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ARTICLES

JURISPRUDENCE IN THE LIGHT OF THE
HEBRAIC FAITH

THOMAS L. SHAFFER*

Justice shall redeem Zion and righteousness her repentant people.

Isaiah 1:27

Judaism is the teaching that there is really only One Power which, while at times it may permit the sham powers of the world to accomplish something in opposition to it, never permits such accomplishment to stand.

Martin Buber

A jurisprudence that has to do with the God of Jews and Christians begins with the Bible, and particularly with the covenant between God and His people. For example, Deuteronomy 5:6-7: "The Lord said, I am the Lord your God who brought you out of Egypt, out of the land of slavery. You shall have no other god to set against me." Faith in Israel's Savior God is the measure of jurisprudence for Jews and Christians. The God in whom we have faith is the God of the Hebrews, Who tells us that He is one God (not to be divided), and Who commands us to have no other god. This is a set of limits on jurisprudence, a set of negative first principles; it rejects any view of the law in which the law takes the place of God. It means that, however we theorize about the place of the law in God's Kingdom and in our lives as His people, we reject all theories that leave us with two gods instead of one.

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1. 2 M. FRIEDMAN, MARTIN BUBER'S LIFE AND WORK 18 (1983).
2. All biblical citations refer to the New English version.
1. No Other God

The major sources for what one might call Hebraic jurisprudence agree that the law can become an idol, and that it must not. Law, especially law as in the way lawyers talk about it, is an awesome force and a value in itself. It is available for idolatry. Not everything is available for idolatry; some things tend to become idols and some things do not. It is unlikely that people will make a god out of a potato, but the evidence of history is that they may make a god out of the earth, money, the state, or their notions of who God is. St. Paul distinguishes, in Colossians 3:5, between sexual sins and greed; it is greed that he says "is nothing less than idolatry." Law is more like the earth, or the state, or money, or theological notions, than like a potato.

**Judaism.** In the Diaspora, in which Jews have lived in Gentile nations, the unity of the Mosaic law is broken. The ordinary civil law that binds a Jew, according to the Talmud, is therefore the law of the nation he lives in; that municipal law carries the force of Mosaic law, with this exception—it must not become a god: "Hebraic religion says no to society whenever society, in its pride, makes claims to absoluteness . . . . Personal self-realization in faith and love needs society for its development, but it possesses a dimension and a goal of which society knows nothing. Ultimately, man stands related to God and fellow-man in a bond which no society can comprehend or social institution embody."  

**Roman Catholicism.** St. Thomas Aquinas is the almost official Roman Catholic philosopher. The Thomistic view of the state is in many ways like that of the Greeks. Socrates said that the duty he owed the state was the duty he owed his parents — obedience even in the face of injustice. Aristotle

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3. The Talmudic principle (from the third century C.E.) is: "The law of the government is binding law." This, Herman Wouk says, "became the basis for the civic loyalty of Jews outside the Holy Land. It gives to the law of the lands where they dwell the full force of religious law." H. Wouk, *This Is My God: The Jewish Way of Life* 301-302 (rev. Pocket Books ed. 1974).

4. W. Herberg, *Judaism and Modern Man: An Interpretation of Jewish Religion* 139 (Atheneum ed. 1980). I am using "Hebraic," as Herberg does, rather than the more conventional "Judeo-Christian." Herberg's usage better reflects the fact that we are talking about a common tradition, not about similarities in separate traditions.


6. Plato, *Crito*, 43a-54e.
grounded his political theory on the virtue of friendship. From Aristotle, Aquinas developed his theory of natural law, and, to Aquinas, natural law was the measure of human law. But both through natural-law theory and otherwise Aquinas limited the authority of the state in a way which would have been problematic for the Greeks. Sophocles's Antigone could not, I think, have been a medieval Christian play.

"[T]he force of a law depends on the extent of its justice," Aquinas said. And justice is determined according to reason. "But the first rule of reason is the law of nature . . . Consequently, every human law has just so much of the nature of law as it is derived from the law of nature." If human law departs from the law of nature, he said, it is "spoilt law." Perhaps it is still law in some way, but it is not clear that it is the law in the sense that it must be obeyed. It may be possible to accept an action of the state as law, and so to honor it, but at the same time to refuse to obey it. Antigone would, again, be a problematic case for medieval Christians.

On the question of obedience, Aquinas distinguishes between laws that are unjust because "contrary to human good" and laws that are "contrary to God's rights," that is, idolatrous. In the first category are laws that are inequitably dispensed and laws that do not serve the common good. For example, "when the ruler taxes his subjects rather for his own greed or vanity than the common benefit." Following Augustine, he said such laws are "outrages rather than laws," and do not bind conscience, "unless perhaps to avoid scandal or riot." That is a subtle proposition; the "unless perhaps" suggests a substantial territory, and Aquinas no doubt realized that it did. He cited Matthew 6:40 to support the "unless perhaps": "If any one forces you to go one mile . . . and if anyone should sue you . . . ." But there is no "unless perhaps" for human laws that are in the category "contrary to God's rights." These, Aquinas said, "are the laws of tyrants which promote idolatry . . . . To observe them is in no wise permissible, for . . . We must obey God rather than men."

This position is in Reformation Protestant writers as well, although among Protestants the position is more elabo-
rately biblical and is not always related to the law of nature.\(^\text{11}\) There are a couple of other opportunities for jurisprudential discussion in these Judaic and Roman Catholic sources that are not so prominent in Protestant theology. One point of emphasis is that the Jewish and Thomistic traditions reflect a relatively positive view of what a human being is. Herberg’s generalization of the reason for a limit on the moral duty to obey Gentile civil law, for example, turns on Israel’s belief that man’s relation with God is “a bond which no society can comprehend.” Robert E. Rodes, a modern, Roman Catholic, natural law thinker, makes the same point, and suggests as well the Thomistic view that tyrannical government is more objectionable, because idolatrous, than unfair government, when he says: “Human authority stands between a God whose ultimate purposes are inscrutable, and a human being whose ultimate being is impenetrable; anyone who makes it a basis for intervening in the affairs of his fellows should do so with humility and reverence.”\(^\text{12}\) This sentiment once found its way into the pages of the United States Reports. Justice James Wilson, an eighteenth century, natural law thinker, said in a 1792 tax case: “Man, fearfully and wonderfully made, is the workmanship of his all perfect Creator: A State, useful and valuable as the contrivance is, is the inferior contrivance of man; and from his native dignity derives all its acquired importance . . . . A state, I cheerfully admit, is the noblest work of Man: But, Man himself, free and honest, is, I speak as to this world, the noblest work of God.”\(^\text{13}\)

A second point of emphasis is the view that Jewish and Thomistic traditions take of what law is. The concept is inevitably ambiguous in Judaism, which takes its tradition from the Torah, the Wisdom of God, a system of divinely ordained law that affects all of human life — government and its operations; legal and moral duties among the Children of Israel; obligations to Gentiles; matters of personal morality such as diet, labor, and sexual behavior; and religious ritual. All of these are law. Indeed, the moral force of civil law in a Gentile nation depends on the civil law’s participation in the divine authority which gave Israel the Torah. Aquinas makes elaborate distinctions among divine law, natural law, and man-made law, but he uses the word “law” throughout his discus-

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Although some Thomists disagree on this point, Aquinas probably uses "law" even to refer to the sort of "spoilt law" that does not conform to the natural law requirement that human law promote the common good.

There is a modern jurisprudential difficulty in the fact that these traditions did not pursue jurisprudence as a discrete inquiry. Neither tradition developed a philosophy of law, a view of what law is in the modern lawyer's sense, and of the sources and extent of its authority, until after the Enlightenment. Jurisprudence as a discipline begins in the eighteenth and nineteenth centuries, among Kantian and utilitarian thinkers who were interested in distinguishing between law and morals; modern Jewish and Roman Catholic jurisprudence, narrowly so called, is a response to those thinkers. One way to suggest the agenda I mean to raise here is to ask whether laws in either of Thomas's categories of impropriety — those "contrary to human good" and those "contrary to God's rights" — are nonetheless laws. The question that hides behind that question is why one would want to ask whether such improper laws are nonetheless laws. Aquinas's response to the hidden question is that prudence may require obedience to spoilt law, but that faith requires disobedience and maybe even defiance of idolatrous law. Thus spoilt law (applying the term to laws contrary to human good) is, in important ways, nonetheless law, but faith requires disobedience and maybe even defiance of idolatrous law. Aquinas's treatment is faithful to the Scholastic injunction — seldom affirm, never deny, always distinguish.

Lutheran Protestantism. The next logical (or at least chronological) inquiry is the position of the German Reformation on the fundamental Hebraic propositions that the law must not become an idol and that one's theory for avoiding idolatry must not divide God in two: The Lord our God is one, and we are to have no other god.

