From Violence to Peace

Theology, Law and Community

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'Love Your (Legal) Neighbour as Yourself': Producing Peace through a Theological Jurisprudence of Truth

This book has engaged in a theological critique of the secular foundation undergirding the modern system of law, arguing that the secular division of reason and faith leads to antagonism and alienation. The Christian revelation of theological truth (the law of love) through the uniting of reason and faith in the Incarnation produces a vision of ontological peace which redeems law and removes this violence—in other words, the Christian law of loving one's neighbour provides the foundation for an ontologically peaceful legal community in which difference operates harmoniously.

In section I of this chapter the notions of secular reason as blind faith and true reason being recovered and united with faith through the Incarnational Paradox will be explained and explicitly connected to notions of the peaceful community. Section II contains a more unified explanation of truth incorporating revelation, correspondence and rhetoric, in conjunction with further exploring the conclusion that truth and law are symbiotic and produce peace in the context of Christ's incarnation, crucifixion and resurrection. Finally, in section III the nature of this ontological peace resulting from theology is more exactly articulated in contrast to the specific nature of pagan (secular) violence.

This chapter (and the book) concludes by critiquing the application of the law of love to the modern (secular) legal system. In particular, section IV considers the relationship between the Christian polity of love and the secular legal system, arguing that forgiveness is the key to establishing a peaceful legal community. Section V specifically applies these notions to a particular system of private law which governs relationships between individuals through contrasting theological and (secular) legal interpretations of the Parable of the Good Samaritan, arguing that the neighbour principle in negligence as derived from the parable lacks and ultimately distorts the theological principle. Finally, section VI proposes that it is only through recovering this principle of love that we may redeem and regenerate the legal system and attain a peaceful legal community.

I. 'The End of Reason': The Blind Faith of Secular Reason and Recovering Reason through the Incarnational Paradox

Christian faith is not merely intellectual assent, but a trust in or reliance on God. This faith is not so-called 'blind faith', or belief despite lack of evidence or in defiance of contrary evidence, but rather is a personal trust in the character of God which has been revealed in Christ. Such trust is in accordance with reason and the faculties of the mind, and indeed without the foundation of Christian faith with the divine mind and reason, the faculties of the human mind and the power of human reason cannot operate. It is this premise of reason based in faith which secular reason rejects, and consequently it sunders faith from reason. So secular reason, by separating faith from reason, actually renders itself blind faith. Secularised reason provides no reason to think that it is reasonable—it is mere belief in its own reason without evidence. Conversely, Christian faith unites itself with reason and recovers both through the Incarnational Paradox.

A. The Blindness and Violence of Secular Reason

When reason was isolated from faith (thus producing 'secular reason') and became the foundation of modern science, its nature as de facto blind faith was revealed. Milbank notes this as emblematic of the fact that 'once secular reason has exposed its own efforts to ground itself in the universal, then its advocacy of a polity and an ontology which is confined to the (non)regulation of conflict through conflict emerges clearly to view'.[1] In any discipline governed by a universalising secular reason which excludes faith, the 'regulation' of the discipline through violence surfaces.

Furthermore, since reason has turned against itself and discovered no universal foundation for reason (ie that it is blind faith), the question may be asked whether there is anything at all. This kind of postmodern deconstruction produces the perfect or mature form of secular reason: a nihilistic mythos antithetical to reason.[2] Furthermore, it sustains its ontology as a mythos through violence, for it has no other means—it cannot use persuasion due to its own unreason, so it must use coercion.[3] Therefore, secular reason is ultimately unreason, nihilistic mythos and blind faith, and tends to sustain itself through violence.

The orientation of the secular to the nihilistic cannot be opposed by simply redeeming enlightenment reason. Rather, this secular reason can be confronted with the faith of Christian theology manifesting in virtue reconciled with

[1] J Milbank, *Theology and Social Theory: Beyond Secular Reason* (Blackwell, 1990) 327.
[2] J Milbank, *The Future of Love: Essays in Political Theology* (Cascade Books, 2009) 156.
[3] See Milbank, *Theology and Social Theory*, above n 1, 260–63.

difference.[4] This is because a Christian perspective saves the human bias towards reason, for reason in the framework of virtue and difference is consistent with the infinite through participation in the divine virtue, and leaves no residue of chaos by allowing antagonistic difference. Rationalism is linked to the biblical mythos in particular, and to save reason in this fashion requires the supplementation of reason by faith, including faith in infinite reason.[5]

There are two ways in which this occurs. The first is that, according to Aquinas, all human rationality is participation in the divine reason, and therefore all knowledge requires faith. The light of revelation strengthens our grasp of natural principles, and consequently theology mediates knowledge in all other disciplines.[6] Therefore, to reason truly, one must be already illumined by God, while revelation itself is just a higher measure of illumination, conjoined intrinsically and inextricably with a created event which symbolically discloses that transcendent reality, to which all created events to a lesser degree point. This event is the incarnation, crucifixion and resurrection of Jesus Christ, the God-man. Instead of grafting faith onto a base of reason, faith is fundamental in seeking to elaborate a Christian *logos*, or a reason which bears the marks of the Incarnation.[7]

The nature of the Incarnation and the Trinity itself is the second, and probably more fundamental, method of confronting secular reason with faith and reason united in Christian theology. In terms of the nature of the Trinity, thinking an infinite differentiation which is also harmony is what grounds the reconciliation of difference with virtue. For the paganism of antiquity, the absolute was chaotic, and Being is infected with this chaos since the only discourse which can include both the same and the different is itself a discourse of difference, not a discourse of reason.[8] The extreme response of Voluntarist theology and the emphasis of the absolute unity and simplicity of God (ie equating him with Being) are also sources of secular reason since they do not take account of difference. Hence, the only transcendental, self-identical reality is an empty will or force which returns as the arbitrary and chaotic different. To save reason, one must derive it from an entity which lies beyond Being and beyond mere difference.[9] The Trinitarian God of Christian theology fulfils this by simultaneously being the divine and the difference in the divine persons, peace in unity and diversity, and the reconciliation of virtue and difference. A Christian ontology can therefore provide the foundation for taking account of difference and producing a reason compatible with faith which is ontologically peaceful as a function of the Trinitarian relations. Such cannot be arrived at by the operation of secular reason, but is rather revealed through faith and is a result of faith.[10]

[4] ibid 320–21.
[5] ibid xvi–xvii.
[6] ibid 252.
[7] ibid 383.
[8] ibid 434–35.
[9] ibid.
[10] ibid 437.

B. Kant on Pure Reason, or the Need for Faith

Secular reason attempts to discern the truth of reality independent of faith or revelation. Milbank proposes that pure (or secular) reason is supposedly able to resolve the four fundamental Kantian antinomies and uncover the truth of reality: beginning/no beginning, freedom/causality, ultimate constituent parts/no such parts and necessary being/contingent being. In addition, Christian theology needed to show that the way things are is a mode of perfection. Here, 'faith achieved what reason could not' by transcending the antinomies, and it did so by claiming such perfection in terms of the 'derivation of things from a perfect being, however inscrutable'.[11] Since God is perfect being, the way things are (truth as revelation of being) is also a mode of perfection. Consequently, the Kantian antinomies can never be resolved through pure or secular reason, but may be transcended through faith in the divine.

Immanuel Kant specifically indicates ways in which reason is unable to fully comprehend reality, opening the space for a reason combined with faith. In *Critique of Pure Reason*, Kant constructs each of the antinomies by firstly outlining arguments for a thesis and then arguments for an antithesis.[12] The first thesis is that 'the world has a beginning in time, and in space it is also enclosed in boundaries'; the first antithesis is that 'the world has no beginning and no bounds in space, but is infinite with regard to both time and space'.[13] The second thesis is that 'every composite substance in the world consists of simple parts, and nothing exists anywhere except the simple or what is composed of simples', while the second antithesis is 'No composite thing in the world consists of simple parts, and nowhere in it does there exist anything simple'.[14] The third thesis is 'Causality in accordance with laws of nature is not the only one from which all the appearances of the world can be derived. It is also necessary to assume another causality through freedom in order to explain them'; the third antithesis is 'there is no freedom, but everything in the world happens solely in accordance with the laws of nature'.[15] The final thesis is that 'to the world there belongs something that, either as a part of it or as its cause, is an absolutely necessary being', while the final antithesis is 'there is no absolutely necessary being existing anywhere, either in the world or outside the world as its cause'.[16]

Kant observes that the arguments for these positions represent the 'glittering pretensions' of reason, yet they 'do not even permit reason to think them'.[17] 'Unfortunately,' he argues,

> reason sees itself, in the midst of its greatest expectations, so entangled in a crowd of arguments and counterarguments that it is not feasible, on account either of its honor

[11] ibid 135.
[12] I Kant, *Critique of Pure Reason* (Cambridge University Press, 1998) 470–95.
[13] ibid 470, 471.
[14] ibid 476, 477.
[15] ibid 484, 485.
[16] ibid 490, 491.
[17] ibid 496.

