EPILOGUE: AN ECUMENICAL CHRISTIAN JURISPRUDENCE

By Harold J. Berman

"I say as do all Christian men that it is a divine purpose that rules, and not fate."" - King Alfred's addition to "Boethius "

Contributors to this volume have brought together a panoply of distinguished nineteenth- and twentieth-century Christian philosophers who sought to counteract the secularism of the prevailing legal theory and to restore an understanding of the spiritual foundations not only of law but of political and social institutions generally. Leo XIII, Maritain, Murray, Kuyper, Bonhoeffer, Niebuhr, Solovyov – these and others represented here are great names, and they have important Christian messages for persons who seek to think deeply about the nature and functions of law in society. Most twentieth-century legal philosophers, however, paid little or no attention to those messages. In the nineteenth and twentieth centuries, and into the twenty-first, prevailing scholarly thought in North and South America and in Europe, including Russia, has simply ignored the various versions of Christian jurisprudence presented in these chapters.

The divorce of modern Western legal scholarship from its Christian heritage is usually attributed to a decline of Christian faith in the West, at least among scholars, since the so-called Enlightenment of the late eighteenth century, and to the accompanying tendency in all the social sciences to look to political, economic, and other material factors, rather than to moral or spiritual values, in explaining social institutions and public policies. Yet responsibility for the radical separation of prevailing legal thought from its Christian philosophical roots lies not only with the secularists, I shall contend, but also with modern Christian philosophers themselves, including those represented in this important volume.

The first error that I would charge to modern Christian philosophy as reflected in these chapters is the separation of the Roman Catholic jurisprudence of so-called natural law, with its emphasis on the moral dimensions of law, from the Protestant jurisprudence of positivism, with its emphasis on the political dimensions of law, and further, the separation of both natural law theory and positivism from historical jurisprudence, with its emphasis on

the source of law in the ongoing traditions of the culture whose law it is. Each of these three major schools of legal thought – natural law theory, positivism, and the historical school – has a portion of a greater truth; none of them, standing alone, meets the challenge that Christian faith presents to legal thought. Only by combining them, as indeed they were once combined in Western thought, into an integrative ecumenical jurisprudence will a Christian legal philosophy again become convincing – a Christian jurisprudence in which tensions between the moral and the political concepts of the law of a society are resolved in the light of the society's historical experience, its memories of the past and its anticipations of the future.

A second related error that I would charge to modern Christian legal philosophy, as reflected in these chapters, is its failure to take adequate account of the providential character of human history, including both the providential spread of Christianity during the first two millennia of the Christian era to people in virtually all parts of the world, and the providential challenge of the third millennium of the Christian era gradually to create a world society governed by world law. To understand this challenge, and to meet it, requires, again, an ecumenical jurisprudence that integrates the political insights of positivism with the moral insights of natural law theory and the historical insights of the historical school. In an emerging world society, this must be, moreover, a jurisprudence that draws not only on traditional Christianity but also on related spiritual values of non-Christian philosophies.

In proposing an ecumenical Christian jurisprudence I shall examine each of these two weaknesses that contemporary Christian jurisprudence has shared with its secular counterparts: its failure to draw together the three major schools and its failure to meet the challenge of an emerging world law.

I.

An ecumenical Christian jurisprudence is premised on the recognition that each of three major schools, which split apart and took their present form in the late eighteenth through the twentieth centuries, has isolated one of the three basic dimensions of law, and that it is both possible and important to bring the three dimensions together into a common

focus.[1] Indeed, the integration of the three is implicit in the trinitarian Christian faith which, prior to the mid-eighteenth century, virtually all leading Western philosophers and jurists avowed.[2]

