *Id.*

16. *Id.*

17. *Id.*

port a concept of self-interest if derived from a moral law based in "God" or in Kant's universal rules.¹⁸

Dworkin's analysis demonstrates just how far we have come in our inability to seek an ultimate and transcendent foundation of law. For example, J.L. Mackie, a leading critic of Dworkin, quickly accused Dworkin of "playing fast and loose with the law."¹⁹ According to Mackie, there is simply no room in theories of law for Dworkin's duty-based theory. Instead, Mackie asserts, there are only two alternatives: some form of natural law doctrine, which he suggests would allow "the consciences and the speculations of judges to intervene more significantly between what the legislative and executive branches try to do";²⁰ and the positivism of Mackie's own preference, according to which "[t]he validity of a law is wholly relative to the legal system to which it belongs. Consequently the finding out of what is the law is an empirical task, not a matter of a priori reasoning."²¹

What is transpiring, largely *sub silentio*, in these debates in contemporary jurisprudence is what Pound recognized sixty years ago in decrying that the state provides the ultimate criteria for validating the law.²² Any position or theory that suggests, through moral philosophy, jurisprudence or theology, the existence of certain norms or morals which are transcendent in nature and serve as sources of authority for law is quickly labelled "Natural Law." The Natural Law position is then superficially refuted by the simple observation of the existence of a different set of norms or moral principles inconsistent with the first. Since neither participant in this debate can "prove" rationally or logically that his or her set of moral principles is necessarily correct and the other set incorrect, morals and norms are therefore assumed to be inherently subjective and relative. On the other hand, the argument continues, law may be relative in the sense of historical and cultural contingencies, but it cannot be wholly subjective since the foundation of law must ultimately reside in the sovereign and the state.

The alternatives of an ostensibly objective approach of positivism and a natural law theory riddled with attacks of subjectivity have left contemporary jurisprudence in a state of confusion and disarray.

18. *Id.* at 175.

19. Mackie, *The Third Theory of Law*, 7 PHIL. & PUB. AFF. 3, 15 (1977).

20. *Id.* at 16.

21. *Id.* at 4. But see Mackie, *Can There Be a Right-Based Moral Theory?*, 3 MIDWEST STUD. PHILOSOPHY 350 (1978) in which Mackie himself attempts to formulate a right-based theory.

22. R. POUND, *supra* note 9, at 13.

B. *The Critique of Critical Legal Studies*

The growing movement identified by its adherents as "Critical Legal Studies" reflects the difficulty in developing a coherent view of the nature and function of law. Increasingly dissatisfied with the unwillingness of contemporary scholarship to admit its ideological and normative presuppositions, the proponents of Critical Legal Studies attack the dominant theories of law as being fundamentally incapable of normative discourse. This inability to engage in normative discourse is considered to be the ultimate futility of liberal political thought.

At the center of the challenge advanced by Critical Legal Studies proponents is the issue of the inability of rational discourse to discern "objective" principles or values which constitute both the substance and the justification of a rule of law.²³ The implicit conviction of liberal rationalism, a label given to contemporary political and legal thought, is that there are fundamental values which are realized over time through free expression and discourse among the population, the legislatures and the judiciary. From the perspective of Critical Legal Studies, contemporary legal thought assumes that the dynamic processes of interaction among groups and institutions in our society, safeguarded by ephemeral touchstones of equal protection and due process, give credence to a "rule of law" which is both rational and foundational to positive law. The key is rationality. A devout belief in the viability and sufficiency of human reason, combined with a rejection of the subjectivity of legal norms, yield the appearance of a close approximation of justice over time.

The attack of Critical Legal Studies on contemporary theory is essentially two-fold. First, the major premise of liberal rationalism—that there are neutral processes which express objective rules of law—is challenged as fundamentally unsound:

Legal scholars' professional endeavors may make them aware that legal rules have no objective content. They cannot bring this personal insight into their scholarly work, however, because their acceptance of fundamental principles of liberal political theory requires them to proceed as if legal rules do

23. As described by Duncan Kennedy, the Critical Legal Studies movement "[is] trying to do radical legal scholarship." Kennedy, *Cost-Reduction Theory as Legitimation*, 90 YALE L.J. 1275, 1275 (1981). This declaration was made in the context of a Symposium on legal scholarship, the proceedings of which appear in *Symposium, Legal Scholarship: Its Nature and Purposes*, 90 YALE L.J. 955 (1981). For further Critical Legal Studies analyses, see *Critical Legal Studies Symposium*, 36 STAN. L. REV. 1 (1984); Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 563 (1983); Note, *'Round and 'Round the Bramble Bush: From Legal Realism to Critical Legal Scholarship*, 95 HARV. L. REV. 1669 (1982).

have objective content The acquiescence of individuals to the liberal rule of law depends upon their continued unshakable faith in its objectivity.²⁴

Second, proponents of Critical Legal Studies suggest that the very premises of rationality and objectivity inherent in contemporary legal scholarship require us to elevate rationality to a position that justifies the resulting rules of law. What may have initially described a process of arriving at objective positive laws becomes a justification for those laws. According to the Critical Legal Studies scholars, the assertion of the historical contingency of rules of law, however, reveals the weakness of such elevation:

[H]istoricism, [which is] the recognition of the historical and cultural contingency of law, is a perpetual threat to the aims of our legal scholarship as conventionally practiced; [and] to defend against the threat (or to protect themselves from becoming aware of it) legal scholars have regularly and recurrently resorted to certain strategies of response and evasion; . . . these strategies have so influenced the practice of legal scholarship as severely to limit its intellectual options and imaginative range.²⁵

The essence of this two-pronged attack is that contemporary legal theory becomes either a highly normative and conservative agenda proceeding under the guise of neutral processes and objective principles, or alternatively, a mere rational balancing of subjective preferences based upon instrumental processes.

In one of the most incisive and direct responses to the criticisms of Critical Legal Studies, Phillip Johnson has, in effect, challenged such scholars to meet their own criticisms.²⁶ Johnson appears to agree with the central conceptual point in the controversy—that contemporary legal theorist's reliance on rationalism ultimately bars admission of or inquiry into the normative foundations of legal theory. Describing liberal rationalism as the assumption "that there are neutral reasoning techniques that

24. Tushnet, *Legal Scholarship: Its Causes and Cure*, 90 YALE L.J. 1205, 1206-07 (1981).

25. Gordon, *Historicism in Legal Scholarship*, 90 YALE L.J. 1017 (1981).

26. Johnson, *Do You Sincerely Want to Be Radical?*, 36 STAN. L. REV. 247 (1984). Milner Ball, who suggests that the Critical Legal Scholars need to acknowledge an "ideological taint," restates his idea that "[to] recreate the courts so that they reflect our nature as a people bound by mutual care is to paint pictures of society that transcend reality. These pictures are . . . theologically informed utopias . . ." Ball, *Don't Die Don Quixote: A Response and Alternative to Tushnet, Bobbitt, and the Revised Texas Version of Constitutional Law*, 59 TEX. L. REV. 787, 793, 811-12 (1981). For their responses to Ball, see Tushnet, *Deviant Science in Constitutional Law*, 59 TEX. L. REV. 815 (1981); Bobbitt, *A Reply to Professor Ball*, 59 TEX. L. REV. 829 (1981).

can generate solutions that transcend ideological conflicts,"²⁷ Johnson sharply attacks the "sham neutrality" which characterizes the very process of legal reasoning which we learn as students, teach as professors and experience as objects of the law.

Having agreed on this critical point, Professor Johnson then presents two insights. First, asking what values, norms or rules of law are *not* necessarily subjective and arbitrary, Johnson wonders whether a principle of equality is any less arbitrary than a defense of inequality. "Equality is the value that looks as if [it] weren't a value, that can be made to seem the 'neutral' starting place when values are absent."²⁸ Johnson's second point is that the proponents of Critical Legal Studies have failed to set forth their own agenda, their own utopia, and their own normative foundations of law.²⁹

The current discourse is a vitally important one because it focuses our attention on the inherent limitations of legal rationality and the inherent biases of any science of law—both personal and cultural. The hesitancy with which we speak of normative foundations of law is brought to the fore by this renewed debate in legal scholarship. Such hesitancy must be overcome, however, if we are to begin to construct normative rather than instrumental justifications for law.

Almost fifty years ago, the German theologian and political philosopher Gerhard Leibholz anticipated the ultimate inadequacy of combining liberalism and democracy, a union which is at the heart of the debate in Critical Legal Studies.³⁰ Liberalism, according to Leibholz, is in essence individualism and has as its fundamental value "the creative freedom of the individual endowed with reason."³¹ From this follows "the belief that a rational solution could be arrived at in all departments of life through the free and untrammelled competition of individual opinions."³² In contrast, Leibholz suggested that democracy presupposes a freedom which has "a universal, collective character."³³ The destructive combination of liberalism and democracy occurs when liberalism calls into question the political values of democracy:

It is a sign not only of the confusion of democracy with liberalism but also of the decline of democracy itself when, as has often happened, criticism, positivism and relativism are identi-

27. Johnson, *supra* note 26, at 271.

28. *Id.* at 276.