Martin Luther seems to me to have rejected, by and large, the notion of conscientious disobedience that is allowed for in Aquinas's theory of laws contrary to human good, and that is commanded in Aquinas's theory of laws contrary to the rights of God. Both Luther and Aquinas took Romans 13:1-6 into account, but Luther followed the Pauline passage with more vehemence than Thomas did. The commands of

15. Aquinas, supra note 8, a. 4.
Civil authority are the commands of God, Paul and Luther say. Obedience is commanded, even obedience to the tyrant. The civil authority St. Paul and his first readers knew about was Roman civil authority; it was on the way to becoming the civil authority of Caligula and Nero. Obedience to such tyrants does not risk idolatry, though, because the tyrants' authority comes from God.

Every person must submit to the supreme authorities. There is no authority but by act of God, and the existing authorities are instituted by him; consequently anyone who rebels against authority is resisting a divine institution, and those who so resist have themselves to thank for the punishment they will receive. For government, a terror to crime, has no terrors for good behaviour. You wish to have no fear of the authorities? Then continue to do right and you will have their approval, for they are God's agents working for your good. But if you are doing wrong, then you will have cause to fear them; it is not for nothing that they hold the power of the sword, for they are God's agents of punishment, for retribution on the offender. That is why you are obliged to submit. It is an obligation imposed not merely by fear of retribution but by conscience. That is also why you pay taxes. The authorities are in God's service and to these duties they devote their energies.16

Does this mean that God's authority stands behind the tyrant? Even behind the tyrant's claim to be a god, which would be a law "contrary to the rights of God" in Aquinas's system? By and large, it seems to me, Martin Luther answered yes to that question. In affirming the Pauline doctrine that the voice of the tyrant is the voice of God, Luther sets the just God of the Hebrews apart from the God who acts through tyrants; he sets the holy God of Sinai apart from the merciful God of the Psalms and of John 3:16 ("... God so loved the world ... "). This is a major subject in Lutheran theology, usually treated under Luther's theory of the tension between law and Gospel, and his consequent political theology of the two kingdoms. It needs to be taken up separately; it is important for theological jurisprudence. But, for present purposes, it is sufficient to notice that Luther almost avoided the traditional doctrine of Judaism and Thomism, that the moral duty to obey the law is limited by the primal command of the God of the Hebrews that His people have no other god.

Almost. Both Luther and modern Lutheran theologians substantially alter this separation of the holy God from the merciful God by noticing that the Kingdom of Love, the Gospel side of the law-Gospel tension, influences the Kingdom of the Law. Luther himself commanded the Christian prince, who, Luther said, had all of the legitimate authority suggested in Romans 13:1-6, to exercise his authority as a Christian, as one who lives in the Kingdom of Love while he presides over the Kingdom of the Law. Love affects law, law cannot affect love; the bridge of influence is a one-way bridge.  

This Lutheran notion of influence suggests a way (a distinctly Protestant way, I think) in which loveless law can be found not to be law, or not to be valid law, or at least not to be the law that St. Paul had in mind in Romans 13:1-6. That possibility, in any case, raises the question of how we are to understand what Paul wrote in Romans 13:1-6. One way to explore Luther, and a way to assess his view of the moral duty to obey law, and therefore his view of what lawyer’s law is, is to ask what St. Paul was up to. We could do that with the words themselves, which suggest that St. Paul was not thinking of unjust law, or at least not of idolatrous law (“government has no terrors for good behaviour”). We could do it, as some twentieth century Protestant scholars have, with a bit of history and context; we could look into the arguments of those who say that Romans 13:1-6 was written in the fear that Roman authority would think the Jewish Christians in Rome were like the Zealots in Jerusalem. On this view, St. Paul was warning the Christians, and probably the Roman Jews too, not to fall in with violent revolutionaries and terrorists, and maybe he overstated his point a bit.

Or maybe, to take another school of thought on Pauline literature, St. Paul was still of the opinion that the Second Coming of Jesus was imminent. He was giving directions for a temporary civilian life in Rome and not laying down a social ethic that he expected to be around to interest Martin Lu-


18. See, e.g., O. CULLMAN, supra note 11, at 56-65.
ther 1500 years later.19

Or we could try still another tack and suggest that the central message of Jesus — peace, love of enemies, forgiveness — must always be the measuring stick in interpreting the New Testament. Jesus is the New Torah for Paul. Paul cannot have meant, therefore, that the tyrant must be obeyed if the tyrant commands that a Christian kill or exploit another person, or, especially, when the tyrant claims God's place in a Jewish or Christian life.20 "You were bought at a price; do not become slaves of men."21 A parallel and related doctrine of interpretation in rabbinical literature understands the Torah in reference to God's purpose in creating man and in choosing Israel as His people. Moses Maimonides held, for example, that "the ritual law is made for man and not man for the ritual law," so that even clear law should be abrogated "in order to bring back the multitudes to religion."22 Anything people are serious about can become an idol; even the community's worship can become an idol.23

If these reflections have any validity, if the question of idolatry can be focused on the issue of the moral duty to obey civil law, the Lutheran tradition puts those who want to discuss theological jurisprudence to a choice: Either we must look more deeply into Luther's teaching that law and Gospel are in tension, or we must disagree with the vehement reading of Romans 13:1-6 that we find in his essay on secular authority.

In either case, when the question is put in terms not of the subject's duty, but of the prince's, the difficulty disappears. Luther's position was here more consistent with the Jewish and Thomistic positions. Luther was forceful (as always) in telling the state that it must not arrogate to itself the prerogatives of the church. The issue of a prince or a modern collectivity claiming idolatrous respect is one thing; the issue of whether the idol must be obeyed is another. Luther did not suppose that the Christian would receive his salvation or his

21. 1 Corinthians 7:23.
well-being from the government. "It pleases the divine will that we should call his executioners noble lords, fall at their feet, and be subject to them with all humility," Luther said, "as long as they do not extend their task too far and seek to become shepherds instead of executioners." 24 One may have to obey the tyrant with his hands, but he cannot obey the tyrant with his heart.

Luther was also clear on how those who serve in government should behave. The difficulty is in St. Paul's and Luther's moral counsel on obedience with the hands to those who are subject to the government. Luther's disagreement with Thomism and Judaism on that score goes to his law-Gospel doctrine, which finally has to do not so much with idolatry as with dividing God in two. Part II of this essay has more to say about both parts of this issue in Lutheranism — that is about both the prince's jurisprudence and the subject's.

Reform Protestantism. John Calvin and those who stand in the Calvinist tradition have much of value to say on the law-Gospel question; but, I think, Calvinists seriously disagree with the Lutheran tradition on the present questions of law as idol and dividing God in two. Karl Barth, in this regard a careful Calvinist, disobeyed, rejected, and fled from German National Socialism, not because it was tyrannical but because it was idolatrous; it put the state where God ought to be; it proposed to replace the church. It was radically evil because of that claim — and this quite aside from what it did. On this basis, if no other, Barth disobeyed with his hands; he took off his preacher's robe and put on a military uniform. 25 He was prepared to go to war against the false god. Barth's teaching here — which is, I think, faithful to the reformed-church tradition — goes beyond the issue of idolatry: He would also say that the state learns what to do, even what it is, from the church. The church knows better than the state what the origin and purpose of the state are. 26

Sectarian Protestantism. The Anabaptist tradition implacably insists on measuring what the government does by the Gospel. A believer may pay Caesar the taxes Caesar demands because God says he must, but he will not follow Caesar into war or, for that matter, even into technology. Sectarian thought in this regard rests on the nature of authority in the

24. M. Luther, supra note 17.
believer's life; it becomes wary of law at that point and therefore does not often reach the question of the state as an idol.\textsuperscript{97}

\textit{Modern Idolatry.} We Jews and Christians do believe, though, that we should respect civil authority, and both the Talmudic and Pauline traditions support us in that belief. Jews and Christians are good citizens, and our reservation that creature not pretend to be Creator, that we must obey God rather than men, is not a daily problem for those of us who live in modern Western democracies. We are secure in the assumption that our political theory has solved that problem. \textit{In our security lies our self deception.} The self deception causes us to make an idol not so much of the state as of the notion of civic virtue. We forget that even virtue is good only until it becomes a god. Even the highest of the virtues, love itself, can become an idol, and often does in modern theological ethics.\textsuperscript{98} The danger for us is not that we build altars to the state, or to the law in the lawyer's sense of law, but that we come not to notice that the altars are already in place.\textsuperscript{99}

We Americans tend to identify the authority of God with civil authority. We have powerful historical precedent and authority for doing so — the early-modern European notion that the sovereign reigns by divine right, for example, or the Pauline and Protestant notion that God established the state (civil law) in order to curb our appetites and punish us for our sins. "They are God's agents of punishment," Paul said. "Frogs need storks," Luther said. Law is "like a whip to an idle and balky ass," Calvin said.\textsuperscript{100} It is possible to go from those relatively monarchical orientations to an orientation that says the government's error is God's business, not ours. (If the government's error is our business, the issue is political, not moral.) We are not able to distinguish, then, between the civil obedience that honors God and the civil obedience

\begin{thebibliography}{99}
\bibitem{27} Finger, \textit{The Problem of Law During the Protestant Reformation}, in \textit{The Bible and the Law} 65, 85 (Occasional Papers No. 3, Institute of Mennonite Studies, n.d.).
\bibitem{28} Moral theory on self-deception is developed with clarity in H. Fingarette, \textit{Self Deception} (1960). Fingarette's theory is given a focus in social ethics, and therefore in notions of civic virtue, in S. Hauerwas, \textit{Truthfulness and Tragedy} 82-98 (1977).
\bibitem{29} M. Marty, \textit{Righteous Empire} (1970). Marty discusses such examples as Thomas Jefferson's reference to the United States as "God's New Israel."
\bibitem{30} All quoted or discussed or both in Alexander, \textit{Validity and Function of Law: The Reformation Doctrine of Usus Legis}, 31 \textit{Mercer L. Rev.} 509 (1980).
\end{thebibliography}
that betrays the Hebraic ideal of love of neighbor. This point is particularly important in the modern political theology that builds on the radical Hebraic bias for the poor and oppressed (of which more later).