The Roman Catholic natural law jurisprudence of Thomas Aquinas and his successors, including in this volume Pope Leo XIII and Jacques Maritain, identifies law primarily with a God-given moral sensibility embedded in human nature itself, and especially in inborn reason. It stresses as the principal source of positive law what in the English courts to this day is called "the law of reason," applicable to the interpretation and correction of legal rules that without such interpretation or correction would work gross injustice. Roman Catholic natural law theory does, however, recognize that there is also a moral value, a moral purpose, in the maintenance of political order through formal legislation and other forms of positive law that express the will of the lawmaker. Only where the lawmaking authority promulgates rules or commands actions that violate fundamental principles of legality itself must it be said, according to natural law theory, that such rules or actions lack the character of law. Indeed, this principle of natural law may be written expressly into the positive law itself, as it is, for example, in the Fifth and Fourteenth Amendments to the United States Constitution, under which courts have the power and duty to deny the validity of legislative or administrative acts that violate "due process of law" – a fourteenth-century English phrase that was, in fact, first used to translate the Latin *jus naturale,* natural law.

In contrast to natural law theory, the Protestant positivist jurisprudence of Martin Luther's followers, including in this volume Abraham Kuyper and Reinhold Niebuhr, identifies law primarily with the policies of the lawmaker, "the state," expressed in the form of a more-or-less self-contained body of rules "posited" (hence "positivism") by the state and enforced by state sanctions. As key terms of natural law theory are *justice, consent, hearing,* and *equity*, so key terms of the positivist school of jurisprudence are *order, power, legislation, rules.* Nevertheless, the Protestant positivism of Luther and his followers, though it attributed human law primarily to will rather than to reason, to politics rather than to morality, also affirmed that law itself is ultimately of divine origin, expressed in the

Biblical commands of the Decalogue to honor one's parents (constitutional law), not to murder (criminal law), not to violate sexual mores (family law), not to steal (property law), not to bear false witness against another (contract law), and not to covet what is one's neighbor's (tort law).[3] In positivist theory, human law *is* in fact primarily an expression of the will of the lawmaker. At the same time, virtually all versions of positivism stress that legislators *ought* to use their reason to enact laws that are just, and that judges and administrators *ought* to apply such laws equitably. Thus the main difference between traditional predominantly Protestant and predominantly Roman Catholic legal theories lies in their respective interpretations of the relationship between the "is" and the "ought": Protestant positivists would separate them; Roman Catholic naturalists would combine them. In cases of conflict between the two, the Protestant positivist, in analyzing and interpreting the law, would subordinate the "ought" to the "is," the reason inherent in law to the will of the lawmaker; whereas the Roman Catholic naturalist would subordinate the "is" to the "ought," the will of the lawmaker to the reason inherent in law.

Viewed historically, these two approaches to law were originally two sides of a single coin. The important differences between them had as much to do with ecclesiology as with soteriology: In the twelfth and thirteenth centuries the Roman Catholic Church had a vested interest in interpreting the law of secular authorities in terms of moral values defined by the Church, while in the sixteenth century Protestant supporters of the establishment of national churches, under royal authority, had a vested interest in distinguishing legal from moral values in the event of conflict between the two. Thus naturalism prevailed in the jurisprudence that predominated in Roman Catholic Europe in the period from the twelfth to the fifteenth century, and positivism prevailed in the jurisprudence that predominated after the Protestant Reformation of the sixteenth century. What determined the differences were primarily historical factors. For in the Western legal tradition what gave the society's law its meaning was its source not only in moral values, as Roman Catholicism stressed, and not only in political values, as Lutheran jurists stressed, but also in society's historical values – its source, that is, in the ongoing legal traditions of an evolving Christian culture. This, indeed, is a third dimension and a third measure of law: its correspondence to the historical memory of the society which produces it and is

controlled by it.

The third major school, historical jurisprudence, emerged as a separate school only after Roman Catholic and Protestant Christianity had ceased to be the underlying foundation of Western legal philosophy. Founded in the early 1800s by the great German jurist Karl Friedrich von Savigny, the historical school attacked both the natural law theory and the positivist theory, both of which by this time had largely separated not only from their Christian roots but also from each other. Also, with the increasing decline of the sense of the cultural unity of Europe, it was not accidental that the historical school stressed the sources of law in the history not of Europe as a whole but of the individual nations – in Savigny's work, the German people. It was the legal traditions of the German people, the *Volk,* that gave direction, Savigny wrote, to the future of German law. Germany, he wrote, was not ready for, and not yet the place for, the codification of the civil law that had been introduced in France. Moreover, the theory of natural rights that had been written into French law did not correspond to the ethos, the *Volksgeist,* of the German people. The primary source of law, he wrote, is not morality and not politics, but history; not reason and not will, but tradition; not equity and not legislation, but custom and precedent. It is the living group memory of the people whose law it is.