29. *Id.* at 281-85, 289-91.

30. Leibholz, *The Nature and Various Forms of Democracy*, 5 SOC. RESEARCH 84 (1938).

31. *Id.* at 92.

32. *Id.*

33. *Id.* at 84.

fied not only with the political principle of liberalism but with that of democracy also. Political relativism undermines the fundamental objective values, the myth and the substance of parliamentary democracy, and finally calls in question the presupposition on which the functioning capacity of parliamentary democracy is based, its social and political homogeneity. Relativism has as its consequence the disappearance of that organizational minimum of common political understanding which is essential to the functioning of democracy.³⁴

The inadequacy of liberal rationalism reflected by both proponents and opponents of Critical Legal Studies lies in this defective congruence of liberalism and democracy. Liberalism, or liberal rationalism, rests upon a rigid view of individual autonomy and the dominance of human reason. Yet we find ourselves unable to use that reason successfully to prove or to persuade others of the validity of what we hold to be moral or legal. Thus, we retreat to the position that all morals, and hence the foundational elements of law, are subjective and relative. The only test, then, for what is valid or objectively true is that which is empirically verifiable. The rapid ascendancy of the relatively new school of economic analysis of law is reflective of our hunger for empirical tests of validity.³⁵

These discussions in contemporary jurisprudence misunderstand the consequences of beginning an inquiry into the nature and function of law with the implicit premises of individual autonomy and the authority of reason. Such premises were at the heart of theological controversies which laid the groundwork for the Enlightenment. In recalling these origins of the Enlightenment we can see more clearly the inadequacies of liberal rationalism today, and can formulate a context for appreciating the ontological, teleological and epistemological fallacies of contemporary jurisprudence.

II. ANTECEDENTS OF CONTEMPORARY JURISPRUDENCE

Neither the assertion of individual autonomy nor the primacy of human reason is unique to the twentieth century. Although the

34. *Id.* at 95.

35. The seminal works in this field are Coase, *The Problem of Social Cost*, 3 J. L. & ECON. 1 (1960); Calabresi & Melamed, *Property Rules, Liability Rules and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972); R. POSNER, *ECONOMIC ANALYSIS OF LAW* (2d ed. 1977). See also, *Symposium on Efficiency as a Legal Concern*, 8 HOFSTRA L. REV. 485-770 (1980); *A Response to the Efficiency Symposium*, 8 HOFSTRA L. REV. 811; Posner, *The Value of Wealth: A Comment On Dworkin and Kronman*, 9 J. LEGAL STUD. 243 (1980).

strengths and weaknesses of these approaches to the concept of law are perhaps more evident today, their antecedents lie in the radical changes in the manner in which questions of law were conceived during the early Enlightenment period. During the seventeenth century, these conceptions of the individual as an autonomous entity and of individual reason as ultimate authority became the determinate criteria for Western theories of law. Reason and rationality became the highest tests for truth, and the authority of law became simply a derivative of individual freedom and individual rights. The individualism and rationalism of the Enlightenment have degenerated, however, into a relativism which is found in the twentieth century jurisprudential emphasis on objective verification.

I am not suggesting that Western conceptions of law are derived solely from the Enlightenment nor that individual autonomy and human reason are antithetical to justice. What I am suggesting is far more modest: certain fundamental changes in the seventeenth century approach to the question of "what is law" are closely analogous to our views of law today. Consequently, through a renewed appreciation of these religious and theological contexts of law we can sense the limitations of and new possibilities for law.

A. Antecedents of the Early Enlightenment

By the early seventeenth century, two formative characteristics of law and legal reasoning had already developed: the emergence of law as a science and the isolation of ecclesiastical sources of law.³⁶

Perception of law as amenable to a rigorous analytic mode of study, as contrasted with a more passive experience of revelation and divine law, has been traced in part to "the rediscovery of the legal writings compiled under the Roman Emperor Justinian, the scholastic method of analyzing and synthesizing them, and the teaching of law in the universities of Europe."³⁷ Combining Aristotelian modes of analysis with abstract principles, legal scholarship during the twelfth and early thirteenth centuries had as its goal the synthesis of legal rules into a comprehensive body of law. "[T]he first comprehensive and systematic legal treatise in the history of the West, and perhaps in the history of mankind"³⁸ has

36. The impact of theology and changes in religious institutions on conceptions of law has been the focus of an excellent study in legal history. See H. BERMAN, *LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION* (1983); Berman, *Religious Foundations of Law in the West: An Historical Perspective*, 1 J. L. & RELIGION 3 (1983).

37. Berman, *The Origins of Western Legal Science*, 90 HARV. L. REV. 894, 899 (1977).

38. *Id.* at 921.

been identified as a treatise by Gratian, a Bolognese monk, composed circa 1140 and consisting of more than 1400 printed pages.

Three centuries later, this new science of jurisprudence was altered by the great challenge to vested authority presented by the Reformation. This challenge involved the theological justification of the individual, the sinner, before God. Indeed, the second formative characteristic of current law—the isolation and limitation of ecclesiastical justification—is derived from the claims concerning sources of authority made during the Reformation. The theological elevation of Luther's formulation of the doctrine of justification by faith through grace meant that the experience of grace was immediate and individual rather than mediated through ecclesiastical hierarchies. With this concept of individualized experience of the transcendence of God came the subordination of all ecclesiastical authority not only to God, but to the preemptive claim of the direct nature of individual justification.

Thus, by the close of the sixteenth century two methodological tools were well in place for the formation of new approaches to law over the course of the following century: the application of early scientific methods to the study of law and the posture of each individual as possessing authority independent of ecclesiastical and secular orders. These were the seeds of subsequent rationalism and individualism.

Because of transformations over centuries, the causal agents behind contemporary conceptions of law and justice cannot be isolated too zealously without falling victim to narrow historicism and distortion.³⁹ Any attempt to gauge at such a distance in time the self-consciousness of changes in conceptions of the nature and source of law and justice is problematic. What is possible, however, is to sense the subtle yet significant movements in the nature of the assertions themselves regarding law and justice. Just as no theory is without antecedents, so also no proposition is completely free from social, cultural or intellectual contingencies. It is precisely because of such contingencies, rather than in spite of them, that we might see in the early Enlightenment period certain jurisprudential changes permeating our theories of law today.⁴⁰

39. On the pitfalls of historicism as a mode of inquiry, see Gordon, *supra* note 25, and Horwitz, *The Historical Contingency of the Role of History*, 90 YALE L.J. 1057 (1981).

40. In terms of the etiology of contemporary moral philosophy, Alasdair MacIntyre finds similar consequences of the Enlightenment:

The problems of modern moral theory emerge clearly as the product of the failure of the Enlightenment project. On the one hand the individual moral agent, freed from hierarchy and teleology, conceives of himself and is conceived by moral philosophers as sovereign in his moral authority. On the other hand the inherited, if partially transformed rules of morality have to be found some new status, deprived as they have been of their older teleological character and their even more ancient cate-

The individualism and rationalism which the "Age of Reason" represents can be seen in the theological controversies of that period. Two particular religious heresies, Arminianism and Socinianism, constitute the intellectual bridge by which one moves from original sin and theocentric conceptions of authority to the individualism and rationalism of the Enlightenment. Within this transformation lies the parallel between the claims of individual rights and popular sovereignty in the English Civil Wars, and the ultimate vesting of such principles in the American Revolution a century later.⁴¹

B. Autonomy and Ability: The Arminian Controversy

In the early seventeenth century, the debate over the depravity of the human condition was that of Arminianism. Technically a controversy on the significance of the "Fall" with regard to the concepts of predestination, election and righteousness, the Arminian "heresy" was essentially a renewal of the argument that each individual must play a significant role in his or her own salvation. For mainstream Protestants in 1618, as for Augustine in 426 and Luther in 1525, the very assertion of the individual's ability to choose salvation was a threat to orthodox doctrines of God's omnipotence and omniscience—and no less dangerously an implicit threat to the theological, if not the secular, order. Receiving its name from Jacobus Arminius, Professor of Theology at Leiden from 1602 to 1609, the basic substance of Arminianism is set forth in five short "Articles" or propositions compiled by a group of Arminius' colleagues shortly after his death, and known as "The Remonstrance of 1610."⁴² The five points of doctrinal dispute reflected in these propositions have been identified as (1) predestination, (2) the nature and the extent of the Atonement, (3) the nature and extent of humanity's corruption and depravity, (4) the nature of God's grace and (5) the possibility of a total fall from grace.⁴³

On first reading The Remonstrance of 1610, students of the twenti-

gorical character as expressions of an ultimately divine law. If such rules cannot be found a new status which will make appeal to them rational, appeal to them will indeed appear as a mere instrument of individual desire and will.

A. MACINTYRE, *AFTER VIRTUE* 60 (1981).

41. For a discussion of the relationship between the Enlightenment and eighteenth century law, see generally B. BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* (1967); P. MILLER, *THE LIFE OF THE MIND IN AMERICA* (1965); G. WILLS, *INVENTING AMERICA* (1978).