> or even of its security, for reason to withdraw and look upon the quarrel with indifference, as mere shadow boxing, still less for it simply to command peace, interested as it is in object of the dispute; so nothing is left except to reflect on the origin of disunity of reason itself.[18]

Even Kant acknowledges that pure reason produces violence and endless strife, lacking the ability to command peace. It has a fundamental antagonism within itself. Since reason fails in this way and the antinomies cannot be conceptualised by the understanding, it follows that any transcending of the antinomies becomes a pure act of faith, not a necessity of reason. However, through the Trinity and Incarnational Paradox of Christ (or specifically Christian faith), these antinomies can be transcended.

For example, as we have already seen in the Trinity, the second antinomy, of difference and sameness, or ultimate constituent parts/no such parts, is transcended. The Trinity is one in the sense of the Godhead and so does not consist of simple parts, but simultaneously the Godhead is composed of the three divine members, Father, Son and Holy Spirit; so the Trinity does consist of simple parts. The Incarnational Paradox transcends the other antinomies. For the first antinomy, of time and space, Christ as God is the eternal *logos*, unbounded by time and space. However, as a man he is temporal and spatial. For the third antinomy, of freedom and causality, Christ's Incarnation was causally necessary (though not in the sense of being in accordance with immutable natural laws) as a matter of fulfilling Scripture and the will of God, but was also simultaneously an act of freedom as a voluntary sacrifice in love. Finally, for the fourth antinomy, of necessary or contingent being, Christ is a necessary (eternal) being as God, but as a man is simultaneously a contingent human. The fact that in the Trinity and Incarnation the thesis and antithesis of each of the antinomies are fulfilled implies that with Christian faith comes the transcending of the antinomies and the sublating of the binaries. And with that destruction of secular structure comes the recovery of reason—for the eternal/becoming distinction in Christ is universal and is what makes reason possible.[19]

Reason is united to faith at the paradoxical interface of the universal (reason) and the particular (faith), which is the event of Christ, for this allows the reconciliation of virtue and difference. The discourse of poetry in Christian theology promotes the recognition of difference through subjectivity and particularity, and the creative difference of the Trinity, in contrast to the pure, universalising nature of secular reason. Thus, secular reason is ultimately blind faith and leads to violence, while reason united to faith in Christian theology is unique in allowing true reason to flourish through the reconciliation of virtue and difference, producing an ontology of peace.

[18] ibid 497.
[19] Milbank, *Theology and Social Theory*, above n 1, 375.

C. Faith, Reason, Peace: A Sacred Polity

The positive combination of faith and reason has a particular distinctive quality when applied to the social or political space. In Enlightenment thinking, political constitution must balance the tension between an absolute sovereign centre and the mass of atomistic individuals. Either the political reality is natural, where the individuals compete in an agonistic market economy, or it is artificial, where the individuals are subsumed under the singular judgment of a sovereign head.[20] At this point, 'the whole is mystically elevated as greater than the parts, in such a fashion that the totality is held to transcend the grasp of reason, and must be regarded as the work of an unfathomable nature or providence'.[21] The secular approach fails to take proper account of this tension between the particular and the universal, atomic individualism and absolute sovereignty. The secular response is simply to extend and expand sovereign power, producing violence; it is an 'abstracting, idealising project'.[22] The existence of irreconcilable difference means that these must be mediated, and this occurs through increased regulation; people are treated as abstract commodities ruled by violence.[23] Therefore, rather than acknowledging the theological foundations of the society in faith, noting the mystical elevation of the sovereign through unfathomable providence, the secular space tends to alienate.

The key, then, is to seek a sacred space in which the individual and the community can be harmoniously connected; rather than faith or reason, it is faith and reason. It is not a matter of purely secular categories which divide, but the embrace of transcendent truths of faith which unite and allow peace.[24] As Milbank says, 'without "community", without its self-sustaining affirmation of objective justice, "excellence", and transcendental truth, goodness and beauty, one must remain resigned to capitalism and bureaucracy'.[25] The society here envisioned is not an endless series of legal rules which can never hope to properly regulate human behaviour (and so only produce violence), but a sacred community. Importantly, this is not a theocratic society based in some kind of legalistic church canon; it is both the model for an ideal society and a way of living within a given society, characterised by love. The aim, ultimately, is to exist harmoniously within a community of difference.

[20] J Milbank, *The Word Made Strange: Theology, Language, Culture* (Blackwell, 1997) 275.
[21] ibid.
[22] ibid 281.
[23] ibid 281–82.
[24] ibid 279–80.
[25] ibid 281–82.

II. 'Faith in the Truth of Christianity': Correspondence through Revelation and Rhetoric

A. Correspondence as Analogical Participation in Revelation

This raises the question of how we may arrive at and implement the transcendent truths which unite a peaceful community. Christian truth is not merely correspondence in the abstruse and atheological sense of propositions corresponding to states of affairs in reality, but is correspondence in the far richer sense that it is *aletheia*, revealed by God. In particular, the Trinitarian relationship is that of self-giving love, or loving the other as oneself, and it is perfect peace because it is the epitomic display of the reconciliation between the One and the Many, or the universal and the particular. The members of the Trinity coexist in perfect harmony as one God, but three Persons. This is superlative unity in diversity and community: unity in common with others. The Tri-Unity, then, is the consummate example for love and ontological peace.

This truth is primarily revealed through the Incarnation of Christ, the second member of the Trinity. The Incarnation, God in flesh or becoming human, perfectly displays the grace of God through demonstrating the unmerited favour of Christ loving the created order by sacrificing and giving himself for the forgiveness of sins. Christ taking on human form and volunteering to die on the cross for people is the ultimate display of the self-giving love characteristic of the Trinity. Its concern is for other and not self, and so it reveals a law beyond formal law, a law of grace which becomes the law of love—to love your neighbour. It is this revelation of God's love in Christ which is truth, or *aletheia*.

In addition, the Incarnation of Christ reveals the peace inherent in the Trinitarian relations by reconciling the temporal and the eternal. For Christ as fully God is eternal, but simultaneously as fully man is temporal, and this also recovers the reality of reason united with faith. Consequently, though reason is directed towards truth, it is not in the crude sense of secular reason discovering the nature of physical reality and systemising it to a set of propositions. Instead, the process is inverted and theologised, with truth revealing itself through the Incarnation of Christ, reconciling reason with faith and recovering it. This revelation is subsequently apprehended and participated in by faith.

B. Participation through Faith

So, although truth-as-correspondence is an appropriate theological definition of truth, it is fundamentally different from the typical meaning of the phrase. One of the more important aspects of this difference is the relationship between revelation and rhetoric. Historically, Christians have always understood that the beliefs grounding their ethics are matters of faith, or persuasion (rhetoric).[26] In particular, as the glory of Christ is revealed to the mind, the mind is persuaded, which is the same as saying the mind appropriates this revelation by peaceful persuasion or rhetoric, rather than the violent coercion of secular reason. As the mind is transformed by faith, it participates in the glory of Christ by imitating Christ and then loves one's neighbour as a reflection of the Trinitarian relations. So the truth of Christianity is that the divine mind of the Trinity in its perfect love and peace as revealed in Christ recovers reason and corresponds to the created order through participation in the Trinitarian relations resulting from faith, the persuasion of the mind by the glorious truth of what has been graciously revealed.

In this sense, the concrete virtue of loving one's neighbour seeks its notion of what it means to have truly human character in a place beyond or above what is human, rather than in or beneath.[27] Ultimately, then, it is this necessary transcendence in human relations which challenges the secular and opens the space for faith, for scholars have historically found it difficult to simultaneously point to the

> universally valid and objective and to the customary particulars which instantiate it … a solution is only really possible in terms of a tradition like Christianity, which starkly links particular to universal by conceiving its relationship to transcendence (truth) in a rhetorical fashion (faith).[28]

C. A Legally Incarnated Truth

The relation of transcendent truth to immanent faith or persuasion is proclaimed most forcefully in the Incarnation of Christ, and more specifically in the Crucifixion and Resurrection. As Milbank observes,

> Most forms of persuasion (and if we eschew violence, but still want to encourage virtue, only persuasion is left) are thoroughly coercive. We need in consequence to find a language of peace, and this is presumably why we point to *one* drama of sacrifice in particular. Truth and persuasion are circularly related. We should only be convinced by rhetoric where it persuades us of the truth, but on the other hand truth *is* what is persuasive, namely what attracts and does not compel. And Christians only see this *entire* attraction in the figure on the cross, a specific and compelling refusal to return evil for evil.[29]

So truth is most effectively revealed and people most ably persuaded by what attracts, namely that Christ's refusal of violence draws people to Christian peace. According to the Gospel According to John, Jesus himself said 'when I am lifted up

[26] Milbank, *Theology and Social Theory*, above n 1, 329.
[27] ibid 328.
[28] ibid 330.
[29] Milbank, *Word Made Strange*, above n 20, 250 (original emphasis).

from the earth, [I] will draw all people to myself', and he 'said this to show by what kind of death he was going to die'.[30] Moreover, the Christian message is affirmed as a way of revealing truth, of indicating the way things really are, through Christ's resurrection. Only in resurrection does the gap between history and nature that we call mythology close, and at this moment the myth ceases to be myth and Christianity becomes more than mere perspective. If the entire narrative of Christianity cannot explain the way things are, there exist no other viable means of determining the question.[31]

These notions are central to understanding the symbiosis of truth and law. In particular, at the end, Christian theology provides a unique post-secular legal community. Truth is the revelation of the law of love and peace in the Trinity through the Incarnation (Crucifixion and Resurrection), and by persuasion and participation this provides the basis and model for peaceful and loving human relations governed by the law of love. Similarly, the truth of correspondence, the way things are between the Trinitarian relations and human participation in terms of a loving but diverse community, is based on the law of love, to love one's neighbour as oneself. Thus, truth is achieved by imitating the divine being in love and peace as enabled and modelled by Christ, and this institutes the legal community in such a way as to remove the prevailing violence characteristic of the secular and to allow in its place the possibility for peace.