Historical jurisprudence, in one form or another, came to be the predominant legal theory of the nineteenth and early twentieth century, not only in Germany but throughout Europe and in the United States. It was congenial to the nationalism of that era, since it was the historical ethos of each nation that was then seen to be the source of that nation's law. Gradually the common Christian heritage of the legal institutions of the nations of the West came to be forgotten. As historical traditions were increasingly overtaken in the later twentieth century by technical rationality and by state power, historicity succumbed to positivism and virtually disappeared as a "school" of legal philosophy. In England and the United States historicity has, to be sure, survived in the doctrine that courts are bound by the holdings of previous decisions and that their adaptations of such holdings to new situations constitute precedents to be followed in future cases. Also in constitutional cases American courts re-interpret the language of an ancient written document in the light of the

meanings it has gradually acquired during more than two centuries. Yet despite these judicial practices, English and American legal philosophers, with rare exceptions, no longer make continuity with, and adaptation of, legal traditions a fundamental basis of law.

Will, reason, memory – these are three interlocking qualities, St. Augustine wrote, in the mind of the triune God, who implanted them in the human psyche when He made man and woman in His own image and likeness.[4] Like the persons of the Trinity itself, St. Augustine wrote, the three are inseparable and yet distinct. He identified will *{voluntas)* with purpose and choice, reason *(intelligentia)* with knowledge and understanding, and memory *(memoria)* with being – that is, the experience of time. Thus, for St. Augustine memory included not only recollection of the past but also awareness of the present and anticipation of the future; it characterizes what a distinguished contemporary psychologist of memory has called "the temporally extended self."[5] God the Father is the primary source of will, or purpose; God the Son is the primary source of reason, or understanding; and God the Holy Spirit is the primary source of memory, or being in time. Yet the three are one. In the thirteenth century the great Franciscan scholar St. Bonaventure amplified St. Augustine's insights into the "vestiges" of the Trinity in the human psyche,[6] and in recent decades some Christian theologians have ascribed the divine tri-unity of characteristics not only to the individual human mind but also, in a tentative way, to social formations.[7] Their applicability to law is particularly striking, for law is indeed a product of will, reason, and memory – of politics, morality, and history – all three; and the synthesis of the three is the foundation of an ecumenical Christian jurisprudence.

In the language of trinitarian theology, official lawmakers reflect in a human way the authority, the will, of God the Father, God the Creator, God the Lawgiver, in enacting and enforcing rules that embody the policies, the will, of the state. To that extent, positivist theory is right: Law is, indeed, a body of rules promulgated and enforced by lawmakers and their agents. At the same time, the naturalist's assertion that law is founded in morality, as understood by reason, is also right, corresponding – again, in an incomplete and human way – to the trinitarian doctrine of the holiness and redemptive power of God the Son, the God-man, who in his Resurrection offers to persons of good will the reign of peace and

justice. Finally, the historicist also has one-third of the truth in the assertion that the primary source of law is not politics and not morality, but history; not order and not justice, but experience; not power and not conscience, but the cultural ethos; not legislation and not equity, but precedent and custom; not will and not reason, but ongoing memory. In the nineteenth century the historical school, taken separately, transformed the theology of the third person of the Trinity, the Holy Spirit, into a belief in the sanctity of the spirit of the nation.