42. The Five Arminian Articles can be found in 3 P. SCHAFF, *THE CREEDS OF CHRISTENDOM* 545-49 (1919). See also *CRISIS IN THE REFORMED CHURCHES* 207-09 (P. DeJong ed. 1968) for further historical explanation and translation.

43. Klooster, *The Doctrinal Deliverances of Dort*, in *CRISIS IN THE REFORMED CHURCHES*

eth century may interpret it as an extremely orthodox statement of Christian faith. For instance, Article II states "Jesus Christ, the Saviour of the world, died for all men and for every man, so that he has obtained for them all, by his death on the cross, redemption and forgiveness of sins";⁴⁴ and Article III states "man has not saving grace of himself, nor of the energy of his free will."⁴⁵ As with many of the great theological controversies, however, the very appearance of orthodoxy made the potential threat to vested orthodoxy that much greater.⁴⁶ The initial and pivotal question before the Synod of Dort in 1618 was whether salvation and justification depended on the individual's free choice through faith to become a believer, as asserted by the Arminians, or whether such free choice was a false assertion of human ability, God's grace being the sole cause of justification. That is, do individuals retain, despite the essential condition of Original Sin, sufficient ability and free will to choose or not to choose God?

The orthodox Calvinist establishment in the Netherlands perceived Arminianism as a most fundamental challenge to the Reformed tradition precisely because any assertion of human choice as integral to salvation elevates the individual to a status independent of God. This controversy was ultimately a renewal of Semi-Pelagianism⁴⁷ and was a battle over the

58-59 (P. DeJong ed. 1968). See also G. CRAGG, *FROM PURITANISM TO THE AGE OF REASON* 20-30 (1950).

44. 3 P. SCHAFF, *supra* note 42, at 546.

45. *Id.*

46. Unusual in the degree of transnational defensiveness which it provoked, the Arminian controversy raged both in Scandinavia and England. With the convening of the Synod of Dort on November 13, 1618 to pass judgment on Arminianism, more than 100 ministers, statesmen and theologians, including representatives from Great Britain, the Palatinate, Hesse, Zurich, Geneva and each state of the Netherlands, met in session to counter this threat to orthodoxy. CRISIS IN THE REFORMED CHURCHES 215-20 (P. DeJong ed. 1968). Philip Schaff described the Synod of Dort as "an imposing assembly; and, for learning and piety, as respectable as any ever held since the days of the Apostles." Schaff, *The Rise of the Reformed Churches in the Netherlands*, in CRISIS IN THE REFORMED CHURCHES 17 (P. DeJong ed. 1968). See also Praamsma, *The Background of the Arminian Controversy (1586-1618)*, in CRISIS IN THE REFORMED CHURCHES 22 (P. DeJong ed. 1968).

47. The school of thought identified as "Pelagianism" is derived from the teachings of Pelagius (late fourth and early fifth centuries), who challenged the doctrine of Original Sin and consequent bondage of the will. According to Paul Lehmann, "[t]he matter to be clarified is how the free will of man and the activity of God are related." Lehmann, *The Anti-Pelagian Writings*, A COMPANION TO THE STUDY OF ST. AUGUSTINE 203, 209 (R. Battenhouse ed. 1979). It was Pelagius' "contention that . . . a perfect life was possible because man was, by the very nature which God had given him, free to pursue the good and to avoid the evil." *Id.* See also G. BONNER, *ST. AUGUSTINE OF HIPPO* (1967).

The term "Semi-Pelagianism" refers primarily to those followers of Pelagius who were willing to admit that humans have imperfect ability as a result of the Fall and Original Sin, but who nonetheless maintained the ability of the individual to choose or to reject salvation.

latter portion of the Reformation formula *sola fide sola gratia*; that is, justification by faith *through grace*.

Politically and legally, the leading proponents of Arminianism threatened much of the Reformed movement by adhering to an Erastian position in which ecclesiastical authority was subject to the rule of the civil and political sovereign.⁴⁸ This mixture of a theological assertion of individual ability with a political assertion of absolute civil sovereignty is reflected in the writings of Hugo Grotius, a leading proponent of Arminianism. According to Grotius, the sovereign political authority—whether the States of Holland or the monarchy of England—possessed the right to condemn preaching and teaching at odds with orthodox doctrines.⁴⁹

The combination of theological liberalism and political authoritarianism may well explain the uneasy alliance at the Synod of Dort between the Anglicans representing James I and the orthodox and radical sects of Calvinism. All had joined ostensibly to condemn Arminianism. Though the Anglican representatives were ostensibly concerned with the theological doctrines of Arminianism, they were also concerned with what was perceived as a close affiliation between Arminianism and "Popery."⁵⁰ In contrast, the orthodox Calvinists sensed a threat to the theological foundations of the Reformation; the more radical Calvinists feared the implications of the Erastian conception of sovereignty and the intolerance that flowed from that conception.

Despite the Synod of Dort's success in condemning the Five Articles of Arminianism,⁵¹ the Arminian doctrine ultimately triumphed in two respects. First, its assertion of individual responsibility for salvation provided the philosophical and theological basis for the subsequent emergence of individualism in the Enlightenment. Second, the very nature of the reasoning process in which the debates occurred provided gradual acceptance of formal logic and rationalism as an authoritative mode of reasoning.

In asserting individual responsibility to choose or to reject justification and salvation through faith, the Arminian position weakened the significance of sin in the human condition and ultimately elevated the

48. Erastianism refers generally to the doctrine that the authority of the church in ecclesiastical matters is subordinate to the authority of the state. Though named for Thomas Erastus, 1524-1583, Erastianism became the focal point of intense debate in the decade preceding the English Civil War.

49. See H. GROTIUS, *RESOLUTION FOR PEACE IN THE CHURCHES* (1614). See also Praamsma, *supra* note 46, at 31.

50. G. AYLMER, *THE STRUGGLE FOR THE CONSTITUTION 1603-1689*, 67 (1963).

51. The text of the Canons of Synod of Dort appears in 3 P. SCHAFF, *supra* note 42, at 550-97, and in *CRISIS IN THE REFORMED CHURCHES* 229-62 (P. DeJong ed. 1968).

concept of individual ability to the level of the major determinant in human affairs. While it may be an overstatement to describe Arminianism as "preeminently the doctrine of Christian rationalism and Christian humanism,"⁵² in its attack on predestination and election Arminianism undermined a concept of ultimate authority based upon a transcendent being, and replaced it with a claim of individual ability. The concept of individual autonomy and corresponding responsibility for one's life follows from the claim of individual ability to decide the theological questions of justification and salvation.

The second aspect of Arminianism which ultimately prevailed, despite its temporary doctrinal setback, is the very method of discourse and inquiry into soteriological questions. At stake was the question of one's ability to prove or "discover" a doctrine of salvation from self-evident truths. What was developing, however, was the ascendancy of nascent rationalism in the form of Ramism.

A professor of philosophy at the College de France until his conversion to Protestantism, Petrus Ramus employed a logical method to demonstrate the necessary unity of knowledge.⁵³ He emphasized the ability to move from one self-evident axiom to a progressively complex yet interrelated "chart" or "diagram" of topics, subtopics, parts, subparts and constituent elements.⁵⁴ By taking the position of relatedness among principles of art, mathematics, theology and ethics, and their amenability to consistent analysis, Ramism "provided its adherents with a secure philosophical and epistemological basis for the belief that humans can ascertain the mind of God as they set to order their thought through the methods God has revealed."⁵⁵

One of the strongest proponents of Ramist philosophy, William Ames,⁵⁶ was present at the Synod of Dort as a counselor to the Calvinists

52. A. WOODHOUSE, *PURITANISM AND LIBERTY* 54 (2d ed. 1974). Professor Woodhouse states that Arminianism "weakens the theological basis of Puritan *inequalitarianism*, of the conception of an aristocracy of the elect, and thus undermines the most formidable of the barriers separating Puritanism from democracy." *Id.* (emphasis in original).

53. A highly controversial author, Petrus Ramus (1515-1572) was one of the victims, on August 26, 1572, of the St. Bartholomew massacre.

54. Perry Miller's discussion of Ramism in P. MILLER, *THE NEW ENGLAND MIND: THE SEVENTEENTH CENTURY* 111-53 (1954), firmly locates the place of Ramist logic in the intellectual life of the seventeenth century. "It is not too much to say that, while Augustine and Calvin have been widely recognized as the sources of Puritanism, upon New England Puritans the logic of Petrus Ramus exerted fully as great an influence as did either of the theologians." *Id.* at 116.