III. Revealing an Ontology of Peace: The Nature of Peace and Violence in Christianity

A. Back to the Future: Augustinian Peace and Pagan Violence

Augustine describes the incomparable good of this kind of peace:

> For peace is so great a good that even in relation to the affairs of earth and of our mortal state no word ever falls more gratefully upon the ear, nothing is desired with greater longing, in fact, nothing better can be found … (it) is dear to the heart of all mankind.[32]

For Augustine, this true, heavenly peace may be defined as suffering no attack from within or from any foe outside. It surpasses all understanding (except that of the divine mind) and is only appropriated by faith.[33] Hence, as the truth of Christ is revealed, our mind is persuaded and we are made partakers of this peace, so we

[30] John 12:32–33.
[31] Milbank, *Word Made Strange*, above n 20, 250.
[32] Augustine, *Concerning the City of God Against the Pagans* (Penguin, 2008) 865–66.
[33] ibid 1081, 1088.

know the perfection of 'peace in ourselves, peace among ourselves, and peace with God'.[34] Reconciling virtue with difference also involves the justice of a city where differences exist harmoniously as a community, based on Augustine's model of the City of God, where the individual is loved and not alienated, and the universal is reconciled with the particular. As Milbank notes, 'the justice secured in this city constitutes a more reliable sort of peace: not a mere suspension of hostilities, but a peace founded upon agreement and organic harmony, when each person sticks to his[*sic*] allotted task'.[35] In this sense, one is reminded of the Apostle Paul's description of the Christian community in 1 Corinthians 12 as members of a body, each with particular functions working in an organic harmony. The absoluteness of the community (it has justice, peace, truth and so forth) presupposes that it reflects an eternal order, and its organic harmony allows the particular different members of the community to be individually virtuous.[36] Thus, virtue is reconciled with difference, which gives peace. Such peace originated with the God who created all in peaceful donation, and is reflected in the heavenly city where the inhabitants remain in a state of selfless generosity. This peace was disrupted by the sinful assertion of prideful self, leading to domination, conflict and a spurious 'peace' of suspended hostilities in a context of chaos. In the Christ Event, however, peace is realised through the unconditional offer of forgiveness, reconciliation and love.[37]

In contrast with Christian theology, the secular is described as neo-paganism by Milbank, 'because it is an embracing of those elements of sacred violence in paganism which Christianity both exposed and refused, and of which paganism, in its innocence, was only half-aware'.[38] In this sense, the secular is a post-Christian paganism, which must be negatively defined as a refusal of Christianity and the invention of an anti-Christianity. The so-called violence of paganism is 'a certain universal primitive religion of an immanentist character, which involves sacrifices, games, and wars, a religion resigned to the "circulation of blood"', such as that described by Benjamin.[39]

Augustine compares pagan religion and practice, incorporating a demonstration of how the nihilistic competition of power with power is itself trapped in a mythos with Christian religion and practice, which is based in faith and the ontological priority of non-antagonistic peace over violence. He concludes that the former is but a dim and distorted echo of the latter.[40] This violent ontology of difference 'teaches the needlessness of regret, and the necessity of resignation to the whole process, where all is equally necessary and equally arbitrary; where

[34] ibid 1082.
[35] Milbank, *Theology and Social Theory*, above n 1, 335.
[36] ibid.
[37] ibid 394.
[38] ibid 280.
[39] ibid 285.
[40] ibid 392.

everything depends on everything else, and this dependence is enacted through constant struggle and counter-resistance'.[41] Against the God of Christian theology, in paganism the gods emerge as a response to an alien voice, reinstating a mythical consciousness of many gods and heroes. To exercise freedom, then, one must submit oneself to the arbitrariness of myth, and find oneself within its uncontrollable power and its violent combat.[42]

For example,

> [the Roman god Jove's] first words are a fateful 'restriction' and binding of his own anger, and at the same time a command to feral human begins to 'contain' their passions … this is a gloss upon Augustine's view that 'pagan virtue' was always limited to the mere 'restriction of anger' through self-control

so that, for the pagans, the 'primal signifiers were weapons, and the basic language was war'.[43] By contrast, 'the virtue of the City of God, being able to root out anger and bad passion altogether, is most profoundly the power of charitable donation'.[44] The Trinity as a kind of natural law embodies the rules for peaceful society by suggesting that true personhood is only enabled by mutual sharing through universal association. This social principle surpasses the pagan where self-preservation is prior to relation and communication.[45] Indeed, the Trinitarian perspective actually reveals the true nature of the pagan as a theological distortion 'where the supposed "primary self" conceals the constitution of this self through delayed and postponed violence'.[46]

In Christianity, the transcendent is peacefully revealed through faith and forgiveness in Christ. Indeed, for Augustine, the pagans were unjust, violent and lacked virtue precisely because they did not give priority to peace and forgiveness.[47] Justice that is content with less than complete social consensus and harmony is therefore not true justice, because one has faith in an infinite justice, that there is a temporally proper (if changing) position for everything, without any chaotic reminder.[48] Furthermore, against the pagan religion, just as God loses nothing in creating the world, so Christians lose nothing by offering love for God. Instead, the self-giving is a new reception of being fundamentally in orientation with the other.[49] Thus, Christian theology in the peaceful gift of self-giving provides a unique way of reconciling difference with virtue and producing peace, in contrast to the violent antagonism of the pagan and the secular.

[41] ibid 317.
[42] ibid 320–21.
[43] Milbank, *Word Made Strange*, above n 20, 108.
[44] ibid 109.
[45] ibid.
[46] ibid.
[47] Milbank, *Theology and Social Theory*, above n 1, 415.
[48] ibid.
[49] ibid 395.

B. Confronting History and the Present: Peace and Violence in Christianity

However, the teachings of history starkly belie the conclusion that Christianity inherently and necessarily possesses an ontology of peace. The religious wars of the Reformation and Counter-Reformation are notable examples of the myriad and extensive catalogue of violence perpetrated in the name of Christianity. Others include the celebration of violent resistance against idolatry and persecution of unbelievers characteristic of early imperial Christianity, where a Christian ruler's faith was expressed through their willingness to pursue and violently punish those who were viewed as enemies.[50] This was eventually extended to include holistic persecution and forced conversion of non-Christians, manifested through later events such as the Crusades and the Inquisition. The Crusades in particular, despite being 'holy wars' allegedly waged on behalf of God for the sake of winning converts and defeating ungodly enemies, were marked with atrocities, which Riley-Smith claims were not aberrations, but rather constitute the norm of violence in Christian history.[51]

It is worth noting that there is a distinction between the violence of the secular, liberal enlightenment (which has violence as a presupposition and universal coercion as an end goal) and the violence allowed by faithful Christianity with an ultimately redemptive purpose: to establish genuine peace. The liberal 'peace' assumes the priority of the individual will through law in the sense of formal generality, and so exists in a universalised vision of coercion. The Christian peace in a sense subverts this law in favour of unregulated, self-giving charity; but by doing so, it opens itself up to violence. Therefore, though violence is not unavoidable, it is allowed in order to facilitate educational redemption and ultimate peace.[52]

So 'in some circumstances, passively refusing to intervene with physical violence to address violence may be more violent'.[53] Just as Christ volunteered to suffer (and thus in a sense allow or coordinate) violence for a redemptive purpose, to re-establish and redistribute the good, it may be necessary to allow or endure violence for the sake of opening the possibility for true peace. Our imperfection intimates that violence may sometimes be necessary to appropriate and instantiate the good.[54] Though any good that needs you to fight for it is not an absolute good, and the absolute Good is never threatened, our comparatively limited apprehension of the absolute good implies that participation in the eternal is not 'cheap and easy'.[55] Given the reality of evil in the world, we must actively seek to oppose it (even to the point of violence), and in the very act of opposing evil and violence

[50] T Sizgorich, *Violence and Belief in Late Antiquity* (University of Pennsylvania Press, 2009) 21–24.
[51] J Riley-Smith, *The Crusades, Christianity and Islam* (Columbia University Press, 2008) 2, 4, 9.
[52] J Milbank, *Being Reconciled: Ontology and Pardon* (Routledge, 2003) 38.
[53] ibid 29–30.
[54] ibid 39–40.
[55] ibid 40.

to pursue and implement some semblance of the good, we remove ourselves from being mere spectators, from a disinterested pacifism which is in fact even more violent. Sometimes violence ought to be refused (opposed) by a type of counter-violence so that final, perfect redemption may occur.