Prior to the mid-eighteenth century it was possible for a Christian legal philosopher to hold these three forms of the triune law – its political form, its moral form, and its historical form – in what Christian theologians, speaking of the Trinity, call perichoresis; that is, each of the three interpenetrates the other. Only in the so-called Enlightenment of the later eighteenth and nineteenth centuries were the links finally severed, in legal philosophy, between positive law and morality, on the one hand, and between each of those and historical tradition, on the other. With the virtual demise of the historical school in the mid-twentieth century, the battlefield is left to the multitude of positivists and naturalists, locked in combat on mutual terms of unconditional surrender. Indeed, a believer in historicity would argue that they cannot possibly be reconciled except in the context of the ongoing history of a given legal order. That, in fact, is the way in which they are often reconciled by American courts, which in deciding cases will turn a positivist eye to the applicable legal rules, a naturalist eye to the equities of the particular case in the light of moral principles underlying the rules, and a historicist eye to custom and to precedent, having in mind not only the precedents of the past but also the significance of their decisions as precedents for the future. A conscientious judge cannot be solely a positivist or solely a naturalist or solely a historicist. The three "schools" are three dimensions of his judicial role.

Ultimately, however, the belief that the political, the moral, and the historical forms of law constitute a tri-unity depends upon a prior belief in the tri-unity of the human psyche on the one hand, and on the other hand, the tri-unity of the communities, local and translocal, to which we belong – not only the nation but also the other communities from which law is

ultimately derived: the family, the neighborhood, the workplace, the religious community, the profession, the ethnic group, the region, and others, including transnational communities. Each of these communities appears in three different forms. Each recognizes itself to be a unified body: this may be said to be its political personality, its structure of authority and its power to act creatively, in St. Augustine's terms its "will." Each also has its own inner life; this may be called its moral personality, its conscience, in St. Augustine's terms its "understanding of itself," its "reason." Finally, every living community is motivated to preserve its traditions and to achieve its goals, to realize its own historical destiny; this may be called its historical personality, its evolving spirit, in St. Augustine's terms its memory, its ongoing being in time. If these qualities are not combined, if they do not interpenetrate each other, the community is threatened with disintegration. Indeed, in a community that has separate agencies to represent these three separate forms of its life, it is essential that those agencies be coordinated and constitute a single complex entity.

A Christian jurisprudence takes us one crucial step farther. It contends that the reciprocal interpenetration of the three forms of law must be understood as part of, and subordinate to, a higher Spiritual Presence – in Christian terms, to the perichoresis of the three forms of the triune God. Otherwise, it may be difficult, and sometimes impossible, for them to be held together either at the philosophical level or at the practical level. Where rules of positive law conflict with principles of justice, it is often possible to resolve the conflict by resort to its historical context – past, present, and future – and by application of norms drawn from historical experience. But where all three basic sources of law are in conflict with each other, an act of imagination and courage, an act of faith, is needed to resolve the conflict. Their synthesis cannot be explained by a purely secular legal philosophy, such as pragmatism, since the three basic sets of norms from which a solution must be drawn are fixed and in such a case are at the same time, by hypothesis, irreconcilable by resort to any one of them. It is not merely a "practical" solution which is sought in such a case but one that consciously reconciles the irreconcilable.

II.

If the first major defect of nineteenth and twentieth century Christian philosophy of law was its failure to integrate the major schools of jurisprudence in an ecumenical Christian perspective, the second was its failure to apply that jurisprudence to explain and support the gradual emergence of a world society governed by a gradually emerging body of world law. Missing, above all, from the writings of modern Christian philosophers has been the belief in the providential character of history. To judge from the writings of our latter-day Christian sages, the God of history, who was so active in the centuries just before and just after His incarnation in the Messiah, now seems to have gone largely into retirement. Why take contemporary history seriously if it has no direction, no pattern, no purpose? Why speak of whence we have come if we have no sense of whither we are headed? Why speak of historicity if we have no faith in the transition of the past into a new future?