In modern Western democracy, we only seem to have found a way to avoid statism. Eighteenth century views of natural law such as James Wilson's, which were for the most part Hebraic theories, seem to have delivered us from sixteenth century Lutheran views of civil authority and from the divine right of kings. These modern political theories say that God acts less through the prince than through the people, who empower the prince because they are empowered by God. But these theories tend to make an idol of the people, that is, of the majority of those whom bias and entropy and civil authority have made prosperous and powerful.

The view that the voice of such a majority is the law — that each of us citizens has made a primordial contract surrendering his autonomy to majoritarian government — replaces idolatry of the prince with idolatry of the town meeting: *Vox populi, vox Dei*. That drift needs always Justice Wilson's corrective: Although man made the (democratic) state, God makes man. One helpful version of that corrective is to understand law not as command but as dialogue: God, who makes each person and gives him inalienable personal rights and a political authority he can exercise collectively, gives him as well a legal capacity that he exercises in conversation with others. Law is the conversation. As Robert E. Rodes puts it: "Man makes two all but universal claims upon law. One is to vindication against unjust force; the other is to rudimentary conditions of life. These seem to correspond to God's earliest promises in Genesis: to go on ruling the world, and to let man live . . . ." Law as conversation is a corrective for statism (that is, for idolatry), because it is more modest than law as temple. Maybe that's because in conversation we are better able to remember that both the Cross and Buchenwald are symbols of what men do to one another in the name of the law.

The view that law is a conversation provides a corrective as well for the more specific and powerful drift toward democratic idolatry among modern American lawyers. Democratic idolatry's most imposing professional monument is the adversary ethic — the notion that a lawyer has a license to be immoral, because the democratic state needs him to do his duty.

in an adversary system of, as we call it, justice. Law as conversation is also a corrective to a less serious, but no less subtle, idolatry in the natural law tradition. When natural law measures positive law, natural law is likely to take the form of positive law. How else are the two to be compared? This way of thinking tends toward codifications of natural law — statements of it in hornbook form. And, of course, hornbooks and codes have authors; they have institutional authorities who promulgate and enforce them. And the institutional authority that stands behind these codifications of natural law can become a god. There are examples of this in Anglo-American common law of the Blackstone variety and in Roman Catholic moral theology.

II. Dividing God in Two

The God of Israel and (therefore) of Jesus is one God and we are to have no other god. Part I considered the implications for jurisprudence of the command to have no other god (e.g., Deuteronomy 5:6-7). This part will consider the implications of the doctrine that our God is one.

The problem with the central requirement that God is one, particularly for jurisprudence, is that our God is not an Aristotelian Prime Mover or deistic Supreme Being; He is a Person, a Lover of mankind, and the Redeemer. A persistent question in Hebraic theologies is: How can He be all of these things at once? The tradition poses the question in a variety of ways.

Example: In the principal work of Jewish mysticism, the medieval Zohar, God as omniscient and omnipotent (En Sof) is separated from God as present in the world (Shechinah). The Shechinah, the Spirit of God, has been separated and is in the world as a consequence of the Fall. The Shechinah is in exile; the ultimate moral task for people is to reunite the divided God, to restore the Shechinah; people do this through lives of piety and moral excellence. Isn’t this an image of two gods rather than one?

Example: The Hebraic traditions consistently celebrate the mercy of God, but they must also take God’s holiness into account. The unity of holiness and mercy in God is central to

St. Paul’s explanation of the Christian doctrine of redemption: “For all alike have sinned, and are deprived of the divine splendour, and all are justified by God’s free grace alone . . .”93 God’s holiness, offended by sinful mankind, is satisfied by God Himself. God in His mercy struggles with and overcomes God in His holiness: “God overcomes himself, and His love saves us from the threat of His holiness.”94 It is the same God Who in holiness deprives man of splendor, and in love justifies man and restores him to splendor. But how can one God pursue two such different purposes?

Example: This question about the unity of God appears even in the doctrine of creation. Buber asks, “[W]hy has the limitless Godhead become the limited God, wandering through the worlds and performing the work of creation in His limitedness . . .? Why has the limitless Godhead, from being an absolute Person, whom nothing stands over against, become one faced by a recipient?”95 How can God be the Creator of the Universe and a Person — a loving Father — as well? Buber’s answer is to attribute love to the infinite Godhead. God wanders in the world because of His kindness. He becomes a God faced by a recipient “from longing for the recipient upon whom It, the Godhead, could bestow its light. Both answers are one. The actuality of God’s way is to be understood from the actuality of His will to show love.”96 Not everyone has resolved this division of God into Creator and Companion so clearly. The Hebraic tradition seems often to have come up with solutions that involve two gods, a tendency that has importance for jurisprudence.

A. Modern Mainline Theology

The Hebraic tradition poses the question in these ways, and many others, but it has finally refused any answer that weakens the doctrine of the unity of the One God. At one extreme, the Christian tradition has rejected docetism in all its forms. Jesus Christ was not a ghostly appearance; he did not merely seem to be a man.97 The early Christian church thought it essential to the Christian doctrine of salvation to

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33. Romans 3:23 (emphasis added).
36. Id.
37. “Docetism” comes from the Greek dokein, “to seem.”
insist that Jesus was fully human and fully divine. "True God of true God," as the Nicene Creed put it, in 325 C.E. At the other extreme, the early church condemned as heresy the first century doctrine of Marcion that the Christ was a different God than the Father, that the Christ was the God of mercy and the Father was the God of holiness.  

One Jewish parallel is the doctrine of Benjamin Nahavendi, one of the early medieval Karaites, who rejected the Talmud. Nahavendi held that God was, as Epstein puts it, "too transcendental to mingle with the material world and that it was an angel who created the world and not God himself." The Jewish tradition has rejected that notion as clearly as it has rejected Philo's notion that the Logos, the word of God, was a second and inferior god and the instrument of creation. "In Judaism," Epstein says, "the God of Justice is the God of Mercy (Love), one and inseparable, both Justice and Mercy being but complimentary aspects of God's character as exhibited in His moral government of the world and His particular providence." The same is true in Christianity, which nonetheless asks, as Judaism obviously does: "How can this be?"

The importance of this question for jurisprudence is: How is the Kingdom of God involved in what lawyers call law? Is God working through lawyer's law, or is one who sees the best and highest good of the human person in Hebraic, transcendent terms wasting his time to work through lawyer's law for a better world? "There is really only One Power," as Buber put it. Maybe, to use an image Thielicke adapts from Luther, the law is gauze in a wound that only the Gospel can cure? Is the Gospel a source of law, as the Torah is, or, to look at that question the other way around, is God present in the world in such a way that the world and the world's law are sources of grace? Is it possible that the state itself is a source of grace, "God's agents working for your good," as St. Paul says? Maybe, as in Barth's phrase, there is a blessing in

39. I. EPSTEIN, supra note 22, at 188-89.
40. Id. at 197-98.
41. Id. at 135-36.
42. 2 M. FRIEDMAN, supra note 1, at 18. In the Protestant tradition this issue is often focused on the doctrine of God's "third use" of the law, on the law as a source of virtue. See Alexander, supra note 30; Dowey, supra note 11.
43. 1 H. THIELICKE, supra note 34.
Martin Luther posed his answer in characteristically straight-forward terms: Law and Gospel are united in the mind of God, but nowhere else. In the world and in human life, they are irreconcilably separate. They are in tension, and we people stand in the field of their tension. Luther doubtless came to the doctrine from an old theological tradition going back at least as far as St. Augustine and from his reading of scripture. The doctrine happened, in any case, to solve several problems for him. One was the contradiction between God's moral commandments and the Pauline doctrine that salvation is God's free gift—His unconditional gift, as Luther saw it. Luther decided, of course, that obedience to the law is not a condition for salvation; therefore, law is separate from Gospel. The promises of the Gospel are not conditioned on observance of the law.

Another Lutheran position concerns the demanding, if not impossible, morality stated in the teachings of Jesus—love of enemies, servanthood, turning the other cheek, etc. These seem to be unreasonable for life in a world of rivalry, bureaucracy, war, and commerce. Luther found unacceptable the medieval notion that the Sermon on the Mount contains "counsels of perfection" and not moral commands, because it led to the development of elites among believers. If, though, each of us lives in two kingdoms, a worldly kingdom (the law) and a kingdom of faith, hope, and love (Gospel), we can differentiate the moral demands put on us; we can satisfy the demands of the world — legal demands — according to the morals of natural reason, and we can satisfy the demands of the Gospel — belief — as Luther put it, "in our faith and in our books."