55. McKim, *Ramism in William Perkins* vi (unpublished dissertation, University of Pittsburgh 1980).

56. William Ames (1576-1633) was a Fellow of Christ's College from 1601 to 1610, when opposition from the Bishop of London forced him to move to the Netherlands. Ames was a

in their attack on Arminianism. Ironically, the form and nature of Ames' analysis of knowledge,⁵⁷ and his defense of Calvinistic predestination, contained in its logic and rationality what was far more congenial to the theological assertion of individual human ability to elect or reject salvation.⁵⁸

The issue involved in Arminianism and the Synod of Dort was that of "Divine Sovereignty and Human Responsibility."⁵⁹ It would be inaccurate to portray the Calvinists and Arminians as adopting polar positions on sovereignty and responsibility, for in much of their theology the similarities outweigh the differences. On the crucial point of human ability to elect salvation and even to lose it negligently later, however, the Arminians presented a conception of individual ability and autonomy which set incalculable distance between them and the Reformed tradition. The combination of Ramist rationalism and the Arminian emphasis on individual autonomy was an important characteristic of the dominant modes of reasoning which emerged during the Enlightenment.⁶⁰

C. *Authority and Sovereignty: The Socinian Heresy*

If Arminianism raised the specter of individual ability and free will,

student of William Perkins (1558-1602); and recent studies emphasize the significance of Perkins' writings on the development of theology in the seventeenth century. David Little has described Ames as "the dominant systematic theologian, who expounded and elaborated the Puritan system from well behind the lines." D. LITTLE, *RELIGION, ORDER AND LAW* 105 (1969). Charles Munson considers Perkins to be "the key transitional figure between sixteenth-century high Calvinism and the later seventeenth-century Puritan covenant theology." Munson, *William Perkins: Theologian of Transition* 3 (unpublished dissertation, Case Western Reserve University 1971).

57. Ames developed more fully than Perkins the ramifications of Ramism in a comprehensive system of "technometria" in which all knowledge could be set forth as "a blueprint of the whole structure of human learning." McKim, *supra* note 55, at 299.

58. Notwithstanding the criticism of both Perkins and Ames of the Arminian position, the Ramist method of analysis was equally congenial to the Arminian position. Munson, *supra* note 56, at 3. "Ramism is not the *differentia* between Arminius and Calvinism. Perkins, whom Arminius charged with the Calvinistic error of predestination, was no less a Ramist than Arminius." C. BANGS, *ARMINIUS: A STUDY IN THE DUTCH REFORMATION* (1971), quoted in McKim, *supra* note 55, at 424 n.124.

59. Klooster, *supra* note 43, at 52-94.

60. In a study of the subtle changes in soteriology from Hooker to Baxter, Christopher Allison finds in the early seventeenth century debates on justification and inherent righteousness the initial separation of morality from theology. "Whatever the causes, the seventeenth century bequeathed to the eighteenth century in England a soteriology which hopelessly alienated ethics and moral theology from their foundations in theological doctrine." C. ALLISON, *THE RISE OF MORALISM* 205-06 (1966). See B. HOLIFIELD, *THE GENTLEMAN THEOLOGIANS 186-98* (1978) (tracing the influence of Arminianism in the eighteenth century theology of the southern colonies).

Socinianism, another seventeenth century doctrine, extinguished the conception of authority as derived from transcendence and revelation.⁶¹ Socinianism challenged the theological precepts of both Catholicism and the Reformation by rejecting the authority of every seventeenth century orthodox form of "revealed truth." Leading Socinian scholars rendered Scripture subject to individualized interpretations through reason, rejected the doctrine of the Atonement as a superfluous gloss on God's creation, asserted the free will of individuals against the Protestant claim of predestination, and dismissed the notion of a community of believers as being simply an aggregate of individual relations.

The chief characteristic of Socinianism is its emphasis on reason. Socinians contended that Scripture is significant for life, but only as interpreted through human reason; that the divinity of Jesus is an unnecessary postulate, for human reason is able to perceive the greatness of his moral teachings; that freedom of individual will and ability is a natural and indispensable corollary to the ability to reason; and that the sacraments possess no more, and perhaps less, transcendent significance than any other act or event. In its most concise doctrinal statement, *The Racovian Catechism*, Socinianism stresses the primacy of reason:

[Reason] is, indeed, of great service, since without it we could neither perceive with certainty the authority of the sacred writings, understand their contents, discriminate one thing from another, nor apply them to any practical purpose. When therefore I stated that the Holy Scriptures were sufficient for our salvation, so far from excluding right reason, I certainly assumed its presence.⁶²

Although its origins antedate Arminianism, going back to the radical sects of the Reformation in Poland in the late sixteenth century,⁶³ Socinianism provided support for the Arminian limitations on Original Sin and its assertion of inherent righteousness of the individual.⁶⁴ Dogmatic only in its modification, if not rejection, of the orthodox doctrines

61. Socinianism derives its name from the teachings and writings of Laelius Socinus (1524-1562) and his nephew, Faustus Socinus (1539-1604). For an extensive discussion of Socinianism, see generally S. KOT, *SOCINIANISM IN POLAND* (E. Wilbur trans. 1957); H. McLACHLAN, *SOCINIANISM IN SEVENTEENTH CENTURY ENGLAND* (1951); E. WILBUR, *A HISTORY OF UNITARIANISM: SOCINIANISM AND ITS ANTECEDENTS* (1945); G. WILLIAMS, *THE POLISH BRETHREN* (1980).

62. *THE RACOVIAN CATECHISM* 15 (T. Rees trans. 1818).

63. H. McLACHLAN, *supra* note 61, at 10.

64. *Id.* at 50. Though there were significant theological differences between Arminians and Socinians, "Arminianism and Socinianism had close affinities and were born of a similar tendency of mind. The difference between them was more one of emphasis than radical departure. 'Arminianism was rather the dictate of moral sentiment, Socinianism a product of rea-

of the Trinity, the Atonement and concepts of sin and revelation, Socinianism lacked its own internal theory of theological awareness. Its basic characteristic was its substitution of the sovereignty of human reason for the sovereignty of God.⁶⁵

The Socinian approach to the sovereignty of God is indicated by its formulation of the doctrine of the Atonement: the theory of the necessary causes and effects of the Crucifixion of Christ with regard to sin and reconciliation with God. In approaching the significance of the Atonement, Faustus Socinus began with the perspective of God as an "offended party," offended by the sin of the individual. As an offended party, God stands in the posture of any person who has been offended; just as an individual can forgive a debt without payment, so also can God.⁶⁶ It follows logically, therefore, that God has the right to forgive sins without exacting punishment or receiving consideration if He so desires. The significance of the Crucifixion consequently lies not in its being a "payment" for sins, but simply in the moral significance of the life of Jesus.

In a lengthy refutation first published in Leyden in 1617, Hugo Grotius carefully and systematically responded to the arguments of Socinus.⁶⁷ The basis of his defense of the Atonement as a form of satisfaction for sins is the assertion that God does not stand in the posture of an offended party in private individual relationships. Instead, God represents an ultimate ruler in both private and public forms of justice. "[T]o punish is not an act properly belonging to the offended party as such . . . because otherwise to every offended party would belong per se the right of punishing."⁶⁸ "On the contrary, this right belongs to the ruler as ruler."⁶⁹ For Grotius, the sovereignty of a transcendent God constituted the only plausible explanation for the specific act of the Crucifixion.⁷⁰

In contrast to the overtly political nature of the Arminian contro-

son.' " *Id.* (quoting J. TAYLER, A RETROSPECT OF RELIGIOUS LIFE IN ENGLAND 202 (1876)).

65. *Id.* at 12-13.

66. 2 Socinus, *Bibliotheca Fratrum Polonorum* 186, in H. GROTIUS, A DEFENSE OF THE CATHOLIC FAITH CONCERNING THE SATISFACTION OF CHRIST, AGAINST FAUSTUS SOCINUS xv (F. Foster trans. 1889).

67. H. GROTIUS, A DEFENSE OF THE CATHOLIC FAITH CONCERNING THE SATISFACTION OF CHRIST, AGAINST FAUSTUS SOCINUS (F. Foster trans. 1889).

68. *Id.* at 55.

69. *Id.* at 57.

70. The governmental theory of the Atonement developed by Grotius stands in sharp contrast to the more personalized and individualized rationalism of the Socinians. Though Grotius was certainly an opponent of Socinianism in the early years of the seventeenth century, his later writings reflect a clear affinity with Socinian rationalism. See H. MCLACHLAN, *supra* note 63, at 22.

versy with its Erastian overtones and political intolerance, the Socinian controversy on the Continent and in England was more politically subdued. Though Parliament ordered the doctrinal texts of the Socinians burned in April, 1614,⁷¹ and Archbishop Laud pushed the adoption of the Canons of 1640 condemning Socinianism,⁷² the highly technical nature of the theological controversies led Herbert Thorndike, an English divine, to intimate that "this heresy seems to be too learned to become popular among us."⁷³

While many of the educated elite at Cambridge and Oxford in the mid-seventeenth century were familiar with, if not attracted by, the reasonableness of Socinian analysis,⁷⁴ it would be a mistake to view this "heresy" as essentially or even superficially a political movement. The significance of Socinianism lies not so much in what it offered, but what it undermined; it lies not in its anti-trinitarian doctrines, but in its rejection of the sovereignty of God and the authority of revelation as a source of knowledge. In Socinianism human reason emerged as the ultimate authority and as a consequence concepts of transcendent authority became illusory.