Yet from a Christian perspective is it not providential that gradually, century by century, millennium by millennium, all peoples of the world have been brought into contact with each other? And is it not providential that in the course of two millennia Christianity has gradually spread to all parts of the world and is now affirmed by more than one-fourth of the world's population? As in the first millennium of the Christian era the peoples of Europe were progressively converted from tribal polytheism to a belief in the one God, Father of all, so in the second millennium Western Christendom, through its missionaries, its merchants, and its military, carrying the banner of the Son, gradually made an entire world around itself. Now, as we enter the third millennium, the West is no longer the center, and the world's Christians are called on to live peaceably with adherents of other faiths, united with them by the Holy Spirit.[9]

In our new interlocked multicultural world, all humanity has been joined together in a common destiny through global communications, global science and technology, and global markets, on the one hand, and on the other hand, through global threats of environmental destruction, disease, poverty, oppression, and war. Despite two world wars and their aftermath of terrible ethnic, territorial, and ideological conflicts, St. Paul's

extraordinary insight that "every race of man" is "made of one blood to inhabit the whole earth's surface"[10] has now not only been proved scientifically but has also become an historical reality. Except for extremists of various religious denominations and of various ethnic movements, the peoples of the world are seeking ways of fulfilling what from a Christian perspective is God's plan – that the human race shall ultimately be united in a world community.

Here law plays a significant role. The global economy is supported by a growing body of world law governing trade and investment and finance. The new technology of worldwide communications is also subject to a growing body of transnational legal regulation. Tens of thousands of cross-border nongovernmental associations work with intergovernmental organizations to introduce legal measures to reduce sources of world disorder and to overcome world injustices, to prevent destruction of the world environment and pollution of the world atmosphere, to prevent the spread of world diseases, to resolve ethnic and religious conflicts that threaten world peace, as well as to promote world travel, world sports, world leisure activities, and other good causes that affect all peoples and that require regulation in order to be carried out in a just and orderly way.

And here the insights of a trinitarian jurisprudence are of critical importance. As we enter the third millennium of the Christian Era, St. Augustine's triune God calls on His children, individually and collectively, to manifest their political will, their moral reason, and their historical memory, in the creation of a body of world law that will support and guide the gradual development of the emerging world society into a world community.

Above all, the historical dimension of a trinitarian jurisprudence gives direction to the evolution of world law. Historically, the Christian concept of a law of nations embraced principles and doctrines common to the world's major legal systems.[11] It included, for example, universally recognized principles and doctrines of mercantile law – principles and doctrines that today remain part of the domestic law of every nation-state – such as the rule that a negotiable bill of lading is a document of title through whose transfer the risk of loss or damage to goods in transit can be shifted to subpurchasers; or, to give another

example, that a banker's letter of credit gives an exporter an absolute right of payment by the confirming bank upon his presentation of the appropriate shipping and other commercial documents. These and a multitude of other features of the world law of mercantile transactions are derived from the historically developing customs of the transnational community of merchants, bankers, carriers, underwriters, and their lawyers, who for centuries have constituted a world community of "friendly strangers," as Lon L. Fuller called them,[12] held together by common traditions and common trust. The emerging world society is built in part on the historical foundation of such communities.

A special place among such world citizens is occupied by participants in world sports. More than 200 different sports are organized at the world level, with rules that are the same everywhere and competitions usually regulated by universal standards. An Arbitration Court of Sport has been established in Lausanne, Switzerland, to which athletes are to submit disputes arising in the course of participation in Olympic sports. In the words of John Boli, sports are "the most visible ritual dramatizing the world polity." Sports, he adds, "express and help shape the subjective axis of world culture, building and ritually displaying individual, national; and human moral values."[13] The role of world sports in symbolizing and effectuating a world society is shared by world games such as bridge and chess, world music, and a host of other universal leisure activities that are governed by universally accepted rules and standards.

Mercantile law and the law of sports are only two examples of many bodies of customary world law that have been created to govern the new world society that has emerged in the wake of two world wars. In the economic sphere, a customary law of transnational investment and transnational finance is developing, supported (as are customary mercantile and banking law) by multilateral intergovernmental treaties and conventions. There is worldwide protection of rights of intellectual property. Protection of the world's environment is increasingly subject to transnational legal controls, as is protection of various kinds of universal human rights. Not only piracy, as before, but also genocide is now a universal crime that may be prosecuted wherever the offender is captured. Moreover, the Statute of the International Criminal Court, to which as of this

writing more than ninety nations have subscribed, gives that court jurisdiction over murder, rape, apartheid, and various other "crimes against humanity," when committed as part of a widespread or systematic attack directed against any civilian population.