This point can be clarified with reference to the important critique of Milbank by the late Gillian Rose. Milbank acknowledges both that Rose is fundamental to his work and that she has also disagreed with it.[56] Rose's desire to 'retrieve and rediscover' a tradition of law that the 'post-structuralist wave' has 'overcome', particularly through her review of Nietzsche, Foucault and Derrida, provides an important foundation for Milbank's theologically parallel work in theology and social theory.[57] Both Milbank and Rose contend that modernism has gone awry and that post-structuralist nihilism is no solution.[58] Although Rose is initially concerned with law in the context of nihilism and deconstruction, she also importantly identifies that there is a tension that exists in law involving the universal and the particular, namely that 'the other, unknowable, law … is precisely … the law of the person'.[59] The formal law is necessary to our self-consciousness and utterly intimate, yet we have no acquaintance with it and it is entirely remote. We obey it only because of its 'universal practical validity'.[60] This is manifested in particular through what Rose calls the 'antinomy of law', or the 'inscrutable encounter with form in general'.[61] Rose expands this idea to mean the 'dual implication of law and ethics' in *The Broken Middle*, and states that where *Dialectic of Nihilism* argues that 'post-structuralist nihilism completes itself as law—unreflected but always historically identifiable'—here 'post-modern antinomianism completes itself as political theology, as new ecclesiology, mending the diremption of law and ethics'.[62]

Where Rose and Milbank part ways is in their conception of the necessity of violence in law. Rose argues that the notion of love without violence is a 'sect mentality' which becomes 'the only refuge for humankind's invincible enslavement to violence'—it displays a 'lack of faith in the violence to be found in love, the love to be found in violence—the law to be found in both'.[63] Fundamentally, contrary to Milbank, violence is 'not being posited as prior to law: it is presupposed as the call of law'.[64] Rose specifically engages Milbank on this point.[65] She argues that Milbank's conception of a heavenly city of peace 'effectively destroys the idea of a city: its task of salvation deprives it of site; while its inclusive appeal deprives it of limit or boundary that would mark it off from any other city and their different laws'.[66]

[56] J Milbank, *Theology and Social Theory: Beyond Secular Reason*, 2nd edn (Blackwell, 2006) viii, xii.
[57] G Rose, *Dialectic of Nihilism: Post-Structuralism and Law* (Blackwell, 1984) 1.
[58] ibid; Milbank, *Theology and Social Theory*, above n 1.
[59] Rose, *Dialectic of Nihilism*, above n 57, 23–24.
[60] ibid 24.
[61] ibid 2.
[62] G Rose, *The Broken Middle: Out of Our Ancient Society* (Blackwell, 1992) xv.
[63] ibid 147.
[64] ibid 151.
[65] See ibid 277–96.
[66] ibid 281.

It is, as Milbank admits, 'a paradox, a nomad city'.[67] Milbank would even see these attributes as virtues; the heavenly city has no alienating and dividing (violent) boundaries, and, as an eternal community, has no specific site—though it can be arguably instantiated on earth, so it is situated to some extent. The disputed issue therefore seems to be the ethereality of Milbank's city, its lack of basis in the reality of socio-legal relations due to its salvific escapism and lack of concrete definition.

Rose claims that we should not embrace either the Athenian tradition of the Greeks, which takes the existing law as transcendent and beyond critique, or the Jewish tradition, which opposes the law of the city to revelation, which then becomes a law that is transcendent and beyond critical evaluation. According to Rose, we should instead take a middle path which engages critically with both extremes. This path is the true realm of law, for the middle is always broken: legal institutions always do some harm, and we should not attempt to either accept it or escape it.[68] True faith is to grapple with this difficulty of the broken or violent middle.[69] Rose understands faith in this context as being (that is, existing) in the midst of uncertainties and mysteries without grasping for facts and reason, in conjunction with the enlarging of inhibited practical reason.[70] Faith is not about any object in particular (it is not a faith 'in' God as Milbank might have it), but rather an inflection or attitude of being and action in the world.[71] So the middle is the realm of the necessarily violent law, and to simply accept it and mask it without critique (as liberalism does) or escape it without a struggling engagement (with Milbank's heavenly city) is to lack faith and actually reinscribe this violence.[72]

Rose ultimately contends that 'mended middles betray their broken middle', presenting a 'holy middle' which ultimately 'corrupts' because it claims to repair the relation between the universal and particular, 'drawing attention away from the reconfiguration of singular, individual and state'.[73] The middle is always 'broken—because these institutions are systemically flawed'—and this implies that 'this holiness will itself be reconfigured by the resource and articulation of modern domination'.[74] In other words, Milbank's (false) claim of a perfectly peaceful city with a holy relation between individual and state will be utilised to perpetrate even greater violence.[75] 'If the broken middle is abandoned instead of thought systematically, then the resulting evasive theology, insinuated epistemology, sacralised polity, will import the features of the City of Death remorselessly.'[76] In short, the

[67] ibid.

[68] V Lloyd, 'On the Use of Gillian Rose' (2007) 48 *The Heythrop Journal* 697, 699; *cf* V Lloyd, 'Complex Space or Broken Middle? Milbank, Rose, and the Sharia Controversy' (2009) 10(2) *Political Theology* 1, where this is applied to the tensions which exist between the individual and the state.

[69] Lloyd, 'On the Use of Gillian Rose', ibid, 700.

[70] V Lloyd 'The Secular Faith of Gillian Rose' (2008) 36 *Journal of Religious Ethics* 683, 692.

[71] ibid 697.

[72] Lloyd, 'On the Use of Gillian Rose', above n 68, 701.

[73] Rose, *The Broken Middle*, above n 62, 285.

[74] ibid 284–85.

[75] ibid 307.

[76] ibid 293.

telos of their critical projects differ; Milbank concludes with a vision of ontological peace, while Rose calls us to be content with the struggle within the world we have.[77]

Importantly, Vincent Lloyd argues that, for Rose, law can be identified with social norms, and since violence is always implicated in law, this implies that social norms never completely match with social practice. This is why Rose is so opposed to any theory which may suggest that a (legal) authority is beyond question—it will result in the violence of unwarranted and unjustified penalties.[78] That is a formidable objection, given Milbank's emphasis on the ultimate or heavenly social peace, which presumably is beyond question because for Milbank it represents the culmination of social ontology. However, it is not an insurmountable one in the sense of considering the possibility that social norms could match with social practice. If this occurred, the broken middle would be repaired, and there would no longer be an inevitable violence of law. This may exist in the idea of the law of love itself. 'Love your neighbour as yourself' is a unique norm because it is a command which may govern human society, but one which can also be seen as a practice of loving your neighbour as yourself. Therefore, in this framework there is scope for social norm(s) and social practice to match, repairing the middle and removing the invincibility of violence. With Rose, we can continue evaluating and interrogating the extent to which these do in fact coalesce, but this does not exclude the possibility of their doing so.

Even Rose seems to acknowledge this to some extent according to Lloyd, since to love is an act of faith, the suspension of usual relational norms; love relationships do not have the usual normative quality, nor do they have any mechanisms of protection.[79] Rose relays the story of Abraham's (near) sacrifice of Isaac as acknowledging the love in violence and the violence in love, with the law being in both. She goes on to say that it is this 'free offering', this 'already knowing yet being willing to stake oneself again' that 'prevents one … from acting with arbitrary violence'.[80] Such an idea culminates in the willing sacrifice of Christ, the ultimate act of faith through suffering of violence and the violent refusal of violence, which implies that we too can choose in faith not to engage in violence. Like Christ, we may be called upon to suffer violence or violently refuse violence when norms do not match practice, but because of his resurrection we are able to do this—and we can also consequently continue a community of love and peace.[81] So, in one sense, Rose's insight is absolutely right: violence is inevitable because Christ always has to suffer. But it is in this very act of violent love, or the paradoxically violent resistance of violence, that the law of love is instituted, and norms can match practice: the possibility for peace remains.

[77] Lloyd, 'On the Use of Gillian Rose', above n 68, 697.
[78] Lloyd, 'The Secular Faith of Gillian Rose', above n 70, 686.
[79] ibid 701–02.
[80] Rose, *The Broken Middle*, above n 62, 148.
[81] See Milbank, *Being Reconciled*, above n 52, 100, 102–03.

C. Future Glory: The Hope of Communal Peace

All this is not to say that violence is ontologically fundamental, nor does it justify the inordinate arbitrary violence perpetrated during religious wars in which Christianity was involved or even the perpetrator. Such acts must be categorically condemned. The fact that the argument centres upon the proposition that Christianity is ontologically peaceful, in conjunction with the historical observation that it has not produced peace, raises what is both an extremely obvious and an extremely fundamental issue. If it is established that Christianity has an inherent ontology of peace rather than violence, this implies that those who perpetrate capricious or excessive violence in the name of Christianity or as Christians have neglected some aspect of Christian theology.

