

‘IT’S NOT JUST COURTESY, IT’S THE LAW’: (NOT) GIVING WAY TO ALIENATION

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ABSTRACT

In Queensland the law generally requires drivers to give way to buses in urban areas. This requirement is depicted on the back of many buses with a diagram including the phrase ‘it’s not just courtesy, it’s the law’. This paper argues the contrast between ‘courtesy’ and ‘law’ assumes a positivist distinction between law and morality. More perniciously, ‘law’ in this context is framed as keeping peace through fear and coercion, or violently alienating members existing in a community. Instead, the paper proposes that law ought not to ground its authority in an ability to produce a spurious peace through violence. Rather, courteous conduct in a broader context of harmonious community can be achieved through the law of love.

I INTRODUCTION

In Queensland the law generally requires drivers to give way to buses in urban areas. As well as being found in transport regulations, this requirement is promulgated through various signs placed on the back of buses for drivers to see. These signs range from simple coloured diagrams with the instruction to ‘give way’ to coloured diagrams accompanied by the caption ‘it’s not just courtesy, it’s the law’. This paper argues the more detailed caption assumes a positivist distinction between law and morality through contrasting ‘courtesy’ with ‘law’ and implying only law contains an enforcement mechanism designed to ensure obedience. More perniciously then, law is framed as a violent instrument which keeps peace and secures ‘courtesy’ through coercion and fear, which alienates members existing in a community. Therefore, in response, the paper proposes that law ought not to ground its authority in violence through fear and coercion, which produces only a spurious and superficial peace. Rather, law should find its authority in the natural law of Christian theology. Hence, this paper supports and draws from my developing body of work which constructs a theological natural law (the law of love in Christianity) to

critique and reform the secular state.¹ Christianity is suitable for the task because Christianity has an ontology of peace rather than violence, demonstrated through Christ's non-violent resistance to coercion and voluntary sacrifice of himself for the sake of others: the law of love, which produces a true peace of harmonious community. Consequently, the courteous conduct of 'giving way' can be achieved not through the ontologically violent coercion of positive law, but through instantiating the Christian virtues of love and humility after the model of Christ as part of the 'law of love'.

Part II of the paper summarises the legislation and details of the give way requirements, before Part III analyses the content and appearance of the sign in detail to indicate its positivist characteristics. Positivism is subsequently outlined in more detail and contrasted with natural law with particular emphasis on the theological elements of natural law. A theological approach to natural law provides the framework for a theological critique of the sign as producing antagonism and alienation in Part IV. Part V outlines the theological alternative of loving neighbour as self, or the law of love, as the framework for implementing the courteous approach of giving way without resorting to inevitable and ontological legal violence or mere duty. Finally, Part VI concludes by reiterating the argument that it is through the transcending function of the law of love that law is actually paradoxically fulfilled to produce a harmonious community

II GIVING WAY TO BUSES IN QUEENSLAND

The requirement to give way to buses in Queensland is contained in s 77 of the *Transport Operations (Road Use Management – Road Rules) Regulation 2009* (Qld), which states:

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¹ See eg Alex Deagon, 'Rendering to Caesar and God: St Paul, the Natural Law Tradition and the Authority of Law' (2014) 13(3) *Law, Culture and the Humanities* 481; Alex Deagon, 'Milbank's Milieu: Theorisations of Truth, Faith and Reason' (2014) 75(1) *International Journal of Philosophy and Theology* 86; Alex Deagon, 'On the Symbiosis of Law and Truth in Christian Theology: Reconciling Universal and Particular through the Pauline Law of Love' (2015) 23(4) *Griffith Law Review* 589; Alex Deagon, *From Violence to Peace: Theology, Law and Community* (Hart Publishing, 2017); Alex Deagon, 'Secularism as a Religion? Questioning the Future of the Secular State' (2017) 8 *Western Australian Jurist* 31; Alex Deagon, 'Liberal Secularism and Religious Freedom in the Public Space: Reforming Political Discourse' (2018) 41(3) *Harvard Journal of Law and Public Policy* 901; Alex Deagon, 'Reconciling John Milbank and Religious Freedom: "Liberalism" through Love' (2019) 34(2) *Journal of Law and Religion* (forthcoming).