These developments reflect a universal belief in law, shared by people of all cultures. Every lasting society has what anthropologists have called "justice forums" for the peaceful resolution of conflict; in every society there exists a peaceful procedure for hearing serious complaints and charges against offenders.[14] Every society recognizes that persons involved in such complaints and charges should have the opportunity to be heard, that the hearing should be before an impartial tribunal, that the tribunal should decide according to principles generally applicable to the kind of dispute before it.

Not in all societies is the tribunal required to be independent of other authority. Not in all does an accused person have the right to be represented by counsel. Yet in all there are general rules of procedure. And it is out of the universal ethic of a fair hearing that substantive legal rights and duties – of contract, of property, of civil liability for injury, of punishment of crime, of association, of taxation and other public controls of the economy, of constitutional liberties, and the rest – have emerged in one form or another in virtually all cultures.

Although some religions and philosophies, including some branches of Christianity, have minimized the spiritual value of law, with its emphasis on formal procedures and general principles of justice and order, all cultures have accepted the global ethic of a fair hearing, expressed in the ancient Latin maxim, *audi alteram partem,* "hear the other side," as a common article of faith. Often, to be sure, disregarded or abused in practice, it is nevertheless universally believed in as a sacred instrument of peaceful resolution of conflict.

That Christianity values law highly is apparent from the essays in this volume. That Christians now live – providentially – in an emerging world society, and are challenged to help to create a body of law that will support that society against threats to its unity and will guide it toward increasingly just and increasingly intimate community interrelationships, is a

thesis that needs amplification by Christian philosophers if the secularization of Western legal thought is finally to be overcome.

Standing alone, neither contemporary Christian natural law theory, represented especially in Roman Catholic philosophy, nor contemporary Christian legal positivism, represented especially in Protestant philosophy, nor contemporary Christian historical jurisprudence, now adumbrated in some Russian Orthodox philosophy, can meet the legal challenge presented by the coming together of all the peoples of the world, with their various cultures, various ethnicities, and various belief systems. An ecumenical Christian legal philosophy is needed, which traces world law to all three forms of the triune God in whose image the human psyche is created – political will, moral reason, and historical memory – and which thereby can overcome the tensions and reconcile the conflicts that hold back the fulfillment of God's millennial plan to bring order, justice, and peace to a world community.

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[1] See Harold J. Berman, "Toward An Integrative Jurisprudence: Politics, Morality, History," *California Law Review*, vol. 76, no. 4, p. 779 (1988).

[2] Spinoza, of course, was an exception. Also it has been argued that John Locke was a Unitarian in his religious convictions. Yet as a faithful member of the Church of England, Locke professed, at least, a Trinitarian faith. In any case, Locke is exceptional, occupying a prominent place in both late seventeenth and late eighteenth century thought. He was a supporter of the Glorious Revolution, which brought the Calvinist Duke William of Orange to the English throne in 1689, yet his writings could be drawn upon a century later by Jeffersonian democrats.

[3] See Harold J. Berman, *Law and Revolution, II: The Impact of the Protestant Reformations on the Western Legal Tradition* (Cambridge, Massachusetts, 2003), pp. [to be supplied]. Cf. John Witte, Jr., *Law and Protestantism: The Legal Teachings of the Lutheran Reformation* (Cambridge, 2002).

[4] See St. Augustine, *On the Trinity, Books 8-15*. Gareth B. Matthews, ed., Stephen McKenna trans. (Cambridge, 2002), pp. 58-59 and 200-202. St. Augustine struggles with the fact that each of the three qualities of the human psyche is distinct yet all three are one, and that each corresponds to a different person of the triune God. See also St. Augustine, *Confessions* 13.11.12 ("The three … are, To Be, To Know, and To will, For I am, I know, and I will. In that I know and will, I am. And I know myself to be and to will. And I will to

be and to know.")

[5] Ulric Neisser, "Five Kinds of Self-knowledge," *Philosophical Psychology*, vol. 1, p. 35 (1988) at pp. 46-50. Neisser defines the extended self as "the self as it was in the past and as we expect it to be in the future, known [to itself] primarily on the basis of memory." Id. at 46. "What we recall depends on what we now believe as well as on what we once stored." Id. at 49.