It was proposed earlier that the wars and violence resulting from the Reformation and Counter-Reformation stemmed from the violent divorce of reason and faith. That claim is qualified here in the sense that it is partly correct, though not completely. Rather, those who perpetrate that sort of violence in the name of Christianity ultimately fail to comprehend the implications of Christianity's Trinitarian theology. One of these is the reconciliation of reason and faith, but even more fundamentally, the nature of the Trinity reveals the reconciliation of difference and sameness through the law of love. In the Trinity, difference exists as one, harmoniously and peacefully, and this is concretely enabled and modelled in the selfless Incarnation and sacrifice of Christ, who died for people rather than committing violence against them. In this way, those whose minds are transformed with the revelation of the Trinity will participate in the divine love, reconciling difference and living in harmony. Hence, it follows that the truth (revelation) of the law of love in the Trinity results in participation by faith, and this entails peace rather than violence.

Given our human weakness and fallen nature, however, some type of violence seems necessary on the path to ultimate peace, redemption and reconciliation. There must therefore be a distinction between the unrestrained and evil (pagan) violence, which detracts from the good, and violence which communicates some substantive good. As Milbank observes, violence may be a 'stay' or 'a rebuke or a caress'—not all apparent violence is actually violence, for violence must be judged as to whether 'a substantive good has been impaired'.[82] How, then, do we determine whether a particular type of 'violence' is of the former kind or the latter? Milbank gives us some clues:

> Every occasion for every good act is always like this—there is always some initial evil, some deficiency, some threat, some terror, something to be warded off … hence virtue is paradigmatically heroism … to be brave … virtue is always reactive: it always secretly celebrates as its occasion a *prior* evil, lives out of what it opposes … Here, at the beginning of every virtue, lies a failure to turn the other cheek … worse still, no … encroachment,

[82] ibid 26–27.

> no seeming violence, is obviously violent in an objective and unquestionable sense. No, violence has always to be judged, since every encroachment, every invasion, including an imperial one, may be a gift, an alien strengthening; we have to decide whether it strengthens us or weakens us … is there a violent tearing apart of our true self here? Or to the contrary, does our true self only emerge on this journey out of itself?[83]

So the delineation is between violence that presupposes a prior evil and/or aims towards some ontologically necessary evil, and so leads to an individual heroic virtue, and violence in a sense that is gift or strengthening, allowing our true self to emerge, which results in humility and a fundamental peace with the community. This is why communal peace and the good is an attainable ontological reality, and atomistic, individual peaceableness or pacifism must be counter-intuitively rejected—pacifism tends to gaze upon violence without refusing it.[84]

Though this scenario is 'apocalyptic' rather than 'utopian' in the sense that we may require violence to bring the ultimate good of repentance, redemption and reconciliation, the fact that this remains an attainable ontological goal retains some utopian elements. It implies that consistent Trinitarian Christian theology opens the possibility for the final reconciliation of the universal and the particular, through revelation and the Incarnation, and provides true peace and the good. Any other differential ontology is non-Christian, presupposing transcendental violence and contending for the necessity of reading reality as ontologically conflictual—the failure to take account of difference is violence, for in the jostling of difference(s) there is agonistic conflict.[85] However, what is sought is not conflict but peace. Peace is the ultimate good; it is delightful, and what will be found in heaven—a peace and life everlasting. Real peace is a state of harmonious agreement, based on a common love and a realisation of justice for all, and it is Christian theology which allows the possibility for this peace through the truth of the law of love. So reconsidering and implementing the law of love in the modern legal system offers a way of rethinking and redeeming the system, reducing its violence and rendering it ontologically peaceful.[86]

IV. Christian Theology and the Modern Legal Community: Proposing the Law of Love

A. Christ against Leviathan

Augustine argues that the eternal city, or the Christian community, possesses heavenly peace by faith. This ideal heavenly peace is attainable, at least in part, on earth

[83] ibid 220–21.
[84] ibid 42–43.
[85] Milbank, *Theology and Social Theory*, above n 1, 297, 313, 315.
[86] ibid 393.

and refers to an ordered harmony in the community of the city, where all citizens contribute and fulfil their role.[87] In such a community, the individual is not alienated and antagonised, but is loved by the community comprising individuals as a function of the law of love, and performs their designated role as an act of love towards all other individuals of whom the community is comprised.

Augustine concludes that without love based in faith (and consequently based on the revelation of God in Christ, the mutual bond of spirit) there is no commonwealth, or legal community. As such, not only is the theological law of love the most desirable ontological basis for a legal community of peace, it is the only basis for such a community. Augustine's point also holds true for our modern system of law. That is, without a peaceful ontology—which involves loving your neighbour as yourself—it is not possible for the legal system to create peace, and it is rendered inherently violent in its attempt to keep violence at bay.

This is because 'the distinctiveness of Christianity, and its point of difference with antiquity and modernity, is its reconciliation of virtue with difference'.[88] The antique (pagan) closure against difference (ie antagonism and alienation of individuals) meant it really promoted a heroic, exclusive, aristocratic freedom.[89] Pagan ethics are therefore not really ethical, because they were not oriented towards a harmonious, relational community as an end goal. Instead, the pagan ethic celebrated control, force and violence over members.[90] The division between the whole and the part, as the division between the soul and the body, perpetuates a fundamental discontinuity, where subordination of one by the other can only be by force. In contrast, Christian ontology abolishes this division and duality, which supports the notion of an ineradicable ontological violence.[91] Christianity is therefore something like the peaceful transmission of difference, or differences in a continuous harmony.[92]

The contrast here is between Hobbesian assumptions of primitive atomistic violence controlled by excessive sovereignty and the loving and peaceful Christian community. The modern state attempts to sovereignly coerce peace as the mere absence of conflict between individuals, but the framework of the church as the city or legal community has authentic relations of love between God and neighbour by the Holy Spirit through the redemption effected by Christ.[93] This is really a contemporary articulation of Augustine's argument. Rather than the state establishing a spurious peace based on the suppression of an allegedly prior

[87] Augustine, above n 32, 876.
[88] Milbank, *Theology and Social Theory*, above n 1, 423.
[89] ibid.
[90] ibid 416.
[91] ibid.
[92] ibid 422.
[93] JKA Smith, *Introducing Radical Orthodoxy: Mapping a Post-Secular Theology* (Baker, 2004) 236–37.

violence, the church as the state or community establishes authentic relations of love through the revelation of truth in Christ and the transformation or persuasion of people through faith. The Church as persuading rather than coercing is important, for this allows the proclamation of a new political event: that of the cross, which replaces the sovereign power of the secular state with a different type of power or strategy of governance.[94]

Paradoxically, the power of the cross is in its complete lack of sovereign power—Christ refuses to exert the power he possesses, instead resisting violent rule and establishing peace through service and the sacrifice of self; this in itself is far more powerful, and through Christ we can envisage the possibility of a similarly loving community. In this community to rule is to serve, and people are not merely individual contracting entities regulated by legal violence, but redeemed people who are part of a community operating under grace beyond legalism and characterised by mutual love, empowered and demonstrated through Christ the King, who gave himself for us.[95]

B. The Law of Love as the Person and Work of Christ

(i) Gift versus Legality

So we specifically find the law of love as applied in the legal community through considering Christ himself as the embodiment and fulfilment of that law. Here, gift can be contrasted with law—or at least can allude to the need to go beyond the law to truly establish the gift of love as the common good. The problem is that this (secularised, enlightenment) law assumes a prior violence, which it is trying to prevent through the stringent regulation of life, liberty and truth.[96] The danger of such an approach is that it really detracts from or prevents the overflowing of divine Good, so is actually evil in the Augustinian sense of privation. Rather than the fullness of life, freedom and truth revealed through the Spirit, the law constrains, alienates and antagonises; as Paul realised, it holds out a formal, abstract standard which can never be fulfilled, thereby spelling out judicial violence.[97]

Conversely, through Christ and his manifold gifts, we can understand our role in society. Where law is said to apply to everyone equally, denying difference and constraining intersubjective relationships, the particular nature of divine gift(s) allows difference to be harmonised and promoted, producing peace in the body, as Paul described in 1 Corinthians 13.[98] It follows that this giving of ourselves

[94] Milbank, *Word Made Strange*, above n 20, 251.
[95] J Milbank, 'The Gift of Ruling' in J Milbank and S Oliver (eds), *The Radical Orthodoxy Reader* (Routledge, 2009) 358.
[96] Milbank, *Word Made Strange*, above n 20, 220.
[97] ibid 227.
[98] ibid.

through the receiving of gifts actually increases our subjectivity, so that the sacrifice of the gift is really no sacrifice at all.