Luther's doctrine of the separation of law and Gospel is complex. It may be too simple to explain it from the perspective of problems it solved for Luther (the two I have mentioned and, no doubt, others), but that is, at least part of the time, the way the Lutherans do it. Helmut Thielicke, for example, insists that the alternative to Luther's doctrine is a point of view that reduces Christian morals to sentiment and

45. M. Luther, supra note 17; 1 H. Thielicke, supra note 34.
46. My two-kingdoms essay discusses these teachings in some detail, with references to Luther's treatment of them and modern discussions by Lutheran scholars. Shaffer, supra note 17.
optimism. The tension between law and Gospel is "the only guarantee that in theological reflection the historicity of revelation will be preserved. If this tension were to be done away with, theology would be taken over by a timeless, monistic principle such as the idea of love or the idea of divine goodness. Instead of being an exigesis of salvation's history, theology would be changed into an optimistic-Christian philosophy or world view." 47

Thielicke argues that the tension is necessary for the preservation of the notion that the Incarnation is an event in history, that the Incarnation is the place and the time where the loving God struggled with the holy God and won. Because of that historic event, the law and the Gospel were and are apart and qualitatively different. They have different points of origin. The implication is that institutional forms of life in secular society and among the faithful are also different, and even that they operate on different moralities.

The Lutheran notion of separation has arrayed against it the Judaic, Roman Catholic, and Calvinist traditions. Calvin's theology generally shows the moral demands of the Hebrew Bible and those of the New Testament as more of a whole than Luther does. The Hebrew Bible and the Christian Bible are not sequential for Calvin; they are concentric circles. "There is indeed only one single and ongoing righteousness of God," he said. Also, for Calvin, as for the Thomistic natural law tradition, the revelation of God (and particularly the revelation of God as it might affect law in the lawyer's sense) is both in nature and in the Bible, the one "engraven on tablets of stone," the other "inscribed on the heart." Law, Gospel, and nature are in a teleological unity; they point to a single destiny for man, as to a single Kingdom of God; they are one, in the oneness of God. God uses the law to convince believers that they are sinful, and to instruct them in how to live, as well as to maintain order. 48

Calvin's reading of the Decalogue illustrates this teleological unity. He sees the Commandments, as Jews see all of the Torah, as positive and not merely prohibitive. For Calvin, the command not to steal is a command to practice charity; as in rabbinical teaching. God's response to His child's having

47. 1 H. Thielicke, supra note 34, at 106.
48. J. Calvin, Institutes of the Christian Religion 349-410 (Westminster ed. 1960); discussed in Finger, supra note 27, at 75-83; and in Alexander, supra note 30. See also 2 M. Friedman, supra note 1; and Dowey, supra note 11.
obeyed a commandment is to give the child another commandment.\textsuperscript{49} God's commandments are not only instruments of judgment and terror; they also express His love. This emphasis is more dominant in Calvinist thinking than is the insistence that the redemption was a mighty miracle performed at a time and in a place in which God as love rescued man from God as holy. Karl Barth expressed this tradition in his theory that the command of God contains forgiveness for violation of the command; the command itself is a concentric circle.\textsuperscript{80}

So, too, Judaism: "Hebraic religion strikes an unmistakably this-worldly note: this world, the world in which we pass our lives, the world in which history is enacted, the world of time and change and confusion, is the world in which the divine Will is operative and in which, however strange it may seem, man encounters God."\textsuperscript{81} Jewish mysticism describes all of physical reality, each bit of it, as containing sparks of the divine. "The holy in things . . . awaits the liberation and fulfillment of the man who gives himself completely . . . he exercises no power but a service, the service."\textsuperscript{82} The poetic image here is in the Kabbala and in the imagery of the eighteenth century Eastern European Hasidic movement. The divine sparks contain ethics, sacramental theology, and the answer to the problem of evil.\textsuperscript{83} In Judaism, moral teaching fastens on daily, worldly tasks as moral action; making a shoe, in faithful service to neighbor, and loving God as the shoe is made, is no less a holy act than prayer or even sacrificial alms-giving. "If you turn away from the world in order to turn to God, you have not turned toward the reality of God but only toward your concept of God; the isolated religious is also in reality the not religious."\textsuperscript{84}

The most coherent, modern Protestant view in opposition to the Lutheran theory of the tension between law and Gospel is probably the Christian social ethic — the jurisprudence, I think — of Karl Barth. Reinhold Niebuhr once criti-

\textsuperscript{49.} Ethics of the Fathers, cited in Owen & Mesch, Protestants, Jews, and the Law, 101 The Christian Century 601, 603 (1984); see also Dowey, supra note 11.

\textsuperscript{50.} K. Barth, supra note 23, at 91 (discussing 2 J. Calvin, supra note 48, at 7, 2).

\textsuperscript{51.} W. Herberg, supra note 4, at 49.

\textsuperscript{52.} M. Buber, supra note 35, at 151-52.

\textsuperscript{53.} Id. at 83-84; I. Epstein, supra note 22, at 244-45.

\textsuperscript{54.} M. Buber, supra note 35, at 235. Compare Barth's teaching on the concept of God as an idol, K. Barth, supra note 23.
cized Barth for placing "the whole political process from beginning to end under the order of redemption." That seems to be a fair statement of Barth's position. Barth was uninterested in that part of the natural law tradition that saw the political order as a manifestation of human excellence, "the noblest work of man" in Justice Wilson's phrase. Barth was a consistent Calvinist; he accepted that the state is corrupt, as are the men who maintain it. But he also rejected the Lutheran notion that the "order of preservation" (the Kingdom of the Law) is separate from the "order of redemption" (the Kingdom of Love). There is, for Barth, only one order — the order of redemption. The grace of God operates in the state and in the law as it operates throughout creation, and it operates redemptively throughout. Finally, Barth does not reject nature as law but sees nature as redeemed, so that there is not a tension between nature and Gospel.56

The consequence of this for Barth was that the position of the believer in the state — the position of the lawyer practicing law — is the position of prophet. His place — and Barth often expressed this as the place of the church, particularly when he resisted the Nazis — is to teach the state what he knows as a believer. Indeed, in Barth's view, the state gets its justification from the church. And it is to be criticized by believers in a specifically religious way. Thus Barth said (in 1938) that Nazi anti-Semitism demonstrated that the Nazi regime sought to be a "basically anti-Christian counterchurch."57

"The really decisive Biblical-theological ground for this assertion," he said later, "is to be found not in the various anti-Christian asservations and actions of National-Socialism, but in its anti-Semitism in principle . . . . Here the Christian Church is attacked at its very root and threatened with death . . . . Anti-Semitism is sin against the Holy Spirit. For anti-Semitism means rejection of the grace of God."57

That is a remarkably indicative piece of theology; the occasion of Barth's making it should not blur its general importance for jurisprudence. Barth's basis for prophetic objection is not that Nazis offended human decency, or natural reason,

57. K. Barth, supra note 26, at 40.
or the morals that are written in the hearts of man, and thus he does not speak as a Lutheran or natural law Roman Catholic would have. The substance of his objection is specifically religious; he speaks with the Bible open in front of him. He speaks of the state, to the state; the state is part of, not separate from, the Kingdom of Love. There is, he said, "an actual, and therefore inward and vital, connection between the two realms . . . in spite of all differences, an inner and vital connection . . . between . . . the worship of the Church . . . and 'political' service of God, a service of God which, in general terms, would consist in the careful examination of all those problems which are raised by the existence of human justice, of law, or, rather, which would consist in the recognition, support, defence, and extension of this law — and all of this not in spite of, but because of, divine justification." 58

The law, in other words, and as Barth put it, is the form of the Gospel. 59 The law is, from the beginning, from before the creation, promissory. The Incarnation exhibits God's eternal will: He did not wrestle with Himself; He did not change His mind. The consequence of such a doctrine, to take a less stressful example than National Socialism, is that church and state are separate, if they are, so that the church's ability to instruct the state will not be corrupted.