Arminianism and Socinianism, as pre-Enlightenment controversies, cannot be held responsible for the confused status of contemporary jurisprudence. Nor should they be lifted up as the causative elements of conceptions of popular sovereignty and individual rights. Such controversies, however, can be viewed as precursors of fundamental changes in the ontological and epistemological conceptions of the nature of sovereignty and the authority of reason. The ground had been laid in these debates for the epistemology of law that ultimately became self-righteousness:

This unity [of mind in the west] lies in the emancipation of man as reason, as the mass, as the nation. In the struggle for freedom these three are in agreement, but once their freedom is achieved they become deadly foes. Thus the new unity already bears within itself the seeds of decay. Furthermore, there becomes apparent in this an underlying law of history, namely

71. *Id.* at 36.

72. *Id.* at 41. Perhaps not coincidentally the "first modern rationalist," René Descartes, was living in Holland during the eighteen months of deliberations at the Synod of Dort. Descartes published his first expression of *cogito ergo sum* in 1637, the year that Archbishop Laud obtained his Star Chamber decree regulating the printing presses in England. Descartes' *DISCOURSE DE LA METHODE* was first published in 1637. For a discussion of the decree regulating the printing presses, see H. MCLACHLAN, *supra* note 63, at 40.

73. C. ALLISON, *supra* note 60, at 107.

74. H. MCLACHLAN, *supra* note 63, at 63-89.

that the demand for absolute liberty brings men to the depths of slavery Luther's great discovery of the freedom of the Christian man and the Catholic heresy of the essential good in man combined to produce the deification of man. But, rightly understood, the deification of man is the proclamation of nihilism.⁷⁵

The present debates in legal scholarship centered on Critical Legal Studies are contemporary reflections of the Arminian and Socinian controversies. The Arminian emphasis on individual ability and autonomy has been transformed into an insistence that each person stands independently of others in defining moral commitments; and this has become the individualism which pervades the ontological perspectives in twentieth century jurisprudence. A theory of law in the context of liberal rationalism possesses an epistemology based upon the ultimate authority of human reason, a defining characteristic of Socinianism, yet denies the presence of moral assumptions in the reasoning process itself. In our current concepts of law, authority and morality we are no longer able to conceive of law as based on something other than custom or power, and morality as anything other than subjective preference. Therefore, any alternative to this perspective—any truly adequate jurisprudence—will be radical indeed, and it will require quite different foundations for the concept of law.

The realization that contemporary debates reflect seventeenth century controversies provides the opportunity to bring to bear in our study of law the questions which have been inherent in our study of religion and our experience of faith. What is needed at this point is a self-consciousness of the ontological, the teleological and the epistemological assumptions which we make as we study law. This awareness, in turn, provides a threshold conceptual framework by which to begin a fresh approach to jurisprudence.

III. TOWARD NORMATIVE JURISPRUDENCE: SOME THEOLOGICAL PERSPECTIVES

In suggesting that there are alternatives for contemporary jurisprudence in the search for the foundations of law I am not asserting the existence of objective moral principles which are discoverable through human reason. Nor am I suggesting that historical, analytical or even empirical approaches offer nothing to elucidate our dilemma. Instead, I suggest that new perspectives in jurisprudence are possible if we rethink

75. D. BONHOEFFER, *ETHICS* 102-03 (1955).

all three of the essential elements of the institution of law: the nature of the community which experiences the law, the ways in which we use the law and the method of the legal inquiry itself. The experience of legal and moral requirements in community involves an ontological perspective; the interpretation of the purposes of law is necessarily a teleological question; and the problem of method in jurisprudential inquiry is epistemological in nature. An alternative epistemology integrated with an awareness of ontological and teleological assumptions yields a more fruitful inquiry into the concept of law.

The need for such an integration is reflected in the law of commercial pregnancy contracts. Recent advances in reproductive technology present a broad spectrum of new possibilities to individuals and couples who desire to have children.⁷⁶ The acceptance of artificial insemination over the past decade has given rise to situations in which, for example, a married couple enters into an agreement with an unrelated female third party. The agreement provides that the third party will become pregnant through artificial insemination of the sperm provided by the husband of the couple. Frequently given the label "surrogate motherhood" relationships, such arrangements usually include a contract which provides that the third party will carry the fetus to term, deliver the child, and return the child to the contracting couple following delivery.⁷⁷

In these surrogate motherhood arrangements, the contracting couple receives a child which is genetically related only to the husband with the other half of its genetic composition derived from the surrogate mother. Within the last few years, however, it has become possible to achieve a complete genetic identity with the contracting couple through the transplantation of a fertilized ovum to the third party.⁷⁸ Predictably, the advent of commercial pregnancy contracts has prompted a growing

76. See Keane, *Legal Problems of Surrogate Motherhood*, 1980 S. ILL. U. L.J. 147 (1980); Comment, *Contracts to Bear a Child*, 66 CALIF. L. REV. 611 (1978); Black, *Legal Problems of Surrogate Motherhood*, 16 NEW ENG. L. REV. 373 (1981); Comment, *Artificial Insemination and Surrogate Motherhood: A Nursery Full of Unresolved Questions*, 17 WILLAMETTE L.J. 913 (1981); Note, *Surrogate Mothering: Medical Reality in a Legal Vacuum*, 8 J. LEGIS. 140 (1981); Note, *In Vitro Fertilization: Hope for Childless Couples Breeds Legal Exposure for Physicians*, 17 U. RICH. L. REV. 311 (1983); Comment, *The Surrogate Child: Legal Issues and Implications for the Future*, 7 J. JUV. L. 80 (1983).

77. Advertisements for surrogate mothers began appearing almost ten years ago. For example, "Wife is looking for a healthy, blue-eyed woman who is willing to carry my husband's child. All expenses paid plus \$4,000," appeared in the *Daily Californian* on Nov. 19, 1976, cited in Comment, *Contracts to Bear a Child*, 66 CALIF. L. REV. 611, 611 n.1 (1978). See also *Baby Sales*, N.Y. Times, Feb. 8, 1983, at A20, col. 1 (editorial); Rosenblatt, *The Baby in the Factory*, 121 TIME, Feb. 14, 1983, at 90.

78. See Andrews, *The Stork Market: The Law of the New Reproduction Technologies*, 70 A.B.A. J. 50 (Aug. 1984).

body of scholarship on the legal aspects of such an arrangement. Numerous articles have appeared addressing such issues as the applicability of current adoption laws and existing statutes prohibiting "black-market baby selling."⁷⁹ Lawsuits involving disputes over these arrangements have reached state appellate courts on at least two occasions⁸⁰ and one has resulted in a petition before the United States Supreme Court.⁸¹ Legislation is now being considered in several states to authorize and regulate such relationships.⁸²

Contemporary jurisprudence is more than ready to provide responses to the questions raised by the advent of commercial pregnancy contracts. But the challenges posed by such questions test the limits of the individualism and the insistence on objective neutrality on which this jurisprudence rests. Using traditional legal terminology such as adequacy of consideration,⁸³ liquidated damages⁸⁴ and specific performance,⁸⁵ legal scholarship suggests that these relationships are amenable to routine legal analysis.⁸⁶ An intuitive sense of uneasiness, however, accompanies the application of traditional principles of contract law to contracts which involve human existence as its subject matter. Although it is generally assumed that the "law" can and must deal with these contractual relationships in one way or another, a disquietude seems to permeate the discussion.

A. *An Ontological Premise of Community: What We Believe*

Jurisprudence struggles with the most difficult of questions when it asks what norms, values or morals should constitute the law. Contemporary jurisprudence flounders in relativism, however, because it fails to express the ontological premises of the "morals" it hopes to identify or

79. See Comment, *Baby-Sitting Consideration: Surrogate Mother's Right to 'Rent Her Womb' for a Fee*, 18 GONZ. L. REV. 539 (1983); Note, *The Surrogate Child: Legal Issues and Implications for the Future*, 7 J. JUV. L. 80 (1983); Bowal, *Surrogate Procreation: A Motherhood Issue in Legal Obscurity*, 9 QUEENS L.J. 5 (1983); Smith, *The Razor's Edge of Human Bonding: Artificial Fathers and Surrogate Mothers*, 5 W. NEW ENG. L. REV. 639 (1983).

80. *Doe v. Kelley*, 106 Mich. App. 169, 307 N.W.2d 438 (1981); *Syrkowski v. Appleyard*, 122 Mich. App. 506, 333 N.W.2d 90 (1983), *rev'd*, 420 Mich. 367, 362 N.W.2d 211 (1985).

81. *Doe v. Kelley*, *cert. denied*, 459 U.S. 1183 (1983). Justice Brennan would have granted certiorari.