- (1) A driver driving on a length of road in a built-up area where the speed limit applying to the driver is not more than 70km/h, in the left lane or left line of traffic, or in a bicycle lane on the far left side of the road, must give way to a bus in front of the driver if—
 - (a) the bus has stopped, or is moving slowly, at the far left side of the road or in a bus-stop bay; and
 - (b) the bus displays a give way to buses sign and the right direction indicator lights of the bus are operating; and
 - (c) the bus is about to enter or proceed in the lane or line of traffic in which the driver is driving.

Maximum penalty—20 penalty units.

- (2) In this section—

left lane, of a road, means—

- (a) the marked lane nearest to the far left side of the road (the first lane) or, if the first lane is a bicycle lane, the marked lane next to the first lane; or
- (b) if there is an obstruction in the first lane (for example, a parked car or roadworks) and the first lane is not a bicycle lane—the marked lane next to the first lane.

left line of traffic, for a road, means the line of traffic nearest to the far left side of the road.²

To summarise the provision, ‘give way’ means to slow down, and if necessary, stop in order to prevent a crash from happening. Subsection 1 provides situations or instances where a driver driving on a length of road in a built-up area is required to give way to a bus in front of them. According to paragraph (a), the driver is required to give way to a bus if the bus has stopped or is moving slowly at the far left side of the road or in a bus-stop bay. Paragraph (b) requires a driver to give way if the bus displays a give way to buses sign and the right direction indicator lights of the bus are operating. Paragraph (c) orders the driver to give way if the bus is about to enter or proceed in the lane or line of traffic in which the driver is driving. In cases of non-compliance, the maximum penalty is 20 penalty units. Importantly, subsection 1 applies only when the driver is driving in an area where the applicable speed limit is not more than 70 km/h and the driver is

² The author acknowledges Ms Shamreeza Riaz (PhD Candidate, QUT) for her invaluable research to gather and summarise the legal resources in this part.

driving in the left lane or left line of traffic or he/she is in a bicycle lane on the far left side of the road. Subsection 2 explains 'left lane' and 'left line of traffic'. 'Left lane' means the marked lane nearest to the far left side of the road. If first lane is a bicycle lane or if there is an obstruction in the first lane, then left lane means the second marked lane on the far left side of the road. 'Left line of traffic' means the line of traffic nearest to the far left side of the road.

The section then provides an example of the 'give way to buses sign' mentioned in subsection (1)(b):



Give way to buses sign

This standard sign, which is a simple coloured diagram with the instruction to 'give way', is not the impugned sign. In 2012 various local governments began rolling out a more substantive sign to reinforce the legislation. This sign is reproduced below:



(Image taken from: <http://busaustralia.com/forum/viewtopic.php?f=5&t=68843>)

The second sign is more substantive. In addition to containing the standard coloured sign with the instruction to ‘give way’, this sign contains the phrase ‘it’s not just courtesy, it’s the law’. It is this phrase, as applied to the legally enforceable instruction to ‘give way’, which is the subject of critique in this paper.