Thielicke's disagreement with Barth on these points — and Thielicke, too, lived through and resisted the Nazi terror — is that Barth is too near docetism. Barth is too inclined to minimize the Incarnation as an event in history, as a mighty miracle. Thielicke said that Luther's position on the separation of law and Gospel was the only way to preserve a historical view of the Incarnation. Barth, Thielicke says, would make of the Incarnation "a ghostly incorporeality." The view that the Incarnation is an exhibition of God's eternal will treats the Incarnation as a piece of evidence rather than an event, which means that the Christian doctrine of salvation becomes a "divine monologue." 60

This theological dispute has its consequences in the problem of evil. Both Thielicke (Lutheran) and Barth (Calvinist)

58. Id. at 43-44.
59. See K. Barth, supra note 23, at 337-38.
60. 1 H. THIELICKE, supra note 34, ch. 7. It might help to notice that H. Richard Niebuhr, in his slightly playful theory of "theological unitarianisms," would likely identify Barth as a God-the-Father unitarian and Luther and Thielicke as God-the-Son unitarians. The point is that each of them is gently accused of not facing up to the unity of God. Niebuhr, Theological Unitarianisms, 40 Theology Today 150 (1983).
follow ancient precedents in considering the problem of evil, but they disagree in a way that is fundamentally important for jurisprudence. Barth's notion (consequent on his view that the Incarnation is an exhibition of God's will, in which man becomes elected because God chooses to be rejected) is that evil is a no-thing. Evil is not created. "The world is no longer subject to evil," he says. Salvation is complete; history does not, in any ultimate sense, consist of "events and turning points and divine resolves."61 Thielicke and the Lutheran tradition describe evil as having considerably more force. Evil is real; God uses law in a lawyer's sense to resist evil, ruthlessly, with coercion, terror, and punishment. In Luther's jurisprudence this use of the law is more prominent than either conviction of sin or instruction.62

There is emphasis in each side of this disagreement that is important for jurisprudence, or so it seems to me. It seems to me likely that a Barthian would look upon a lawyer's political and professional action as a calling, as a necessity, as missionary work, and that a Lutheran would not. A Barthian would, as we say, bear witness to his faith in his legal life and a Lutheran would not. The point is a point about theory, and when theory is made explicit, about professional life. Many of the great, modern reformers have been Lutherans. Dag Hammarskjold, for example. But they took pains—as a comparison of the news of those days with Hammarskjold's Markings would demonstrate—that their activity in the world was seen to be secular; they did not proclaim the Good News as they went about their work.63 That difference is not merely one of style; it is theological, and therefore jurisprudential. At least one of its theological implications will be whether a lawyer or one who works with the law but is not a lawyer is able to see his work as what old-fashioned Catholics used to call an apostolate, being an apostle. The Lutheran theory here seems to pose an obstacle to doing that—in view of careers as inspiring as Hammarskjold's was an obstacle that is, of course, a point not of praise but of theology.

Another way to highlight the differences between the Lutheran and Calvinist approaches to law and the one-God question is to raise the persistent difficulty of what "law" meant to the fathers of the Reformation, none of whom seem

61. Discussed in 1 H. Thielicke, supra note 34, at 98-117.
to have tied law to nature as much as the Thomists did. By and large, Luther’s use of the word law will permit translation to the civil context, because Luther, by and large, discusses civil law in terms of its office of prosecution, and very little in terms of its office of education or political witness. Calvin’s (and Barth’s) use of the term often distinguishes among these three offices and only sometimes equates the word law, as it appears in scripture, with law in the civil community. Calvin’s use of the word is complex, in other words, but the complexity is helpful to jurisprudence.

Calvin’s view of the Torah is that it was grace; it was not only a thing of strictures (which is how Luther understood it). Calvin taught, for example, that St. Paul’s use of the word law was truncated, that St. Paul did not mean law in the full Judaic sense of the word, but meant an abusive reduction (perhaps a particular contemporary Pharisaic reduction) of Jewish law, when Paul said, “Law intruded . . . to multiply law breaking,” or “The law was a kind of tutor . . . until Christ should come.” Calvin taught, as Judaism always has, that Jewish law is grace as well as judgment.

Barth restates this teaching:

"Hearing the command . . . means hearing the love in the command . . . the absolutely primary Yes which God says to us through the command. If we do not hear this gracious Yes . . . we do not hear the command at all. It is a theological hardness of heart that sees a lower stage of religion in the Old Testament because it does not know the abstract differentiation of law and gospel which, even in the face of the jubilation with which Psalm 119 and other passages sing about the gift of the law, dares to operate with the catchword of legalism, or which, according to the same schema, would find in Calvin’s joy in the law a relapse into Judaism."

“No one can deny,” Calvin said, “that a perfect pattern

64. Finger, supra note 27; Alexander, supra note 30.
65. See supra note 42. Barth’s doctrine was that law is subject to the order of redemption; it, and all of nature, says “that God’s goodness is shown to us, and is made a norm, as a human goodness which is unrestrictedly and unhesitatingly opened up and addressed and offered to others.”
68. J. Calvin, supra note 50; K. Barth, supra note 23.
69. K. Barth, supra note 23, at 91.
of righteousness stands forth in the law.” And not only in command, but also in forgiveness. The law includes God’s promise of grace; in this way it is able to stand against the despair that would otherwise come from finding God’s command unattainable. This is radically different from Luther’s view that, although God reigns over the state, the state and its precepts are apart from God’s redemptive action. Luther even said once, “Christ does not participate in this secular kingdom. God — and not Christ — institutes it.”

Calvin associates civil law to his view that both Torah and Gospel are sources of grace, thus, all three sources of law — nature, Torah, and Gospel—are sources of grace and in that sense (at least sometimes) use of the word law includes all three sources. Calvin saw the law as used by God in three ways: to convict of sin, to achieve order, and to instruct. He speaks of civil authority as a means of divine help: “The help of the magistrate is a holy gift of God.” This runs both ways, from God to civil law and back again. There is grace in civil law; God acts there. And Torah contains “the basis of all social order. For when we discuss any one of the Commandments,” Calvin argues “we need not restrict ourselves to its bare working, but must search for the deeper purpose behind it.” Calvin taught, as Roman Catholicism has, that the commandment to obey and respect parents is, as well, a commandment to obey and respect the government. That raises difficulties, of course, when one comes to unjust law and questions of civil disobedience, but the difficulties are the product of a high, theological view of what ordinary law — law in the lawyer’s sense of law — is. Such a view makes it possible for a lawyer to see his work as an apostolate.

B. Outside Modern Mainline Theology

There are two other traditions on this one-God issue that are important to theology and to jurisprudence. One of these has to do with the Anabaptists; the other has to do with what has come to be called liberation theology.

70. P. Althaus, The Ethics of Martin Luther 46 (1972). Finger says that Luther’s doctrine in this regard “sanctioned and hastened the process of secularization whereby so many areas of life — government, science, economics, law — were emancipated from the control of the church. Politicians, scientists, merchants, lawyers — all were allowed to explore their fields of activity and conduct them on basis of reason freed from religion’s control.” Finger, supra note 27, at 74.

71. Finger, supra note 27, at 75-83; Alexander, supra note 30.
Liberation Theology. The theology of hope, or political theology, or liberation theology — it attracts all of these labels — has grown out of recent work by a wide spectrum of modern Christian theologians, from Jurgen Moltmann, whose tradition is Calvinist; to Gustavo Gutierrez, a Peruvian Roman Catholic pastor; to Johann Metz, also a Catholic; to Miguez Bonino, an Argentinian Methodist clergyman, trained in the U.S., who is at the moment one of the presidents of the World Council of Churches. These thinkers are Barthians in the sense that they see the political process as under the order of redemption and see God's presence in the world as promissory. But they, like Judaism, place a much more radical emphasis on the theological significance of the future than Barth's ethic does. They see social justice (what the philosophers call distributive justice) as central to the behavior of believers in the world, rather than grace — or, to put that more carefully, they see justice as grace, and grace as justice. "Justice," Bonino says, "is the only acceptable ground for social order." The social order he is talking about is a one-kingdom social order; it is the product of grace working in the lives of those who struggle for social justice. This emphasis on unity, on behavior (act), and on the future, is, again, Judaic.

Liberation theology shares with Anabaptist theology an emphasis on the world as an inhumane, suffering place, and on the faith that God is in the world as it suffers; He is suffering with it. Both are theologies of Job, theologies of the Cross, theologies of the poor. "Christ," Moltmann says, "is Lord not only of renewed hearts but of the whole world." 

Douglas Sturm, in his survey of the liberation theologians, suggests that their position turns on four proposi-
tions:  

First, the character of the moral agent, the person, is political. The person cannot be separated from the political order(s) in which he lives. Theology cannot be separated from politics. The moral agenda for a believer is to notice that the world is inhumane and to seek to transform it. At the very least it is the believer's business to remove himself from the company of those who impose inhumanity on other people. Scripture has authority in this process, but like everything else, scripture is read in a political context. "It is always in the political fabric — and never outside of it — that a person emerges as a free and responsible being, as a person in relationship with other people, as someone who takes on an historical task," Gutiérrez says.

Second, the ground of moral judgment (and, I think, of jurisprudential judgment) is God as promise. Not God in nature, but God in history. Metz talks about the modern era, one that has been (as liberal Protestant theology has been) dependent theoretically on Kant, as an era of "hominization," of making man the measure of all things. But that development, he says, has resulted not in a more humanistic world, not in liberty, but in the subjection and the oppression of the poor. The Hebraic task in such a world is to take the side of the poor, and to recognize that the institutions around us continue to be subject to power; they are the results of power. As Sturm puts it, "Over against the traditional Reformation doctrines of foreordained orders of creation and vocation, Moltmann [for example] argues that institutions are elastic and malleable, that social roles should be transformed to accord with the promises of the kingdom of God, and that to be a moral subject is to be a political agent engaged in that process." As the civil rights slogan used to have it, "If you're not part of the solution you're part of the problem."