> A genuine gift is excessive since it is not required, and it occasions not a loss but a gain in subjectivity for the giver which is reinforced by the counter-gift of gratitude from the recipient. In *this* virtue is to be found no sacrifice.[99]

Hence the society can continue perpetually in peace, forever giving and receiving the gift of love through the law of love, specifically empowered and modelled through Christ's resurrection. With the vision of the resurrected Christ, the presupposition of death is cancelled, along with pagan virtue and death-limiting law. All that remains is charity.[100]

(ii) Gift as Forgiveness

The second element of the law of love in the legal community as embodied in Christ is the way in which Christ inaugurates and endows the gift of forgiveness. The person and work of Christ is 'necessary for the redemption' because he 'enacts and enshrines the *viability* of the new, forgiving practice, by virtue of its unique and universal "attractiveness"'—that in being put on the cross Christ draws all people to himself.[101] Only Christ can end all violence, because his death is not only an example but an enabling metaphor for refusing violence and pursuing forgiveness.[102] Furthermore, if Jesus' death is fully effective, it is not limited to ethereal spirituality. It is also the '*inauguration* of the "political" practice of forgiveness; forgiveness as a mode of "government" and social being'.[103] This produces a state of perpetually giving forgiveness or infinite gift-exchange, what Milbank calls an 'atoning practice', which can only arise in a community which prioritises human relationships in a way which images Christ as God.[104]

Christ as the embodiment of the gift of forgiveness creates the space for a community practice of atonement in the law of love through projecting the image of God from heaven to earth—the practice of the gospel which is peace rather than violence. The event of the Incarnation, Crucifixion and Resurrection exceptionally allows this because Jesus as the God-man, the omniscient and innocent divine *logos*, represents the singular suffering of all humanity, a maximally sovereign suffering which is capable of instituting forgiveness on behalf of all.[105] So, through representing universal suffering, Christ also provided the possibility for universal forgiveness by participation through faith and the spirit in the law of love, leading to reconciliation of human relationships. Since we participate in the Trinity and

[99] ibid 226 (original emphasis).
[100] ibid 229.
[101] ibid 160 (original emphasis).
[102] ibid.
[103] ibid 161 (original emphasis).
[104] ibid 162.
[105] Milbank, *Being Reconciled*, above n 52, 61.

Incarnation by faith, we also participate in the giving of forgiveness initiated by the divine love. We receive the divine authority to give and accept forgiveness as part of intrahuman reconciliation.[106]

C. Coercion and Love

At this point, a question may be asked regarding the place of punishment and deterrence in this kind of community. The answer is that Christianity can still allow coercion, for the goal of coercion is final peace, and the coercive action to prevent a person damaging themselves or others can be redeemed through their retrospective acceptance of the means taken to reach this final goal of peace. However, the coercion used by the pagan, earthly city does not have the final peace in view, but only the peace of compromise between wills, which consequently contains an arbitrary element open to the exercise of power.[107] Indeed, secular reason appropriated this arbitrary element and pervaded law by engendering a newly rationalistic and formalised approach, one which resulted in pure possession and control, and in the regulation and balancing of power. This, in turn, led to liberal conceptions of property rights, a doctrine of unlimited sovereignty and relationships between legal bodies (both persons and corporations) being conceived on a contractualist basis.[108] In particular, Milbank argues that Hobbes

> traces the origins of human society to individual self-seeking, which eventually gives rise to laws which merely protect established power. Against this background, crime is partly 'rational', because it protests against an undeveloped notion of right and subjectivity. And punishment at this level is virtually indistinguishable from 'revenge': the reassertion of the right of force. Crime and punishment, like revenge, belong to an endless 'fatal' process, because in the realm of force, which is a realm of sheer quantitative 'indifference', one action is only 'equivalent' to another, or 'compensation' for another, in a purely arbitrary sense. No-one is ever satisfied that justice has been done; there is always a balance to be rectified; the punishment can never fit the crime.[109]

Such is at fundamental odds with the Christian vision of loving one's neighbour personally, seeking communal peace and reconciliation, rather than as an abstract legal entity doomed to an endless repetition of violence. In a specifically judicial context, it is more important to investigate than to punish, for once the offence is discovered, the aim is always to restore the offender and promote reconciliation and redemption.[110] Here, the practice of forgiveness nevertheless involves a practice of restitution, because forgiveness is a gratuitous self-offering beyond the demands of the secular law. Christ is the ultimate model for this, since he offered

[106] ibid 62.
[107] Milbank, *Theology and Social Theory*, above n 1, 424.
[108] ibid 441.
[109] ibid 170.
[110] ibid 424.

himself for forgiveness of sins when he was under no legal obligation to do so. Hence, wrongs must be put right by rectification and restoration, or if this is not possible, some other means which demonstrates a will to harmony among human beings.[111] 'The practice of forgiveness, as surplus to any system of desert or obligation, is able creatively to break out of the blindness induced both by the wrong act of the offender, and by the corresponding anger of the victim.'[112]

This emphasis on harmony and mutual trust through the Christian practice of forgiveness recalls statements made by Benjamin and Cover, who saw the need to redeem law through non-violent enforcement with the preconditions of (communal) peaceableness and trust by virtue of unity within Christian practice. These preconditions are met both at the transcendent level and the immanent level. At the transcendent level, the perfect peace that consists between the Trinitarian relations is revealed in Christ and is imparted to the mind by faith, which is a synonym for trust. The preconditions are subsequently met at the immanent level since the persuasion of the mind and participation in the law of love by the subject open the possibility for a community of peace between individuals, a constantly atoning practice, based on a mutual trust. Such a redeemed legal community which exists in love beyond law is exemplified through the Good Samaritan, the paradigm of loving your neighbour as yourself.

V. The Law of Love, or Love beyond Law: Releasing the Spirit of the Good Samaritan

A. Kelsen and the *Grundnorm*

It is possible to conceive the law of love (loving obedience to the law through transcending the rules of law) as providing the foundation for civil law and the community found in the Apostle Paul through comparison with Hans Kelsen's *Grundnorm*, or basic norm. For Kelsen, the idea of the basic norm is a presupposed, fundamental norm that authorises and founds any coherent and valid legal system. It gives meaning to a legal system and bestows the legal power to create such a system.[113] At one level, some may note the apparent absurdity of using Kelsen, the high positivist and anti-moralist, as a model for how a theological truth such as the law of love may found the civil law. However, Kelsen himself notes that the law of love is an example of the basic norm, illustrating that the neighbour principle contains content from which other norms can be logically deduced, resulting

[111] ibid 422, 428.
[112] Milbank, *Word Made Strange*, above n 20, 164.
[113] M Green, 'Hans Kelsen and the Logic of Legal Systems' (2003) 54 *Alabama Law Review* 388, 388.

in the establishment of an entire system of valid norms.[114] Given that Kelsen can observe the fact that the law of love is an example of the basic norm, it might seem that theology should also be able to begin implementing such a process.

The most powerful example of how this may work is found in Romans 13:8–10. In this passage, immediately following Paul's injunction to render obedience to the civil authorities, he clarifies it by stating that this should be achieved by loving one another, for love fulfils the law. He proceeds to show that the commandments are all summed up by the law of love: to love your neighbour as yourself. Thus, Paul is arguing that, in addition to the reasons given in Romans 13:1–7, the civil authorities should be obeyed as a function of the law of love. Furthermore, the law of love legitimises and validates the commandment system in conjunction with the civil authorities, for Paul uses it to justify his instruction to obey them by stating that this law of love fulfils obedience. It is the law of love that vindicates and gives meaning to the civil authorities and the series of commandments by ultimately transcending and fulfilling them. Paul also demonstrates that the law of love provides the content from which an entire system of valid norms can be logically deduced. In Romans 13:10, he states that love does no wrong to a neighbour. In this way, all the commandments, such as not to murder or steal, are contained by this principle, since if you love your neighbour according to Paul you will not murder them or steal from them. Therefore, the axiom to love your neighbour as yourself can plausibly provide the content of 'doing no wrong to a neighbour', from which a series of norms can be promulgated and a harmonious legal community which loves the individual can be created.

However, there is great danger in this approach. I have already noted the counter-intuitive nature of considering Kelsen in this context, given his positivistic framework. The effect of having the foundation of law as a norm (even a 'good' norm, such as loving your neighbour as yourself) through which a series of norms can be logically deduced reintroduces the problem of juridification. The risk of legalising and systematising the law of love in a legal context renders the principle into a rigid code which becomes inflexible, secular and formal—the precise issue with the secular modern law that we have already identified. Like the legalism of the Pharisees that Christ confronted, or even like the rigid equitable principles of our own time, such a law invites transgression by articulating itself in terms of formal boundaries; in other words, such a law is intrinsically violent.[115]

To pursue the law of love as the foundation for a legal community is the right idea, but to approach it through Kelsen's *Grundnorm* maintains a secular form or secular *logos*, which will reproduce violence. What is needed is to go beyond law, to love: the theological *logos*. For in the spiritual bond of love, we are freed from the violent constraints of the law of the letter, yet we are able to fulfil the law of the

[114] H Kelsen, *Pure Theory of Law* (University of California Press, 1967) 195–96.