III ‘IT’S THE LAW’: POSITIVISM AND NATURAL LAW IN THE GIVE WAY SIGN

A Analysing the Sign: A Positivist Approach

The phrase ‘it’s not just courtesy, it’s the law’ is expressed using contrasting colours and font size. ‘It’s not just courtesy’ is in a smaller white font against a green background, while ‘it’s the law’ has larger bolded white letters against a red background. The colour green is colloquially associated with freedom and permissibility, while the colour red is colloquially associated with warnings, rules and the prevention of particular conduct. For example, green means ‘go’ and red means ‘stop’ at traffic lights. The striking contrast of the larger ‘it’s the law’ font gives the impression of ‘it’s the law’ dominating or being more important than the smaller ‘it’s not just courtesy’. This juxtaposition of fonts and colours implies that if the instruction is not followed as a matter of courtesy, then it will be enforced as a matter of law. In other words, appealing to mere courtesy or ‘just courtesy’ to ensure people will give way to buses is deemed insufficient; it

must be backed by a threat. 'It's not just courtesy, it's the law' effectively means 'it's not just an optional nice or moral thing to do, it will be enforced by the state'.

The phrase therefore implies a stark distinction between courtesy and law. By contrasting 'just courtesy' with 'law', courtesy is distinguished from law. More significantly, courtesy is a type of civility or morality which, in this context, is distinguished from law. Furthermore, the phrase 'it's not just courtesy' as distinguished from 'it's the law' implies courtesy by itself is insufficient to facilitate obedience to the instruction. Something additional is required and that feature is 'the law'. This further requirement for law finally implies that 'law' is unique in its capacity to enforce obedience. Therefore, from this sign we can derive certain underlying assumptions about the nature of law. First, the requirement to 'give way' is an instruction, and also a law. Second, law is separate from morality. And third, law is unique in its capacity to enforce obedience in the event of noncompliance. These three assumed aspects of law match exactly with the classical positivist understanding of law, and consequently the sign exposes the fundamental theoretical contrast between positivism and natural law.

Classical positivism had its intellectual foundation in the Hobbesian promotion of a system of law as command, which was then expressly and systematically articulated by the eighteenth century legal positivist, John Austin.³ Hobbes stated that 'it is manifest that law in general is not a type of counsel, but a type of command ... it is a command of one to another who has been formerly obliged to obey him'.⁴ In this sense, Hobbes defines law in terms of the command of the sovereign, the entity which obliges subjects to obey.⁵

Austin adopted this idea of law as command backed by an obligation to obey. For Austin, the 'province of jurisprudence' (i.e. the definition of law) is positive law or law that is 'posited by political superiors to political inferiors' (law by position).⁶ In other words, it is a 'rule laid down by an intelligent being having power over him'.⁷ The 'political superior' with power is termed

³ See Alex Deagon, *From Violence to Peace: Theology, Law and Community* (Hart, 2017) 97-102 for the full account.

⁴ Thomas Hobbes, *Leviathan* (Longman, 2008) 183.

⁵ James Boyle, 'Thomas Hobbes and the Invented Tradition of Positivism: Reflections on Language, Power and Essentialism' (1986) 135 *University of Pennsylvania Law Review* 383, 391.

⁶ John Austin, *The Province of Jurisprudence Determined* (Ashgate, 1998) 8-9.

⁷ *Ibid.*

the ‘sovereign’.⁸ So every law, ‘properly so-called’, is a ‘species of command’ issued by the sovereign, which is the entity owed habitual obedience by the majority of the society.⁹ Command is ‘distinguished from wish or desire’ by the fact that the party issuing the command has the ‘power to inflict evil’ or pain in the event that the command is not obeyed, and this ‘evil incurred through disobedience’ is called ‘sanction’, or enforcement of/obligation to obedience.¹⁰ Therefore, law strictly so-called according to Austin may be defined as a command from a sovereign enforced by sanction.

It is consequently straightforward to map this classical positivist understanding of law onto the assumptions undergirding the give way sign which have been explained earlier. The law to ‘give way’ is an instruction provided by the Queensland Parliament which passed the law. This is, in effect, a command by a sovereign as the Parliament (through law) is habitually obeyed by a majority of people. The assumption that law is unique in its capacity to enforce compliance corresponds to Austin’s idea of sanction, which is the power of the sovereign to compel obedience through the threat of pain. Again, it is the Queensland Government as ‘sovereign’ which has this enforcement ability through its executive arm, and particularly the police. Finally, Austin says explicitly that morality, or the ‘laws of God’, are not ‘within the province of jurisprudence’ – which is Austin’s definition of law.¹¹ This is reflected in the sign’s contrast between courtesy and law which implies that courtesy, a moral virtue, is not law, and therefore law is separate from morality.