Third, the central moral and jurisprudential problem of the modern age is dependency, powerlessness. The challenge, Bonino says, is "discerning actual historical possibilities and determining which among them matches most closely Christianity's commitment to the poor . . . . Christianity in its most primitive impulse is a religion of the underdog." That is a political agenda; a jurisprudence built on such a theology would be a tendentious, biased jurisprudence. This is neces-

79. Sturm, A Liberationist on Ethics, supra note 74.
80. Robert E. Rodes is developing a jurisprudence based on liberation theology, particularly that of Gutiérrez. See R. Rodes, supra note 12 and accompanying text. See also R. Rodes, Liberation Jurisprudence (un-
sarily so because, as Gutierrez teaches, the God of Jews and Christians is a God encountered in history, among the poor. In this political sense, Moltmann sees God as future; He is present among us as promise. Moltmann has developed a theory of negative dialectic in which the evil in the world testifies to God's presence, because in noticing the absence of God we understand His presence as promise. Thus, he says, the Cross (and, I think, the presence in history of suffering Israel) is the presence of God in the condition of the world as it is now. Thus he calls his theology a theology of hope. When he published in English a book called The Theology of Hope, in 1964, his American friends criticized him for the title and pointed in sadness to their country's military involvement in Viet Nam. "I promised," Moltmann says, "that when I came back to the United States I would speak no more about hope, but only about the Cross." In 1974 he published in English a book called The Crucified God. In such a negative dialectic, to talk of God is to talk of the possibility of change. The forms of the liberation of the poor are, to Moltmann, like sacraments.

Fourth, the ultimate purpose of the moral life is community. Liberation theology fields much of its theory in conferences of bishops, in meetings of the World Council, and in academic and political statements of consensus. Like Judaism, it is communitarian in theory and in method. Its ethic is relational, not individualistic as in Kant or in much of American evangelicalism. As a theology of liberation, it aims to win for the powerless a place of human agency in the community, and thus to deliver both the oppressed and the oppressor from a condition of inhumanity. Its doctrine of the church is a doctrine of friendship; Jesus, Moltmann says, is better seen as friend than in the traditional images of prophet, priest, and king. Gutierrez says that the essence of evil is the breach of friendship.

Anabaptists. The jurisprudence of the prominent and ar-

published manuscript).

81. Volf, supra note 72.

82. "In genuine Judaism ethics and faith are not separate spheres; its ideal, holiness, is true community with God and true community with human beings, both in one . . . . The religious character of the people consists emphatically in that something different is intended for it from what it is now, that it is destined for something different — that it should become a true people, the 'people of God.'" M. Buber, supra note 76, at 111, 207.
ticulate Mennonite theologian, John Howard Yoder, if he were to write one, might be subtitled “the possibilities of law for peace.” Yoder's theology — which, so far as I can tell, is solidly within the Anabaptist or (as the professional theologians say it) Sectarian tradition — is that Jesus had a coherent, purposeful, political and legal agenda and that this agenda is apparent, if hard to take, in the Gospel, and particularly (for Yoder) in the Gospel of Luke. Anabaptist theology confronts the modern, mainline American Protestant notion that Jesus was indifferent to political order.

Jesus taught that the Kingdom of God had come. Jesus brought a political order with him. That political order rejected violence (“the compulsiveness of purpose that leads men to violate the dignity of others”), confronted evil, and was open to the action of God in overcoming evil through suffering — the suffering of the individual believer, the suffering of God’s people (as in the traditional Jewish reading of Isaiah 53), and the suffering of God Himself. Yoder’s theology in a phrase is that “the Kingdom is the Cross.” He says, “The alternative to how the kings of the earth rule is not 'spirituality' but servanthood”.

The Gospel is therefore not so much prophetic as it is simply apart. The Gospel is neither within centers of power, as Barth would say, as Nathan was prophetic within the political center of David’s kingdom, nor in tension with them as Luther would say. Christians live apart from a community that resolves its disputes with force, apart from a political and legal order that rests on coercion rather than servanthood. The realm of coercive power is not a kingdom as in Luther, but is more like Moltmann’s notion of negative presence. This teaching has had prominence in American peace-church withdrawal from secular institutions that use force, but it also comprehends and forbids use of force within and by the church.

84. Finger, supra note 27.
85. See, e.g., O. Cullman, supra note 11, at 88-91.
86. J. Yoder, supra note 77, at 244.
87. Id. at 46 (citing Luke 22:25); see also Shaffer, The Legal Ethics of Servanthood, 8 SOCIAL RESPONSIBILITY: JOURNALISM, LAW, MEDICINE 34 (1982).
88. Yoder, The Hermeneutics of Peoplehood, supra note 83.
An appropriate jurisprudential question, then, is what sort of community the community-apart (the church) should be. What should its character be? This is a key jurisprudential point, since it probably will not happen that the Jew or Christian apart will take a central role in the deliberations of a power-dominated civil and legal society. The Jew and Christian apart does take a central role in the deliberations of the society of non-violent witness, though. And, so, the character of the society-apart would likely be a central concern in Anabaptist jurisprudence. (There are ancient and recent parallels in Judaism.89) Because Christians must decide on the character of the church from their collective understanding of what the kingdom of God is, they will not necessarily either seek answers from the broader community, or seek to provide answers to it. They will not, though, refuse to participate in the life of the larger community; they will rather pick and choose.90 In any case, and in every case, they will not take responsibility for what the larger community achieves, or appears to achieve through coercion.

A mundane ethical consequence of this theology is a series of questions about tasks and roles. What can a member of the society-apart do in the broader community? Can he, for example, be a lawyer? Maybe. A judge? Maybe not. A soldier? No. A policeman? Probably not. These answers about tasks and roles may vary depending on how much the believer is able to define what his task is. The Anabaptists would not follow Luther into allowing the task to define its own morality.91 A believer might, for example, decide that she or he can be a lawyer because lawyers have control over what they do as lawyers, but he could not be a lawyer if the consequence of that vocational choice were a commitment to the American adversary ethic or an acceptance of violence as an instrument of statecraft.

Yoder has accepted that it is important for him to re-

89. See, e.g., 2 M. Friedman, supra note 1; M. Buber, supra note 76.
90. "[O]ne would begin from Christ's vision of corporate existence, and then search for analogies and partial realizations in public law. One would also have to assume that the way of Christ might occasionally—and perhaps frequently—come into conflict with current legal norms and practices. At such points, Christians guided by an Anabaptist orientation would have to become very critical of, or refuse to participate in, certain legal activities. Perhaps they would find their opportunity to function in the recognized legal system sharply curtailed or even wholly denied." Finger, supra note 27, at 91.
91. See Shaffer, supra note 17, at 24-27.
spond to the demand that his Anabaptist theology be universal. The Judaic tradition is that Israel is chosen by God for the welfare of all mankind. (God made a covenant, after the flood, with all mankind, and then He made a covenant with Abraham.) The mainline Christian tradition has seen the evangelistic mission of the church as the central reason for there being a church. In each case such preference in God’s eyes as believers enjoy is explained with a universal divine purpose. The chosen are God’s instruments. All men are the objects of His love. What is the Anabaptist answer to this need for universal significance, from a tradition that sees the church as a society-apart, a society that does not try so much to change the world as to bear witness in the world to the Kingdom of God? This is a one-God question; the choices seem to be between a God Who is for some but not all people, or two gods, one for the chosen and one for everybody else. This is how Yoder speaks to this question of universalism:

[T]here are really two kinds of [Christian] universalism. One affirms the adequacy of the religious expression of almost everyone or at least of people in almost every condition, sometimes in other religions or perhaps in no religion, because of some inherent human qualities for which one considers the label “Christ” to be a symbol. This would apply to . . . inclusive ways of thinking today about salvation beyond the bounds of the church. This vision is at home in the inclusivistic reflexes of the mainstream of Christendom, which even when the church has lost positions and privileges still wants to be taking responsibility for and giving meaning to the cultural mainstream.

The other kind of incipient universalism is that of the confessing minority whose commitment to her Lord, despite its being against the stream, is so convinced of the majesty of His Lordship that she risks trusting that His power and goodness can reach beyond the number of those who know Him by his right name. The former universalism is a high view of the human; the latter a high view of Jesus.

92. I. Epstein, supra note 22; W. Davies supra note 20, ch. 6.
Anabaptists have not traditionally given attention to civil law, probably because they have so often been the victims of its oppression. But a jurisprudence is possible in Anabaptism, and would be unique. Such a jurisprudence will not be exclusively a jurisprudence of the "confessing minority," because it is important to find with the broader community the possibilities for peace that are in the broader community's law. This latter importance is no doubt recognized as well by the liberation theologians, and in the Calvinist tradition; it seems to me more problematical in the Lutheran tradition, particularly if the "peace" one is talking about is a biblical notion. Nonetheless, the heart of Anabaptist jurisprudence, the essential theory of it, will be found in what it will say about what the society-apart, the "confessing minority," is to be and how it is to conduct its law and its polity.94

In a meditation on I Cor. 14:26, 29, and on the Reformation, Yoder argues that the early Reformation church sought to be a place of non-coercive practical moral reasoning—in some important senses a place of jurisprudence. This vision was largely lost by the tendency of Reformation churches to turn their polity over to governments, that is, to coercive power. The early form preserved individuality, because it was voluntary; its method was conversational, not juridical.95 It aimed at reconciliation, not judgment, and was "ratified in heaven" — a biblical claim that it made and that Yoder makes for it. In this meditation, Yoder focuses on law as process — "not how ideas work but how the community works." The loss was in turning this process over to coercion; an Anabaptist jurisprudence would, I think, aim at redeeming the conversation.96

It is important, finally, to understand that the Anabaptist tradition puts special emphasis on the faith that the God of the Hebrews is the Ruler of the universe. The position Anabaptism describes is not a position of weakness, but is a position backed by all possible authority and all possible power.