[6] Bonaventure, *The Soul's Journey into God*, trans, with Introduction by Ewert Cousins (New York, 1978).

[7] See Jürgen Moltmann, *History and the Triune God: Contributions to the Trinitarian Theology* (New York, 1992) at xii-xiii. ("The triune God is community, fellowship, issues an invitation to his community and makes himself the model for a just and livable community in the world of nature and human beings.") Raimundo Pannikar analogizes the three persons of the Trinity to the three persons of grammar represented by the pronouns "I," "Thou," and "He/She/It," and "We," "You," and "They," which are present in all known languages. He states:

> The Trinity appears then as the ultimate paradigm of personal relationships … A n I implies a thou, and as long as this relation is being maintained it implies also a he/she/it as the place where the I-thou relation takes place. An I-thou relation implies equality, a we-you dimension, which includes the they in a similar way as the he/she/it is included in the I-thou.

Raimundo Pannikar, *The Trinty and the Religious Experience of Man*, xv (New York, 1973); see also Leonard Boff, *Trinity and Society*, Paul Burns trans. (New York, 1988).

[8] Wolfhart Pannenberg has adumbrated a theological basis for an integrative jurisprudence similar in some respects to that presented in these pages. He has written about the tension between the Lutheran conception that law is grounded in the ethics of the created orders (Stände, estates) namely, church, family, and state, and the twentieth century Barthian conception, followed by some leading German theologians, that grounds law in "Christological principles," which, however, Pannenberg does not attempt to define here. He resolves this tension by grounding law in "the historicity of man," that is, the historical character of all human reality. "Positivism in law," Pannenberg writes, "can only be overcome by a theory that makes the radical historicity of legal formulations comprehensible in their concrete variety ...." Pannenberg, "Toward a Theology of Law," *Anglican Theological Review*, vol. 55, p. 397 (1973). And later (p. 407): "A theology of law is in its proper province only when the foundations of law appear within the horizon of history."

[9] This insight into the relationship of the three millennia of the Christian era to the three persons of the Trinity is drawn from a great and greatly neglected Christian philosopher and historian of the twentieth century, Eugen Rosenstock-Huessy. See his *The Christian Future: Or the Modern Mind Outrun* (New York, 1946), reprinted with Introduction by Harold Stahmer (New York, 1966), pp. 113-131. See also his *Heilkraft und Wahrheit: Konkordanz der politischen und der kosmischen Zeit* (1952, reprinted 1991), pp. 35ff.

[10] Acts 17:26. Cf. Genesis 1:27-28: "And God created man in His own image .. male and female created He them. And God blessed them and God said to them, be fruitful and multiply and fill the earth."

[11] Prior to the late eighteenth and early nineteenth centuries the law of nations *(jus gentium)* was understood to include not only what later came to be called international law but also common features of the various major systems of municipal law. See [to be supplied]. In 1789 Jeremy Bentham invented the term "international law" to refer solely to the law based on treaties and agreements between nation-states. See Harold J. Berman, "World Law," *Fordham International Law Review*, vol. 18, no. 5 (1995).

[12] See Lon L. Fuller, "Human Interaction and the Law," *The American Journal of Jurisprudence*, vol. 14, p. 1 (1969). Fuller employs the notion of a spectrum or scale of relationships, running from intimacy at one end, as in the average family, to hostility at the other, with a "place midway that can be described as the habitat of friendly strangers, between whom international expectancies remain largely open and unpatterned." Id at 27. The latter area, he writes, is "the area where contractual law is most at home and most effective." Id. at 29.

[13] See unpublished paper of John Boli in possession of the author.

[14] See Laura Nader, "The Life of the Law – A Moving Story," *Valparaiso University Law Review*, vol. 36, p. 655, and sources there cited. Anthropologists, Nader writes, "have been able to document the universal presence of justice forums.... Indeed, social psychologists have argued that the justice motive is a basic human motive that is found in all human societies…"