82. See Andrews, *supra* note 78, at 56.

83. Note, *The Surrogate Mother Contract in Indiana*, 15 IND. L. REV. 807, 828 (1982).

84. *Id.*

85. Comment, *Contracts to Bear a Child*, 66 CALIF. L. REV. 611, 620 (1978); Note, *Surrogate Mothering: Medical Reality in a Legal Vacuum*, 8 J. LEGIS. 140, 148 (1981).

86. Perry Vieth has suggested that "[c]reative contracting may avoid many of the problems associated with surrogate mothering." Note, *Surrogate Mothering: Medical Reality in a Legal Vacuum*, 8 J. LEGIS. 140, 149 (1980).

refute. The only ontological premise, if any, expressed in such jurisprudence is the radical autonomy of the individual from the community.

The ontological question concerns the nature of being. For purposes of the study of law, the ontological question is the extent to which the authority of law derives from a belief that the essence of being is in the autonomous individual or from a belief in the social nature of the human community. In the former the perspective is one of individualism. In the latter the perspective is one in which individual existence is comprehended as part of the social, the "self-other" relationship.

Though there is a hesitancy among certain Critical Legal Scholars to admit the relevancy of religious questions or perspectives in moral philosophy or the study of law,⁸⁷ the nature of the questions to be asked is indeed emerging within the context of these recent discussions. In their recent free-wheeling dialogue on legal theory in a symposium on Critical Legal Studies, Peter Gabel and Duncan Kennedy touched upon the ontological question in Gabel's suggestion that "alienation is ontological," yet recoiled from pursuing it directly.⁸⁸ In a more substantive article in the same symposium, Thomas Heller acknowledges liberalism's "intellectual retreat from theology and ontology,"⁸⁹ and evaluates the structuralist and poststructuralist method of avoiding the delimiting perspective of the autonomous self.⁹⁰ The ontological question has long been a pivotal question for studies in religion, theology and philosophy. These most recent exchanges in legal scholarship suggest that the time has arrived for bringing this question to the fore in contemporary jurisprudence as well.

87. "[M]oral philosophy . . . accomplish[es] little more than a certain intimidation of those of us less versed in particularly scholarly fields." Tushnet, *supra* note 24, at 1213-14. Phillip Johnson has recognized the religious strains which occur in the writings of certain Critical Legal Scholars, despite their disavowal of transcendence. Johnson, *supra* note 26, at 285-89. Johnson observes that "Religious questions have to do with our perceptions of ultimate reality, our sense of what life is really about. Such beliefs form our values, and law reflects those values It is only prudent to take that reality into account in everything we do." Johnson, *supra* note 26, at 288-89.

88. Gabel and Kennedy, *Roll Over Beethoven*, 36 STAN. L. REV. 1, 18 (1984). While Kennedy preferred to rest with the summary that "'Alienation is ontological' is my impoverished statement of what I would rather put in the form of 'nothingness is the worm at the heart of being,'" *id.* at 19, Gabel was insistent that "the word 'ontological' is a true word—that there is something called 'social being.'" *Id.* at 45. See generally, *Critical Legal Studies Symposium*, 36 STAN. L. REV. 1 (1984).

89. Heller, *Structuralism and Critique*, 36 STAN. L. REV. 127, 176 (1984).

90. Several significant contributions to legal philosophy have involved the analysis of structuralism. See, e.g., Hermann, *Phenomenology, Structuralism, Hermeneutics, and Legal Study: Applications of Contemporary Continental Thought to Legal Phenomena*, 36 U. MIAMI L. REV. 379 (1982); Cornell, *Toward a Modern/Postmodern Reconstruction of Ethics*, 133 U. PA. L. REV. 291 (1985).

It has been argued that individual rights and freedom of contract give a surrogate mother the right and the freedom to enter into a commercial pregnancy contract if she so desires.⁹¹ Consequently, the interests of the child, which are the subject matter of the contract, are relegated to a subordinate status. While individuals may differ in their religious or ethical views of such relationships, a complete deference to individual preference in this matter is little more than moral relativism.

The ontological fallacy is the premise that the individual is the source of authority for the existence of such morals. If each person stands apart and alone in his or her declarations of morals then individual autonomy is inescapable. The corollary is precisely that of the Arminians: the individual is able to choose effectively the good and the evil.

What is missing from contemporary jurisprudence is the possibility that the nature of being is *relational* rather than *individual*. If one hypothesizes that each of us exists only in and through a community, then morals or norms or principles might be essentially, if not necessarily, the defining characteristics of such relations. A sense of individuality would remain under this hypothesis, but it would be inseparable from a sense of the dependency of one's self on the "self" of another person. Thus, the substance of existence would be found neither in one's self as autonomous nor in the autonomy of any other person. Rather the essence of our individuality, and the substance of moral convictions, would lie in the complexity of interpersonal relationships.⁹²

This is the conviction that moral reality lies not in individual perceptions but in a sense of complicity. The term "complicity" as it is used here does not mean the common sense of shared guilt for a crime, but rather the sense in which the understanding of one's self is necessarily and essentially a part of one's understanding of community.⁹³ Morals, principles and norms would thus be "located" in the ontological character of personal and interpersonal relationships. The declaration by a

91. Keane, *Legal Problems of Surrogate Motherhood*, 1980 S. ILL. U. L.J. 147, 161-69 (1980). See also Goldfarb, *Two Mothers, One Baby, No Law*, 11 HUM. RTS. 27 (1983).

92. In his *ETHICS*, Dietrich Bonhoeffer cautions against the danger of beginning one's ethical theories with the individual self and other persons as autonomous entities:

The life of deputyship is open to two abuses; one may set up one's own ego as an absolute, or one may set up the other man as an absolute. In the first case the relation of responsibility leads to forceable exploitation and tyranny . . . In the second case what is made absolute is the welfare of the other man, the man towards whom I am responsible, and all other responsibilities are neglected.

D. BONHOEFFER, *supra* note 75, at 196.

93. See M. BUBER, *I AND THOU* (2d ed. 1958) and H. NIEBUHR, *THE MEANING OF REVELATION* (1941) for two modern theological analyses of this ontological perspective.

community, through majoritarian processes, of the validity of certain morals would in this manner not be any more authoritative than a similar declaration by a single individual, however. The validity and authority of morals would lie in the essential nature of the interdependent existence of individuals in community.⁹⁴

An ontological premise of community would provide contemporary jurisprudence with a significantly different perspective in resolving the dilemmas posed by commercial pregnancy contracts. It would not only allow, but would necessitate consideration of the impact of such contracts on the nature of the family. Moral assumptions concerning the bonding which takes place over a nine month gestation period would have to be considered in the formulation of laws. The existence of other children of the surrogate mother and the possible impact of the transfer of the child to the contracting couple on those children would not only be an appropriate element for consideration, but a necessary element. Individual rights of the respective contracting parties would obviously continue to play a significant role, but the community in which the legally authorized or regulated transaction takes place would have a voice in formulating the law.

Similarly, our foreknowledge that breach of contract disputes will arise over the failure of the surrogate mother to turn over the child following delivery, or refusal by the contracting couple to accept the child, would require us to evaluate the appropriateness of the remedy of specific performance in light of the broader community in which the child must be assigned a home, if not a parent. A jurisprudence based on an ontological conviction of the essential interdependence of individuals in community would take into consideration the transcendent nature of familial responsibilities as it would map out the parameters of individual conduct.

In moving from an ontology of self-righteous individualism to an ontology of complicity, the question of what we believe about law is based on the *we* that make this inquiry. In this way we might avoid the dilemma of Arminianism which was the inability to retain any concept of community as an integrating principle. A concept of authority today requires more than an assertion of individualized autonomy to sustain and legitimize law. It requires an understanding of the essential nature of community which makes possible a recognition of the individual within community. As suggested by Milner Ball,

94. John Finnis comes close to such a premise in his description that the "sharing of aim rather than multiplicity of interaction is constitutive of human groups, communities, societies," and in his assertion that one of the three elements of justice is "other-directedness." J. FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 152, 161 (1980).

[t]he search for the source of authority leads from the Constitution to the constitution of the society, from the beginning of the republic to the biblical beginning. The immediate, material repository for authority is the Constitution. The Constitution draws authority from the constituting act. The constituting act evidences community.⁹⁵

B. Teleological Differentiation in Law: What We Believe

A second fallacy of contemporary jurisprudence is its failure to differentiate the multiple functions of law. The teleological question for jurisprudence involves the purposes or ends of law in more than a purely instrumental fashion. A teleological perspective in jurisprudence is one that includes consideration of the ends of the law, in terms of goals. As the term is used here, however, it connotes "ends" that are more than simply the intended consequences of the law or its underlying policies. Teleology suggests far more. As applied to jurisprudence, a teleological perspective examines the nature and validity of law in terms of final or ultimate ends, not just of a particular law, but of the phenomenon of law itself. A teleological perspective necessarily involves consideration of the manner in which law is part of interpersonal existence.⁹⁶

95. M. BALL, *THE PROMISE OF AMERICAN LAW* 15 (1981).

96. In a recent article, Gregory Alexander identifies "a general trend towards a new and overtly teleological analysis." G. Alexander, *The Concept of Property in Private and Constitutional Law: The Ideology of the Scientific Turn in Legal Analysis*, 82 COLUM. L. REV. 1545, 1550-51 (1982). Alexander uses the term "teleological mode" to refer to contemporary legal scholarship which rests on a superficially scientific and objective methodology. *Id.* at 1549. Using entitlement theories of property law as his context, Alexander points out that the teleological approach avoids the "property vel non question," focusing instead on the concepts of due process and just compensation. With this approach the validity of laws dealing with entitlements is determined not by the status of an entitlement as property, "but by its relation to the theory of substantive values attributed to the concepts of just compensation or due process." *Id.* at 1552. His conclusion is that the scientific approach of such teleological scholarship was necessitated by the failure of conventional scholarship to acknowledge the inherent contradictions between entitlement theories of property and the ideological conviction of individual autonomy. This new teleological mode, however, serves only to "preserve the same liberal values of individuality and autonomy." *Id.* at 1598.