[115] See A Deagon, 'Rendering to Caesar and God: St Paul, the Natural Law Tradition, and the Authority of Law', *Law, Culture, and the Humanities*, first published on 10 March 2014 as DOI: 10.1177/1743872114524324, 3–4, 24, where this problem has been identified.

spirit. This problem of attempting to implement the law of love as a legal norm within a secular, formal legal system can be explicitly seen through the (secular) legal understanding of the Parable of the Good Samaritan in modern negligence.

B. Understanding the Parable

(i) The Legal Interpretation

Although there are examples and illustrations of common law having a foundation in Christian theology and the law of love (the importance of truth in evidence, trust in contract, principles of equity, establishing peace through criminal law, rehabilitation as a sentencing purpose), these tend to be traces and distortions, a residue of an earlier, pre-secular period that is now long gone. Rather than demonstrating the potential to have a secularised civil law based in the theological truth of the law of love, these examples tend to be the exceptions which prove the rule that secular law seeks to eliminate faith, theology and, ultimately, love. They are part of a mere Christian residue, a malformed vestige which limits the radical selfless love modelled by Christ and puts in its place what amounts to little more than altruistic self-interest. Such can be observed in the seminal case for modern negligence, *Donoghue v Stevenson*.[116] Here, Lord Atkin articulated the rule which has provided the foundation for much of negligence law over the past 80 years. He stated that:

> The liability for negligence … is no doubt based upon a general public sentiment of moral wrongdoing … the rule that you are to love your neighbour becomes in law that you must not injure your neighbour; and the lawyer's question, Who is my neighbour? receives a restricted reply … the answer seems to be—persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called into question.[117]

Lord Atkin bases his articulation of the (civil) law of negligence on the (theological) rule, or truth revealed, that you are to love your neighbour—the law of love, to love your neighbour as yourself. In the context of understanding what Lord Atkin precisely intends to convey by invoking this principle, it is worth noting the later observation by Lord Diplock that it was 'the Parable of the Good Samaritan evoked by Lord Atkin in *Donoghue v Stevenson*'.[118] The situation of the parable is reproduced in full below:

> And behold, a lawyer stood up to put [Jesus] to the test, saying, 'Teacher, what shall I do to inherit eternal life?' He said to him, 'What is written in the Law? How do you read it?' And he answered, 'You shall love the Lord your God with all your heart and with

[116] *Donoghue v Stevenson* [1932] AC 562.
[117] *Donoghue v Stevenson* [1932] AC 562, 580 (Lord Atkin).
[118] *Home Office v Dorset Yacht Co Ltd* [1970] 2 All ER 294, 326 (Lord Diplock).

> all your soul and with all your strength and with all your mind, and your neighbour as yourself.' And he said to him, 'You have answered correctly; do this, and you will live.' But he, desiring to justify himself, said to Jesus, 'And who is my neighbour?' Jesus replied, 'A man was going down from Jerusalem to Jericho, and he fell among robbers, who stripped him and beat him and departed, leaving him half dead. Now by chance a priest was going down that road, and when he saw him he passed by on the other side. So likewise a Levite, when he came to the place and saw him, passed by on the other side. But a Samaritan, as he journeyed, came to where he was, and when he saw him, he had compassion. He went to him and bound up his wounds, pouring on oil and wine. Then he set him on his own animal and brought him to an inn and took care of him. And the next day he took out two denarii and gave them to the innkeeper, saying, 'Take care of him, and whatever more you spend, I will repay you when I come back.' Which of these three, do you think, proved to be a neighbour to the man who fell among the robbers?' He said, 'The one who showed him mercy.' And Jesus said to him, 'You go, and do likewise.'[119]

So the law of love as the revelation of Christian theology was appropriated by Lord Atkin as the foundation for a duty of care in modern negligence. However, despite its promise, it is a mere trace, a distorted, pagan version of the 'law of love'. Atkin's appropriation of the theological principle to love one's neighbour applied to the legal principle that one should not injure one's neighbour implies a far more restricted sense of conduct than Christ advocates in the parable (which Atkin explicitly acknowledges in the above quote). For example, in the case of *Hargrave v Goldman*, it was found, after a brief discussion of Lord Atkin's neighbour principle and its origin in the Parable of the Good Samaritan, that:

> The dictates of charity and of compassion do not constitute a duty of care. The law cast no duty upon a man to go to the aid of another who is in peril or distress not caused by him. The call of common humanity may lead him to the rescue. This the law recognises, for it gives the rescuer its protection when he answers that call. But it does not require that he do so …[120]

Christ's commandment to love your neighbour as yourself extends to showing mercy to people in peril not caused by you (such as the example given in the parable, which we are called to imitate), but this is not the case in the legal adaption of the theological principle. Thus, far from the love of neighbour being the ostensible foundation for modern negligence, in fact 'the dictates of charity and compassion' (love) are explicitly distinguished from law, and separated from law. Though the law acknowledges that 'the call of common humanity' may compel a rescue and provides protection to this end, it nevertheless excludes charity and compassion from the operation of law. This promotes a law or legal system not modelled after Christ in the fashion of selfless love, but rather a cold, calculating law, one based on an ultimately selfish desire to avoid helping one who is in need. The law of love has been twisted and secularised, reified, by modern law. The trace remains, but contains none of its power.

[119] Luke 10:25–37.
[120] (1963) 110 CLR 40, 66 (Windeyer J).

(ii) The Theological Interpretation

In contrast to Lord Atkin's restrictive and self-interested duty of care, which tends to promote an attitude of eschewing the boundary of least convenience, or even the pursuit of minimum effort just to satisfy some formal goal, we should seek to articulate the neighbour principle in a way which is consistent with Christian theology. Specifically, we need to go beyond mere legal duty and selfish interest, and desire to truly act with love and sacrifice in order to promote a peaceful community, just like Christ did. As Milbank exhorts, 'to act charitably we must break through the existing representation of what is our duty towards our neighbour and towards God', and 'break through the bounds of duty which "technically" pre-defines its prescribed performance'.[121] This initially involves understanding the Parable of the Good Samaritan in its theological context.

The superficial content of the parable is straightforward. A man was travelling from Jerusalem to Jericho and was mugged and severely injured, left for dead. A priest and a Levite pass by and avoid the man, but a Samaritan comes and has compassion, tending to his wounds and paying for him to recover at an inn. The full parable is recorded only in Luke's account, though he is probably drawing from an earlier, truncated account in Mark 12:28–31.[122] There are some important differences between the accounts. Mark's account has only the initial conversation, where Jesus is asked about the greatest commandment and responds by saying that the greatest commandment is to love God and love your neighbour. Where Mark has the question raised by a scribe, Luke mentions a lawyer; Luke's concern in the context of the account is eternal life, whereas Mark focuses on the greatest commandment.[123] Finally, Mark has Jesus answer the question regarding the greatest commandment, while in Luke it is the lawyer who answers the parallel question of what one must do to inherit eternal life.

These factors indicate Luke's focus on the inclusivity or universalism of the gospel of Jesus, and particularly how Jesus sought to reconcile Jews, Samaritans and Gentiles; some commentators also argue that this parable foreshadows the later Gentile mission recorded by Luke in Acts.[124] Luke attempts to demonstrate how discriminating categories (such as Jew versus Gentile) are dissolved in Jesus, inaugurating a global harmonious community.[125] Luke's alterations make his account more relevant to his Gentile readers, who would have had little concern for scribes

[121] Milbank, *Word Made Strange*, above n 20, 134.

[122] W Baird, 'The Gospel According to Luke' in C Laymon (ed), *Interpreter's Concise Commentary* (Abingdon Press, 1983) 227.

[123] Scribes were originally copyists of Scripture, while lawyers were the experts in Jewish law and legal procedure. The increasing prominence of scribes in the time of Christ resulted in a merging of the roles, which may be why Mark refers to a scribe and Luke refers to a lawyer. See C Blomberg, *Jesus and the Gospels* (B&H Publishing Group, 2009) above n 123, 47.

[124] Blomberg, ibid, 163–64; also see, eg, TJ Lane, *Luke and the Gentile Mission: Gospel Anticipates Acts* (Peter Lang, 1996).

[125] R Gundry, *A Survey of the New Testament* (Zondervan, 1970) 94–95.

and the commandments of the Jewish law.[126] Jews and Samaritans especially had an extremely acrimonious relationship, a deeply entrenched process of negative stereotyping stemming back even to respective accounts of origins of the Samaritans, and a theological dispute over the proper place of worship.[127] Jesus was using this parable as a hyperbole to demonstrate the extent to which one should love your neighbour, regardless of different prejudices, races or legal categories. Samaritans were considered as objects of contempt in first-century Jewish culture, but, by having a Samaritan help a Jew in need, Jesus breaks down the boundary between Jew and Samaritan and claims that whoever responds to human need is the truly loving neighbour.[128]

Furthermore, the term 'half dead' is best understood to mean that he appeared alive, but in a severe condition requiring help. This renders the actions of the priest and the Levite inexcusable for Jesus, since going to the aid of another is not a matter of legal category, but of the heart and compassion (and it was the Samaritan who had compassion).[129] It is also worth remembering that the question asked of Jesus, 'Who is my neighbour?', was asked by a lawyer. In this context, the lawyer is an 'expert in the law', someone 'trained to interpret and teach the law of Jewish tradition'.[130] Jesus does not directly answer the question of who the neighbour is, but rather redirects the focus towards the lawyer (and us as the reader). He effectively changes the question from 'who is my neighbour?' to 'who acted like a neighbour?' and 'to whom can I be a neighbour?', implying that we should not try to avoid the divine demand through formal legalisation, but should instead show love to all who need it without distinction.[131] According to this anthropological reading, Jesus finally emphasises we should 'go, and do likewise'; that is, we should be like the Good Samaritan, loving and showing mercy to any who are in need without seeking to restrict the scope of the command through legal definition or ethnic prejudice.