94. The influential moral theologian Stanley Hauerwas has turned his attention to this issue in his last two books, A COMMUNITY OF CHARACTER (1981) and THE PEACEABLE KINGDOM (1983).
95. Cf. Matthew 18:15-18 (admonition to fraternal correction).
96. Yoder, The Hermeneutics of Peoplehood, supra note 83. The parallel in Judaism is the teaching that controversy "for the sake of heaven is destined to result in something permanent." The test is sincerity. ETHICS OF THE FATHERS 5, 20, quoted in DAILY PRAYER BOOK 478, 520 (P. Birmbaum ed. 1977). Cf. M. Buber, supra note 32.
Anabaptism says with Judaism (in Buber's reading\(^97\)), "there is really only one Power," one God. Jesus, Walter Rauschenbusch says, "wielded no sword but the truth. But mark well, that truth was a sword in his hands and not a yard-stick. It cut into the very marrow of his generation. It was mighty to the casting down of strongholds. So it has proved itself whenever it has been in dead earnest. It reveals lies and their true nature . . . . It makes injustice quail on its throne, chafe, sneer, abuse, hurl its spear, tender its goal, and finally offer to serve as truth's vassal . . . . Whenever Christianity shows an inclination to use constraint in its own defense or support, it thereby furnishes presumptive evidence that it has become a thing of this world, for it finds the means of this world adapted to its end.\(^98\)

III. THE POSSIBILITY FOR HEBRAIC JURISPRUDENCE

The possibility for Hebraic jurisprudence is a possibility that turns not on intriguing theological differences, but on a common insistence that law is radically limited: Law is not God. "No one or no thing can claim the kind of allegiance that must be reserved for God alone." Not the state, but not "the administration of justice" either. Not even the hope that law can free the oppressed or feed the poor. Not Israel, and not the church. Not certainty and not conviction. Not even sincerity: "If God is the sole possessor of all truth, then even the most inspired attempts to proclaim and communicate that truth will fall short . . . . And that is a recipe for cooperation.\(^99\)

The negative and limiting principles of Deuteronomy 5:6-7 are, as negative, significant for jurisprudence and for the practice of law. They are themselves recipes for cooperation. The adversary ethic, for example, with what Dean Murray Schwartz calls its "circumstantial dispensation from [moral] responsibility"\(^100\) is called into question by these Hebraic limits, as an instance either of the idolatry of the state which can require that its minions in the legal profession be immoral, or as an instance of the division of God into two

\(^{97}\) 2 M. Friedman, supra note 1.


gods, one of whom rules life at home while the other rules life in town. These Hebraic limits are significant for professional traditions, such as American legal ethics, that say the practitioner's moral teacher is the profession itself, or the social and economic class from which professional people are chosen. Hebraic jurisprudence, on its negative premises alone, is at odds with American civil religion and with the American legal profession's long-standing penchant for putting our law into a temple, for referring to lawyers as priests at a statist altar.

But the strength of these limiting principles raises an ecumenical question, a question for believers, on the possibility of learning from one another. Is there a common, positive direction in the Hebraic tradition — a direction strong enough to sustain a conversation in which all of the intriguing differences among Jews, Thomists, Lutherans, Calvinists, Anabaptists, and Liberationists can be aired, compared, and enriched for the sake of heaven? Is the common and the positive deep enough and broad enough to sustain that sort of ecumenical conversation? Might these theologies share enough to make worthwhile the pain involved in being truthful about their differences? I think so. I see four themes as not only distinctive in jurisprudence, but also as positive, common, and strong.

First, law as itself a tradition. If law is seen as an instrument of statecraft, or as a consequence of political, social, and religious revolution, the most interesting thing to study will be politics or social history or religion, not law. Law will always be a sign that points to something else, something more important. If law is seen as itself an instrument of God — as the Reformation Fathers saw it when they argued over the uses (God's uses) of law — it will be defined as itself an organic tradition. It will then not be something else, not the voice of the sovereign; it will have a voice of its own. Professor Harold Berman's scholarship on the law of revolutions, 

103. See, e.g., 2 D. Hoffman, A Course of Legal Study 720 (2d ed. 1836).
104. Finger, supra note 27; Alexander, supra note 30.
105. H. Berman, Law and Revolution: The Formation of the Western Legal Tradition (1983), and subsequent volumes in process; Berman, Religious Foundations of Law in the West, 1 J. Law & Religion 3 (1983); Berman, The Origins of Western Legal Science, 90 Harv. L. Rev. 894
as well as his work and the work of other scholars on the interaction of law and religion, 106 points to the possibility that law, all across the Hebraic spectrum, has a voice of its own. It is, I hope, not an exaggeration to say that Berman opposes the law-as-politics arguments of the Critical Legal Studies movement with the view that law is theology. For example, he relates the developing notion of legal judgment in the law of European cultures to eschatology, as he relates the origins of European jurisprudence to St. Anselm's doctrine of the Atonement. If law is a cultural tradition that forms and survives revolutions and upheavals and reformations, then a jurisprudence is possible that is as culturally broad as anything people can study. There is theology in it, at its core, theology that comes to light in the study of law as in no other way.

I had useful advice, as I prepared this essay, to the effect that a person's view of law is likely to depend on his view of God; Berman might suggest that it would be useful to state that the other way around, just to see how the conversation would go.

The historical office of Hebraic tradition in the law is, here, a paradox. Professor Haym Soloveitchik has shown how, in medieval European Judaism, law operated to discipline the community - so that those who interpreted the Torah to Jewish communities were most severe when the communities were lax in practice, and most accommodating to custom when the communities were pious. "The ironic result of such a mentality is that a community which seeks allowances will not receive them from the Halachist . . . But a culture which . . . seeks a thickening of the divine yoke . . . will often receive allowances with alacrity." 107 That cultural experience with law, which has parallels in, say, the American Revival and in both the medieval church and the Reformation church, would justify the way I fancy Berman might ask the question about views of God and views of law.

Understanding law as organic in a culture makes it possible to think of a dialogue between the community's law and the community's self-image. Thus, for example, law explains


the myth, particularly prevalent in times of crises, of the return to a former time: "Society moves inevitably into the future. But it does so by walking backwards." According to Hebraic jurisprudence, when a community is most in crisis, it most needs a coherent ethos from its past, and least needs the largely procedural notions of justice that support American pluralism. The Hebraic traditions contain in common such a coherent ethos. This shared ethos is part of the culture; indeed, Berman argues, it is part of the law.

Second, law as substance. Biographers attribute the effectiveness of Justice Louis D. Brandeis to the peculiarly Jewish zeal for social justice. Wrongs committed by man against God can be atoned for on the Day of Atonement, but transgressions by man against man can be forgiven only when the injustice is remedied," Rabbi Isaac Wise said. "Belief in God is significant for the Jew only as that belief is transmuted into righteous action . . . . Judaism is essentially a summons to social action." Such a spirit is deep, too, in the Christian traditions, even in those that get least credit for it. The American lawyer-evangelist Charles Grandison Finney, for example, directed his lieutenants to examine the converts who responded to his sermons. It was important to him that these converts' views on slavery be consistent with Christianity. The social gospel was more prominent throughout the waves of fundamentalist religious fervor in the nineteenth century United States than it is usually given credit for being. Principles of social justice in the Roman Catholic tradition had been clearly restated for the modern industrial West long before the Russian Revolution. The religious ethics of such twentieth century Protestant teachers as Karl Barth, Reinhold Niebuhr, and Dietrich Bonhoeffer were available before liberation theology came along. This century's obvious need for correctives in religious life are...
prompted less by failures in religious social ethics than by failures in practice, particularly political and professional practice.

The point of saying that the theory was in place when the practice was not is to show that the social action celebrated in Brandeis's life and in Rabbi Wise's teaching rests on substance, and that the substance is Hebraic, common, and positive. Such action and teaching does not rest on procedural notions of equality and fairness, nor on Enlightenment notions of natural right. It does not rest on standard American jurisprudence but, rather, on a long history of giving transcendent value to human relationships, on the belief that the other person is a child of God. These notions are central in the Hebraic traditions, and they are specifically legal. In Judaism, for example, law is life; the blessing that is spoken over the Torah scroll in a public worship service in the synagogue says, "Blessed are You O Lord Our God . . . Who in giving us a Torah of truth has planted everlasting life within us." Similar claims are made by the evangelists for the ethical teachings of Jesus: "I have come that you might have life . . . ."