In contrast to Gregory Alexander's use of "teleological" to refer to modes of reasoning that are primarily scientific, perhaps objective, and certainly instrumental in nature, my use of the term "teleological" incorporates those ends or purposes which are grounded in religious, philosophical or existential convictions about the nature of being. In this manner, a teleological perspective not only permits but requires the explicit recognition of the role of moral and religious beliefs in politics. As I propose it, a teleological analysis in the context of entitlement theories of property law would force the realization that the ontological premise of liberalism has long been one of individual autonomy. Indeed, the Arminian doctrine of individual autonomy combined with Socinian emphasis on the authority of human reason provides quite close correlations with the recent scientific analysis of law.

With a teleological perspective, the radically different types of laws become evident. Certain laws are intended as purely instrumental in a narrow sense, such as traffic control regulations, and may be designed to regulate or control specific forms of behavior in a manner which is relatively nonobjectionable. Other laws are designed to protect or foster ideals or concepts which persons hold to be central to their existence, such as religious freedom and rights of association and speech. A teleological perspective in its deeper sense helps one recognize the validity of certain types of laws in terms of instrumental results, yet does not require that validity of law be defined in terms of instrumental results. When viewed in terms of *ultimate* ends, the validity of law will rest heavily on convictions about the ultimate ends or purposes of the human community. This conjunction, however, is what seems to be missing in the tendency of legal scholarship to look towards narrow, objective, short term ends to ascertain the validity of law.

Despite the common application of legal policies, there is something essentially different between a typical contract for personal services and a commercial pregnancy contract. When there has been a breach of an ordinary contract for personal services, the remedy of specific performance is rarely available. In commercial contracts for the delivery of unique goods, specific performance may well be available. In dealing with a contract for the production of a child, the application of such traditional contract remedies is inappropriate. Similarly, there is an essential difference between a legal pronouncement that all commercial pregnancy contracts are illegal, subjecting the parties to criminal sanction, and a pronouncement that such contracts are merely void and unenforceable as a matter of public policy. In the former context, society declares that certain behavior will not be permitted; in the latter, though such behavior is permitted, neither party to the contract can seek the aid of a court in ordering enforcement of the contract.

In the situations involving commercial pregnancy contracts, there is an assumption that if existing law is able to design plausible judicial solutions to contract disputes, then this new contractual relationship should not be indirectly or directly regulated by new positive laws. A second assumption seems to be that the role of legislation in this area should be limited to rather narrow functions. Any suggestion that the culture has a stake in the existence of parent-child relationships is carefully avoided. The difficulties with such assumptions are that contemporary jurisprudence offers no clear guidance as to whether a matter should (a) be left to the domain of unrestricted freedom of contract, (b) be subject to regulation by positive law yet still permitted within broad parameters or (c) be

completely prohibited as a matter of public criminal law. The difference between these alternatives involves an understanding of the functions of law in society. The nature of law must be differentiated according to function, for the relationship of law and morals may be extrapolated from the relationship among the different functions of law.

A concept of law which embodies differential functions or uses was first formulated most clearly during the Protestant Reformation. Martin Luther expressed the Doctrine of *Usus Legis* as the concept that law serves different functions: a theological use, a political-civil use and a didactic use.⁹⁷ The theological use of the law, according to Luther, is to foster awareness of the essential self-righteousness and pride which blinds us to our own limitations and fallibility. The political-civil use of the law is the expression of positive law by a community or society for the purpose of protecting and effectuating the essence of the community itself. The third use of the law, the didactic use, is that which encourages and guides individuals as members of a community to do and to be more than may be required by the positive laws of the community. Each function, then, is directed towards the accomplishment of certain ends. The theological use of law is to reveal sin and separation from God; the political use is to minimize chaos and establish order; the didactic use is to encourage greater expression of selfless love.

But these "ends" of the law are, for Luther, not merely instrumental goals. They are the defining characteristics of "uses" themselves. Implicit in each function or use of law is the existence of an ultimate foundation beyond its simple creation by an individual or a community. The object of the law was a knowledge of the limitations of individual ability (theological use), a necessary participation of the individual in community (political-civil use), and an essential participation of the individual in community (didactic use). Only in the political-civil use of law does positive law rest on penultimate authority of the state as sovereign.⁹⁸

A second characteristic of the Doctrine of *Usus Legis* which has

97. For a more complete analysis of the formulation and implications of *Usus Legis*, see F. Alexander, *Validity and Function of Law: The Reformation Doctrine of Usus Legis*, 31 *MERCER L. REV.* 509 (1980).

98. This teleological formulation of the functions of law differs significantly from Ronald Dworkin's characterization of teleological theories. He suggests that a theory of law is distinguished from other theories only in that the "goals" which the law is to achieve constitute part of the definition of the law itself. See R. DWORKIN, *supra* note 14, at 169-71. The teleological nature of the Lutheran formula, however, finds in the essence of law not only a goal or purpose, but also an antecedent existence of a transcendent source of authority for law and for each of the functions of law. Cf. MacIntyre's suggestion that the loss of teleological foundations for ethics was the elimination of "any notion of man-as-he-could-be-if-he-realized-his-telos," which had the result that "[m]oral judgments lose any clear status and the sentences

significance for contemporary jurisprudence is the interdependent nature of the different functions of law. Specifically, the political-civil use of the law is subject to the theological use of the law. Though ordained by God, a political sovereign is never absolute in its authority. The theological use of the law stands as a radical critique of the righteousness of the state. In turn, the didactic use of the law both presupposes and is subject to the theological use of law. Though one may believe one knows what is morally required, one cannot become righteous in moralizing. The constant and creative tension of law and morals exists most clearly in the didactic use of law, but the theological use stands as a barrier to prevent the merger of law and morals from becoming legalism or antinomianism. In this sense, the theological use of law—the understanding of human fallibility and the tendency to self-righteousness—was described by Luther as the *prima usus legis*.

A teleological conception of law is precisely that which allows an acknowledgement of our limitations to create the possibility of greater awareness. In this conception, individual autonomy, human reason and political sovereignty are consequently rejected as possible foundations of the ultimate authority of law. As Paul Lehmann has stated:

Thus, the *primus usus legis* denotes a political reality. Its recognition is a datum of the knowledge of faith. Its functional reality, however, is independent of such recognition. A refusal to entertain the possibility that faith can supply what reason cannot arrive at, is itself the expression of faith, of a faith indifferent or blind to political reality. The dynamics of the *primus usus legis*, however, embrace both positivism and pluralism as penultimate instruments of a sovereignty whose unifying action is the point and the purpose of politics.⁹⁹

The teleological confusion which characterizes contemporary jurisprudence is two-fold. First, it is the inability to differentiate the civil and didactic uses of law, and second, it is the unwillingness to recognize transcendent elements in the rule of law. Failure to differentiate the civil and didactic uses leads, in the case of commercial pregnancy contracts, to unacceptable options. A position which dissolves the civil use of law into the didactic use insists that positive law (whether civil or criminal) mandate all that may be morally desirable and maximize legislation of morality. A position which rejects the relevancy of a didactic function of law

which express them in a parallel way lose any undebatable meaning." A. MACINTYRE, *supra* note 40, at 52, 57.

99. Lehmann, *A Christian Alternative to Natural Law*, in *DIE MODERNE DEMOKRATIE UND IHR RECHT* 541 (K. Bracher ed. 1966).

allows the civil function to be a statement of what is desirable. A differentiation of these two functions allows one to argue in favor of positive legislation regulating commercial pregnancy contracts only to the extent that such legislation is justified by one's moral assumptions about co-existence in community. It would also require one to decide at what point the positive law must not attempt to legislate one's moral convictions. This differentiation of functions is the difference between insisting that commercial pregnancy contracts be regulated only as much as may be necessary to protect the interests of individuals as part of a community, and insisting that such contracts be criminally prohibited. Reasoned deliberation is necessary to discern how deeply such relationships affect the very nature of our existence together.¹⁰⁰

In this alternative theory of the nature and foundations of law I have outlined an ontological premise and a teleological characteristic: a premise which begins with a conviction about the essential character of community and an analysis of content which embodies the antecedent reference to differentiated functions of law. Neither point suggests an objective natural law which is eternal and perceptible by human reason. Although it is certainly normative in some senses of that term, these points suggest primarily a different way of asking the question of *what we believe* about the law.