> The one who asks, 'Who is my neighbour?' thinks of others in the world as classifiable commodities. One can build fences to determine who is in the circle of those to be cared for, and who is not. Then we and all others can 'take care of our own', thinking that our help should be directed to those we are related to by ties of family or friendship—things based on law, rights, bloodlines, culture or tradition. By means of this parable Jesus calls his hearers away from a legalistic or culturally conditioned mind-set to a life of authentic love. One should not seek to define who the neighbour is, but simply be a neighbour to the one in need … the example of the Samaritan, who does good to a person in need without any apparent regard for religion or ethnicity, illustrates how authentic love pays no attention to religious, ethnic, or cultural distinctions.[132]

[126] Baird, above n 122, 227.

[127] H Williamson, 'Samaritans' in J Douglas (ed), *The Illustrated Bible Dictionary Part 3* (InterVarsity Press, 1980) 1378.

[128] A Hultgren, *The Parables of Jesus: A Commentary* (Wm B Eerdmans, 2002) 98.

[129] ibid 96.

[130] ibid 95.

[131] Baird, above n 122, 228; Blomberg, above n 123, 338; Gundry, above n 125, 163.

[132] Hultgren, above n 128, 100.

So authentic compassion, a Christian love based on selfless sacrifice, transcends the boundaries and limits violently imposed by law, and instead tends to establish a community life of selfless sacrifice. Indeed, the lawyer's question could be seen as a 'typical' lawyer's question, a 'boundary question of an exclusionary type'—and the common answer, in accordance with the focus of the Mosaic law, was a fellow Israelite, excluding Samaritans and Gentiles and encouraging the engagement of group differentiation and stereotyping.[133] However, 'that a representative of one of the hated outgroups is brought along that road challenges the whole structure of group differentiation which the law functioned to maintain', and the fact that it was this representative who exhibited admirable conduct further disrupts this legally imposed alienation.[134]

The type of compassion envisaged has no limits, as shown by the rich and loving detail Jesus supplies. The force of the parable directs us to conclude that love which transcends legally sanctioned boundaries is a more desirable form of life.[135] And, as with the atonement, this is not intended to be an isolated incident, but a way of life permanently instantiated through human relations. By shifting the focus from neighbour as category to neighbour as proper love-action, and telling his audience to do likewise, Jesus intends to universalise such behaviour and generate a new principle of existence in community.[136]

It is this sublime vision of truly and universally loving one's neighbour, particularly when that neighbour is in dire need, which indicates its theological foundation. In fact, your neighbour extends to your greatest enemy, and to love your neighbour means to show mercy even to your greatest enemy; there are no boundaries to the concept. Here, the Parable of the Good Samaritan can be read not only anthropologically, but also christologically. In this light (that we are the person in need, helpless and dead in our sins, rescued by the sacrifice of the Samaritan, who represents Christ), the logic of the parable 'raises the possibility that we first need to be shown compassion by a neighbour as a condition of becoming neighbours ourselves'—and 'only the divine persons are capable of showing us this kind of compassion', particularly by Christ, who became flesh and gave himself for us—'claiming us … as persons sharing his communion with the Father and the Spirit'.[137]

These observations are important for understanding the source for love of neighbour. We love our neighbour because we have first been loved by God—the modelling of sacrificial love through Christ, who showed love, mercy and forgiveness to all humanity, his former enemies, by willingly dying on the cross in their

[133] P Esler, 'Jesus and the Reduction of Intergroup Conflict: The Parable of the Good Samaritan in Light of Social Identity Theory' (2000) 8 *Biblical Interpretation* 325, 329–37.

[134] ibid 342.

[135] ibid 343.

[136] ibid 350.

[137] I McFarland, 'Who is my Neighbour? The Good Samaritan as a Source for Theological Anthropology' (2001) 17 *Modern Theology* 57, 62–63.

place, enables us to love one another. Those who love another are in turn loved by the other. So Jesus says to love your neighbour means to show similar love, mercy and forgiveness to all individuals without bound, and he commands us to do this in a model after himself. In this sense we are liberated from the letter, legalism and limit of the law, but, as Paul identifies in Galatians 5:13–15, this liberation is for obedience and peace, not selfish striving which leads to destruction:

> For you were called to freedom, brothers. Only do not use your freedom as an opportunity for the flesh, but through love serve one another. For the whole law is fulfilled in one word: 'You shall love your neighbor as yourself.' But if you bite and devour one another, watch out that you are not consumed by one another.

So, through the revelation of Christ, through the law of love, we are liberated from the alienation and antagonism of the secularised (formal, codified, limited) law, so that we may have life and freedom. Paradoxically, we fulfil the law by going beyond it, and establish a truly sacred community of peace.

VI. Fulfilling the Christian Vision of a Peaceful Legal Community

This book has argued that the modern (secular) legal system retains some vestiges of the Christian theology, but these have been distorted and limited, with the result that the secular system of law produces violence. The promotion of the liberal legal subject, with their autonomy and reason, has ultimately failed, for this alienates the members of the universal community in favour of privileging the individual, which leads to violence. However, the alternative vision of the socialist collective alienates the individual in favour of privileging the community, similarly resulting in violence. Consequently, what is required is not simply the positing of a secularised and impotent 'law of love' in the civil legal system, nor merely ad hoc adjustments according to the law of the letter (ie the passing, amending and repealing of legislation or the steady progression of the common law) which are already built on the foundation of the secular, but a complete restoration; a rebuilding on the new foundation of the theological law to love one's neighbour as yourself to reinvigorate the legal system, a law of the spirit which will reconcile the individual and the community, allowing all persons, particular and universal, to exist in a legal ontology of harmony and peace.

This 'new creation' of the law from its very spirit will lead to a peace beyond violence and a law beyond force, for instead the law of love, of selfless sacrifice and the pursuit of peace, will inhere in the interactions of individual persons, constituting a community of peace modelled on the relations between the members of the Tri-Unity, graciously enabled and revealed in Christ. This beautiful relationship of love exchange and receipt between members of a legal community is possible because of the revelation of the Trinity in Christ and his paradoxical work of dying to live—this, in conjunction with the paradoxical need to fulfil law by transcending it in the fashion revealed by Christ, is the move from violence to peace.[138]

However, the aspiration to a fully regenerated legal system in this sense may be too much to ask. After all, there are many questions regarding how we may move from the dominant modern, secular system of law to this kind of community, questions that for now remain unanswered. I am not advocating a Christian theocracy or for a polity governed by something akin to legalistic canon law. Rather, in lieu of a radically regenerated legal community founded upon the law of love, one could settle for an existence within our current legal community which is characterised by the 'fruit of the Spirit': 'love, joy, peace, patience, kindness, goodness, faithfulness, gentleness, self-control'; for 'against such things there is no law'.[139] Perhaps manifesting and displaying this alternative community of love beyond the law, meaning the secular can peacefully coexist, will be enough to persuade people that there is another way to true peace and that it is worth seeking. By revealing this heavenly peace on earth beyond the law, it may be possible to move towards an eschatological, final redemption of law.

Ultimately, it is this vision which Christianity seeks and makes possible—to bring the heavenly peace of community and love to earth in the context of what may effectively become a post-secular system of civil law. This law of love exists in its perfect display within the relations of the Trinity, and is revealed as truth through Christ, who reconciles the eternal and the temporal, rescuing reason from its secular, violent form, and produces an ontology of vertical and horizontal peace between God and humanity. Persuaded by this vision, humanity participates in the glorious divine, implementing the law of the Spirit to love one's neighbour, rather than the law of the letter, thus creating a harmonious community which reflects the heavenly relations.

It is hoped that this indicates that society ought not to yield to an allegedly inevitable ontology of alienation and antagonism, but may instead embrace ontological peace, which loves all individuals in the community and allows the reconciliation of virtue and difference based on the Trinity. It is further hoped that subsequent work will focus on a detailed articulation of redeeming the current secular system of civil law, imbuing it with the law of love as signalled in this chapter. With these developments, the Christian vision of an ontology of peace undergirding human and divine relations can be not only a heavenly vision, but an earthly reality as well.

[138] Milbank, *Being Reconciled*, above n 52, 57.
[139] Galatians 5:22–23.