Speaking of theological, biblical, substance as legal has an ecumenical advantage over ecumenical enterprises that deal with grace and salvation. The common thread in jurisprudence is an assurance of the triumph of righteousness, rather than a view of salvation. It is useful, of course, to have ecumenical conversations on faith and works and other, as the Christian theologians call them, soteriological issues. But those discussions carry old and new denominational baggage, much more so, I think, than propositions within each stream

115. Barth's teaching on this point can be common and positive, I think: "In the people of God, there can no more be mere objects of right than there can be mere objects of education. God's honor wills to dwell among his people. For each individual this means submission and orientation to the neighbor, the orientation being no less a command than the submission. I cannot will only that right come to me. A purely passive relation to right is a sure sign that I have not yet thought of the concept of right as that of necessary conflict between the public order of life and my private order . . . . As the true object of right, one will necessarily become its bearer, the bearer of the social order with all that is to be said for and against this." K. BARTH, supra note 23, at 386. See also Forer, McLennan & Shaffer, Some Problems in the Administration of Justice in a Secularized Society, 31 MERCER L. REV. 459-66; T. SHAFFER, supra note 112, at 135-42 (discussions of justice as gift).

116. DAILY PRAYER BOOK 370 (P. Birnbaum ed. 1977); see ETHICS OF THE FATHERS, supra note 49.
of the Hebraic tradition that speak to action as consequent on faith and provide guidance to action. That action as specific to the religious tradition will show up mostly, I think, in a prophetic criticism of the state and in an Hebraic understanding of peace in a lawful community.

Third, law as (therefore) prophetic. When it is seen to be organic and substantive, law has the ability — in fact, the imperative — to criticize politics, not in terms of a political tradition (as, say, in appeals to the American Founding Fathers), but in terms of what Berman calls the legal tradition (as, say, in appeals to justice as righteousness, or in the melancholy fact of history that collectivities destroy people). In this regard, Martin Buber, Hebrew prophet that he was, urged upon modern Israel the distinction between state and community, and then claimed for the prophet the ability and freedom to criticize the community. He spoke of the community not as a society but as a practice, a practice “for the sake of a common covenant . . . to practice in actual living the community between being and being, person and person, toward which end creation was created . . . to preserve directness in a world which is becoming more and more indirect, in the face of self-righteousness of collectivities to preserve the mystery of relationship, without which a people must perish in icy death.”

Buber was talking, as the Jewish tradition often talks, of law as a conversation with God. The sequence of his reasoning was that the conversation with God is carried out in relationships among people — law as a conversation among people in community; that the community in its covenant with God serves such relationships; and that the community is therefore in opposition to the political collectivity. The community is prophetic: “The more unrelated individuals are,” Buber said elsewhere, “the more consolidated the State becomes, and vice versa.” Such reflections lead, I think, to an understanding of law and the practice of law as devices for holding the collective in check — law against order, in Charles Morgan’s phrase. This practice is carried out when law operates prophetically in the community, preventing the community from demanding group loyalties when it should be fostering personal loyalties. “A society can be termed

117. 2 M. Friedman, supra note 1, at 163.
human," Buber said, "in the measure to which its members confirm one another."\footnote{120}

All of that Buberian personalism is an example of law being prophetic. There are no doubt other examples, many of them available through jurisprudential reflection on liberation theology. The limiting emphasis that Buber and his understanding of the Hebraic tradition (he had a deep understanding of the Christian traditions as well as of his own Judaism) will bring to any such example is that the twentieth century's reliance on the state as a source of goodness is misplaced — is, in a word, idolatry. The Hebrew prophet stands ready to say of any modern state what Buber said of ancient Rome — "a forced union that had supplanted all natural community; it was legitimized arbitrariness, sanctioned sacrilege, a mechanism wearing the mask of an organism, an organism wearing the mask of the spirit . . . a contraction of a strayed will to community."\footnote{121} A positive and common Hebraic emphasis requires in addition to such prophetic denunciation an understanding of the difference between state and community and, then, an understanding of the office of law as something that can operate positively within and sometimes against the community. "It is impossible," Buber said, "to make an idol of the people as a whole [if] the religious attitude to the community is inherently critical and postulative."\footnote{122} Israel is the biblical example; Israel has always been called to righteousness, to what it is to become.

This prophetic witness in and through law is not an experiment; if it is faithful, the Hebraic traditions teach, the prophetic witness claims the promises of God. It has a religious claim to make, both in the substance of what it says and in the authority with which it speaks. It is as law a matter of

\footnote{120. M. Buber, Knowledge of Man 67 (1965).}
\footnote{121. M. Buber, supra note 76, at 124-25.}
\footnote{122. Id. at 207. The argument depends on a familiar distinction between nation and state — see, e.g., J. Maritain, Man and the State (1951) — but also on a political theology that centers in the community, the nation, that subordinates the state to the community. Buber's complaints about political activity in Israel frequently made use of the Jewish tradition in this regard. 2 M. Friedman, supra note 1. Barth states the point in Christian theological terms: "The ethical relevance of nationality is that we must meet God in this reality and not another, that in this respect . . . God will find us where he has put us. It has nothing whatever to do with mutual boasting. Concretely it simply means loyalty to the way of my people . . . not because they are . . . assigned in the first instance to me too. Nationhood (like family) is a framework for my action as obedient action." K. Barth, supra note 23, at 192-93.}
truth, though, not of power. (Buber says the eternal types in Judaism are the priest seeking power and the prophet seeking truth. 123)

Hebraic jurisprudence will not talk, as standard jurisprudence does, of compromise, nor of utilitarian gain, nor interest balancing, nor costs and benefits: "God is the guarantor that moral striving is not pointless, that persistent moral endeavor can really prevail over the inevitable opposition it encounters and the inescapable moral weakness and despair we experience. Indeed, if rational individuals engage in religious reflection in the first place, and if they seek to ground the dictates of their own consciences in a source beyond the human, it is because they recognize that practical reason cannot fully justify its own authority before the corrosive testimony of ordinary experience. Belief in God is a way of protecting conscience from reason's own assaults." 124 The promises of God are not, of course, an assurance of effectiveness; one can hardly reflect on the hatred in Christianity, or on the suffering of Israel, and conclude that God promises success. Buber taught, with irony but also persuasively, that God fulfills his purposes not by power but by spirit, through a secret leadership that works through failure rather than success. This is the meaning of the Suffering Servant of Isaiah: "The way, the real way, from the Creation to the Kingdom is trod not on the surface of success, but in the deep of failure. The real work from the biblical point of view, is the late-recorded, the anonymous. The real work is done in the shadow, in the quiver." 125

Much of this work is, I think, in the law, but it will be a mistake for movements in Hebraic jurisprudence to situate study in church-state issues, to the neglect of issues having to do with lawyer-client relationships. That mistake would be to let the state set the agenda; it would resemble the tendency to let law dominate Gospel that Barth complained of in the Lutheran tradition. As justice is a gift people give to one another, and not something citizens get from the state, peace under law rests on benevolence more than it rests on order. Thousands of promises are made and kept for every lawsuit that is litigated or settled under the law of contract. The raw material for this emphasis in Hebraic jurisprudence will be

123. M. Buber, supra note 76, at 88.
125. 2 M. Friedman, supra note 1, at 88.
the law office, the lawyer's life as counselor and planner, and collective efforts — many in religious congregations — to provide forums for the resolutions of disputes that are scriptural in their disdain for the courts and sacramental in their determination to reconcile the faithful to one another, to honor and preserve a unity in the community that the state, at its best, can only respect and protect, never provide.

Fourth, law as a way of peace. The Hebraic traditions know what peace is; they hold in common a view of what peace is. In their shared knowledge they can, I think, talk about law as a way to peace. Cullman's account of Jesus's view of the state is useful on this point: The state is not to be resisted with force, but it is not righteous, either. Hebraic commonality here, I think, has two distinct features — a theory of servanthood rather than of service, and an insistence on the central importance of forgiveness. On the one hand, as Rabbi Hillel said, "My abasement is my exaltation, and my exaltation is my abasement." On the other, the emphasis in the Hebraic tradition is on God's triumph over evil: "To believe that evil is incapable of redemption and to permanently exclude the evildoer from the kingdom of God is to divide the world forevermore between God and Satan . . . God's exiled glory . . . dwells in all places . . . and it can be served wherever it is met." But, as Buber's Yehudi, a professional person, said, "It takes a long time before a man gets to understand what his duty is. It is the duties that prevent him from doing so."

126. O. Cullman, supra note 11.
128. 2 M. Friedman, supra note 1, at 315. Despite the pessimism of the most comprehensive report on them, it is possible that contemporary movements in theologically-based reconciliation of disputes provide a form and a forum for the practice of law according to the jurisprudence I mean to suggest. C. Auerbach, Justice Without Law (1983). See L. Buzzard & L. Eck, Tell It to the Church (1982), and the dozens of sources cited by Auerbach on Jewish courts of reconciliation in the United States and Canada.
129. M. Buber, supra note 32, at 85.