C. *A Tolerant Epistemology: What We Believe*

If, as Critical Legal Studies suggest, the fallacy of contemporary liberal rationalism is its pretense of neutral, objective, rationally verifiable rules of law, we are still entitled to ask whether any hope is to be found in the suggestion that "[o]ne must step outside the liberal paradigm, into a realm where truth may be experiential"?¹⁰¹ Does this mean that descriptively the liberal paradigm is inadequate in pointing to truth, or does it mean prescriptively that truth is essentially experiential? If truth is experiential is it therefore necessarily relative and subjective (and thus not "truth"), or is it indeed substantive and somehow transcendent? In its criticisms of dominant legal theories, Critical Legal Studies is correct in exposing the inherent limitations of both rationalism and empiricism,

100. This teleological distinction between the civil use of law and the didactic use of law preserves the prophetic critique by law of existing political institutions and structures, and prevents the collapse of legal principles into legal justification of positive law. This is similar to the suggestion made by Roberto Unger in his critique of objectivism, that what is needed "is a conception of the ideal that should guide the reconstruction of the institutional forms." Unger, *supra* note 23, at 583.

101. Freeman, *Truth and Mystification in Legal Scholarship*, 90 YALE L.J. 1229, 1237 (1981).

and there seems to be little disagreement on this point among the "counter-remonstrants" such as Phillip Johnson.¹⁰² One must be careful, however, not to fall victim to the alternative hypothesis that if neither rationalism nor empiricism yields answers, there can be no answers.

The third error of contemporary jurisprudence is epistemological in nature. As the study of theories of knowledge, epistemology involves the question of how we know what we claim to know. The Socinian doctrine of the sixteenth century has given contemporary theories of law an epistemology which insists upon definite concrete substance to our knowledge. That is, the total content of what law is must either be that which we rationally conclude to be law or which we can empirically verify to be law. The elevation of rationalism to a position of ultimate authority has created an intolerance for ambiguity and subjective beliefs.

Yet, the pivotal methodological issue lies precisely in not moving so quickly from the extremes of rationalism to empiricism, or from individualism to relativism. A decision that there are limits to our rationality does not compel the conclusions that there are either rational objective truths which are a priori or that morals are inherently relative and subjective. While certainly both conclusions are plausible, the demise of liberal rationalism may point to another possibility.

This possibility is the conviction that individual ability and collective rationality are incapable of perceiving ultimate substantive truths. Yet, this conviction is neither the necessary nor the essential denial of the existence of transcendent norms.¹⁰³ Theologically, this is the orthodox concept of Original Sin. Our own self-righteousness is precisely that which stands in the way of a full experience of a transcendent God. To the orthodox theologian or a person of deep faith it is an obvious proposition that God exists in spite of our own inability to be God. Yet to those attempting in legal scholarship and jurisprudence to arrive at the ultimate foundations of law, the unanswerability, or at least uncertain demonstrability, of transcendent principles is an unacceptable barrier to accurate theories.

To accept a principle of human limitation, however, whether in the deep sense of Original Sin or otherwise, is not to suggest the futility of all

102. See Johnson, *supra* note 26.

103. John Finnis responds in part to the problem for natural law theories which is posed by diversity of opinions and beliefs by quoting Leo Strauss' statement that "'knowledge of the indefinitely large variety of notions of right and wrong is so far from being incompatible with the idea of natural right that it is the essential condition for the emergence of the idea: realization of the variety of notions of right is the incentive for the quest for natural right.'" J. FINNIS, *supra* note 94, at 29.

inquiries into law and justice.¹⁰⁴ As theologians from Augustine to Bonhoeffer have argued, the search for a coherent theory of law is necessary so long as we remain convinced of the *penultimate* essence rather than the *ultimate* essence of such a theory. To have a methodology of inquiry which contains the epistemological conviction of our inherent limitations is not to refute this enterprise before it begins. Instead, it encourages the enterprise and allows for greater possibility.¹⁰⁵ It was in this vein that earlier philosophers of law could suggest without embarrassment such concepts as "natural law with a variable content,"¹⁰⁶ or "creative natural law."¹⁰⁷

The unacceptability of a theory of natural law today is due precisely to the self-righteousness of human reason which develops, defends and attacks such theories. As Paul Lehmann succinctly observed, "[t]he flaw internal to the natural law and its tradition in western ethical thought is that human reason cannot bear the normative weight assigned to it."¹⁰⁸ An epistemology which is aware of its self-righteousness allows for the possibility that differences in norms, morals or the foundations of law may well be a reflection on the nature of human beings rather than an indication of the nature of moral reality. It allows for the possibility that our knowledge and our existence, as well as knowledge of our existence, contains an antecedent affirmation of transcendence. As suggested by H. Richard Niebuhr, it will also enable us to restate our *cogito ergo sum* as "I am being thought, therefore I am,' or, 'I am being believed in, therefore I believe.'"¹⁰⁹

A jurisprudence which contains an epistemology aware of the limits of rationalism would not develop narrow legal answers to the dilemmas

104. Paul Carrington's not so subtle characterization of scholars in the genre of Critical Legal Studies as nihilists who "ha[ve] an ethical duty to depart the law school," reflects perhaps Dean Carrington's own sense of uneasiness with an epistemology in jurisprudence which admits simultaneously the presence of ideological convictions and the fallibility of human rationality. Carrington, *Of Law and the River*, 34 J. LEGAL EDUC. 222, 227 (1984). A portion of the hailstorm provoked by Dean Carrington's articles is reflected in the correspondence reproduced in 'Of Law and the River,' and of *Nihilism and Academic Freedom*, 35 J. LEGAL EDUC. 1 (1985).

105. "Yet, to set aside the search for some truth-in-itself does not overthrow objectivity or abandon us to relativism. Rather, it frees us to discover and to develop comprehensive, fruitful perspectives and to extend the horizon of our understanding." Ball, *Don't Die Don Quixote: A Response and Alternative to Tushnet, Bobbitt, and the Revised Texas Version of Constitutional Law*, 59 TEX. L. REV. 787, 793-94 (1981).

106. See C. HAINES, *THE REVIVAL OF NATURAL LAW CONCEPTS* 249 (1930) (discussing R. STAMMLER, *THE THEORY OF JUSTICE* (1925)).

107. R. POUND, *supra* note 9, at 14.

108. Lehmann, *supra* note 99, at 531.

109. H. NIEBUHR, *THE MEANING OF REVELATION* 140 (1941).

posed by commercial pregnancy contracts quite so readily. The magnitude of the aspects of these relationships, which are not objective, not quantifiable and not concrete, demands a jurisprudence which at the minimum seeks the assistance of other disciplines such as theology, moral philosophy, psychology and family counseling. The emotional and subjective aspects of such relationships would not be viewed as irrelevant to the formulation of legislation; rather, an inquiry into such aspects would be essential to appropriate laws. The fact that individuals may hold strong differences of opinion as to the appropriateness or desirability of commercial pregnancy contracts would not compel the conclusion that there is no justification for a law restricting or prohibiting such arrangements. Instead, it would compel a more cautious and conscientious response to what is technologically possible. The possibility that far more may be taking place in the dynamics of human reproduction than we can objectively quantify or rationally analyze requires a jurisprudence which eschews the availability of quick answers by accepting the possibility of more ambiguous answers.

My final suggestion for an inquiry into law and morals is the combination of my first three suggestions. By asking about law the questions we ask about religious faith, we can adopt an ontology in which moral reality is found in complicity, a teleology in which the various purposes of law are not confused, and an epistemology which is aware of its own limitations.

As suggested by Gerhard Leibholz toward the close of the Second World War:

[T]o rediscover the foundations and creative moral forces of the [basic values of human life] a new spiritual realism is necessary. After the experiences of the last century have shown the frustrations of all attempts to build a new political order on a purely humanitarian basis, the resurgence of such a realism can only come through those who are aware that the basic values of human life transcend liberalism and derive their ultimate binding force from deeper spiritual sources than from a man-centered philosophy or doctrine.¹¹⁰

IV. CONCLUSION

With rare exceptions, contemporary jurisprudence flounders because it has embraced too deeply the pre-Enlightenment controversies of Arminianism and Socinianism. A primacy of individual autonomy and

110. G. LEIBHOLZ, *POLITICS AND LAW* 86 (1965).

human rationality have given us theories of law in which morals are relative and where instrumentalism seems to be the test for law.

What is needed in contemporary jurisprudence is a reformulation of the manner in which we inquire into the nature and function of law, and consequently, into the relationship between law and morals. Our inquiry must begin with an acceptance of the limitations of the authority of reason, yet with a conviction of the possibility of a transcendent source of law. We must identify the functions of law while understanding the purposes of law with reference to an antecedent authority. We must pursue the essential character of law in moral reality, while grounding that reality in complicity.