B *The Contrast with Natural Law*

Conversely, the jurisprudential discipline of natural law tends to address the question of authority and obedience by finding the source of the civil law in a higher, moral law.¹² Thomas Aquinas, a thirteenth century scholastic theologian and the classical proponent of natural law, defines law as ‘a dictate of practical reason emanating from the ruler who governs a perfect community’, and so there is an eternal law or *lex eterna*, which is God’s law and which fulfils these criteria.¹³ Since

⁸ Ibid.

⁹ Ibid 11-12.

¹⁰ Ibid.

¹¹ Ibid 8-9.

¹² See Deagon, *From Violence to Peace*, above n 3, 85-90 for the full account.

¹³ Thomas Aquinas, *Summa Theologica* (William Benton, 1952) vol 2, 208.

the eternal law of God is a subset of the content of the divine intellect and is therefore unchangeable truth, and to some extent people by grace know God and know truth, to this extent they know the eternal law.¹⁴ The 'divine law' or *lex divina* allows people to participate 'more perfectly in the eternal law' through clarifying the eternal law against the limitations of pure human reason, and consists of the true revelation contained in Holy Scripture, the Old and New Testaments of the Bible.¹⁵ Those who do not have this law of revelation nevertheless do by nature (illuminated by grace) those things which are of the law, and so know what is good and what is evil by conscience.¹⁶ This is the 'natural law' or *lex natura*, which humans apprehend through their possessing a 'share of the Eternal Reason', and so they are able to 'participate in the eternal law through reason'; hence, the natural law is 'the rational creature's participation of the eternal law'.¹⁷

Through human reason (enlightened by grace as a subset of the divine reason or *logos*), the precepts of the natural law 'proceed to the more particular determinations', which are called positive or 'human laws'.¹⁸ All human law or *lex humana*, as it accords with right reason, ultimately derives from the eternal law. Hence, if a law deviates from right reason (implying it does not accord with the eternal law of God or immutable truth), it is necessarily unjust, and therefore lacks the necessary quality of law.¹⁹

C *Natural Law as a Theology*

As I have argued elsewhere, following the tradition of Aquinas and sources he uses, there is good reason to think his conception of natural law is fundamentally based in the existence and nature of the God of Christian theology, revealed through the Incarnation of Christ to be the law of love.²⁰ Given Aquinas' particularly heavy reliance on Augustine, it is worthwhile considering

¹⁴ Ibid 216-217.

¹⁵ Ibid 210-211.

¹⁶ Ibid 208-209.

¹⁷ Ibid 209.

¹⁸ Ibid 210.

¹⁹ Ibid 216-218.

²⁰ See Deagon, *From Violence to Peace*, above n 3, 58-62, 85-90 in response to the possible objection that the natural law can be known through pure nature or natural reason. In short, even natural reason is enlightened by grace, and a full understanding of the natural law requires illumination through the Divine law (Scripture or God's revelation). The conclusion that natural law is a kind of theology is also supported by some contemporary interpretations. See e.g. Deagon, *From Violence to Peace*, above n 2, 85-90; Alex Deagon, 'Rendering to Caesar and God: St Paul, the Natural Law Tradition and the Authority of Law' (2014) 13(3) *Law, Culture and the Humanities*

Augustine's own framework for natural law in this context. To begin, Aquinas quotes Augustine as an authority for stating that 'there exists an eternal law', which is 'Supreme Reason' and 'Unchangeable'.²¹ Similarly, Aquinas argues that Augustine 'distinguishes two kinds of law, the one eternal, the other temporal, which he calls human'.²² Humans may access the eternal law through reason, which is sharing in the eternal reason, and this 'participation' is the natural law from which may stem human or positive law.²³ Hence, following Augustine the eternal law is 'imprinted' in our nature by the 'Divine light'.²⁴ Aquinas, further using Augustine, argues that the 'new law is instilled in our hearts', and not written down, but 'inscribed on the hearts of the faithful'.²⁵ This is the law of faith and of the Spirit. This new law is also the law of love, which contains the old law and fulfils it.²⁶ Ultimately then, according to Aquinas and following Augustine, the laws of the state have their justification and authority from the fact that they are part of the eternal and natural law of love given by God.²⁷

Augustine contends that in order to live in peace, a person 'subordinates their primal tendencies to the rational soul'.²⁸ However, 'divine direction' is required to know what to do, and 'divine assistance' is required to obey.²⁹ A person requires grace, in order to apprehend obedience and consequent peace in the context of the everlasting law, and to be 'in subjection to this law for the good of the society'.³⁰ The basis for this is 'two precepts taught by God' – to love God, and to love one's neighbour as themselves. If one follows these, it will result in 'obedience to the law of society' and peace in that society.³¹ For if the law of society is love of neighbour in the power and manner provided by Christ, this society will be characterised by selfless sacrifice, charity and generosity – a harmonious community.

481, 481-484; John Milbank, 'Paul Against Biopolitics' in J Milbank et al (eds), *Paul's New Moment: Continental Philosophy and the Future of Christian Theology* (Brazos Press, 2010) 24, 33-36.

²¹ Aquinas, *Summa Theologica* vol 2, above n 13, 208.

²² Ibid 210.

²³ Ibid 208-210.

²⁴ Ibid 209; C.f. M Crowe, *The Changing Profile of the Natural Law* (Martinus Nijhoff, 1977) 143.

²⁵ Aquinas, *Summa Theologica* vol 2, above n 13, 321.

²⁶ Ibid 326-329.

²⁷ C Anton-Hermann, 'The Fundamental Ideas in St Augustine's Philosophy of Law' (1973) 18 *American Journal of Jurisprudence* 57, 75.

²⁸ Augustine, *Concerning the City of God Against the Pagans* (Penguin, 2008) 873.

²⁹ Ibid.

³⁰ Ibid.

³¹ Ibid.

Therefore, the primary content and principle of the natural law for Augustine, and later for Aquinas, is the law of love, which is to love your neighbour as yourself.³² As such, this paper will argue that a fully theological natural law is the path to a legal community based in peace rather than violence, where the individual and the community are reconciled and interpersonal conflict is resolved through the notion of the law of love. In particular this is applied to the requirement to give way to buses in the sense that people should in fact give way to buses as a function of courtesy (a subset of the law of love) rather than due to fear or coercion (sanction) by law understood in a purely positivist sense. This argument is developed in detail in Part V. For now, the fact that natural law is (or at least can be) intrinsically connected with theology implies a more substantially theological critique of the positivist aspects of the sign is relevant. The paper now turns to this critique.

IV A THEOLOGICAL CRITIQUE OF THE SIGN: LAW AS COERCION AND ALIENATION

It has already been established above that the content and context of the phrase 'it's not just courtesy, it's the law' assumes the inadequacy of courtesy as an incentive to give way to buses, and relies on the threat of 'law' as an enforcement mechanism. These assumptions in turn expose more fundamental ontological assumptions amenable to critique using the theological framework I have developed previously.³³ First, the need for law and the inadequacy of courtesy assumes a framework of atomistic, self-interested individuals with no sense of harmonious being in a community. The primary reason, broadly speaking, that a person would not give way to a bus as a matter of courtesy is because they believe they are more important than the people on the bus and so they need to 'get ahead' rather than 'give way'. Rather than being together as members in a community, which requires patience and self-sacrifice, this framework alienates members as selfish individuals. Put in more explicitly theological language, the framework assumes a secular ontology of violence based on selfish desire rather than a Christian ontology of peace based on the self-sacrifice intrinsic in the law of love.

³² See also Anton-Hermann, above n 27, 72; Crowe, above n 24, 54, 57-58 which situates these claims in the classical context.

³³ See Deagon, *From Violence to Peace*, above n 3, vi-vii, 1. See also Alex Deagon, 'On the Symbiosis of Law and Truth in Christian Theology: Reconciling Universal and Particular through the Pauline Law of Love' (2015) 23(4) *Griffith Law Review* 589, 591-594.

As I have argued extensively in *From Violence to Peace*, this ontology of violence is underscored by the positivist assumption that obedience to law requires law to be backed by sanction or threat. In this sense law is accorded the inherent characteristic of coercion, and is violently imposed on people to enforce obedience. Indeed, the very term ‘positivism’ itself connotes the violent positing of law, a use of force to establish, impose and preserve the law, as well as to compel obedience to it. Integral to Austin’s very definition of law is this notion of sanction for disobedience, namely that obedience by which the legal subject is (en)forced through inflicted evil and pain.³⁴

In his critique of Austin, twentieth century legal theorist HLA Hart (a positivist himself) agrees, arguing that Austin’s law of the sovereign giving coercive orders (commands enforced by sanction) is nothing more than the law of the gunman: ‘A orders B to hand over his money and threatens to shoot him if he does not comply’.³⁵ Not only does this seem to strengthen the contention that Austinian positivism is violent, but for Hart it also demonstrates the failure of Austin to give a proper account of the nature of the legal system as a series of rules producing obligations.³⁶ In particular, Hart states that two types of legal rules exist. The first or primary rules are those rules under which people are required to do or abstain from certain actions. The secondary rules introduce, extinguish and modify primary rules, and determine the nature of their operation. The most important of these is the secondary rule of recognition, which identifies and gives validity to the primary rules of obligation.³⁷ This obligation stems from what Hart terms the internal aspect of rules, where the citizen as part of the society (internal to it) is under some duty or obligation to obey the rule through something like habit or social pressure to conform, as opposed to the external point of view which merely views rules as predictors of human behaviour, with the external observer experiencing none of the obligation to comply.³⁸

However, William MacNeil argues that Hart never really resolves the latent violence in the command theory of Austinian positivism – instead of replacing this violence with rules, Hart displaces the violence to the rule system itself, especially to the rule of recognition.³⁹ MacNeil

³⁴ See Deagon, *From Violence to Peace*, above n 3, 100-102.

³⁵ HLA Hart, *The Concept of Law* (Oxford, 1994) 82.

³⁶ *Ibid* 79-80.

³⁷ *Ibid* 80-81, 100.

³⁸ *Ibid* 86-89.

³⁹ William MacNeil, *Lex Populi* (Stanford, 2007) 44.

also notes Hart's apparent indifference to the violence of law, symptomatic of his anxiety (as a positivist) to avoid invoking moral concepts of the good.⁴⁰ Even Hart's rule of recognition imbibes violence due to its circular nature (the officials recognise the rule that recognises them as officials), for it proclaims certainty when there is only ambiguity, and papers over what Jacques Derrida termed the 'mystical foundation of law' – that on this view, there is no foundation – only coercion.⁴¹ Indeed, it appears that Hart ultimately appeals to law being recognised as that which parliament enacts, which indicates no fundamental difference with Austin's theory.⁴² Although, this is not quite so – MacNeil identifies that there is one problematic difference. Due to the internal aspect of Hart's rule system, the Austinian violence displaced there is no longer external, but internal. In other words, the gunman is now inside your head, so to speak; there is a mental 'shootout' between law and morality. Thus, MacNeil appeals for the return of Austinian positivism and the rejection of Hartian positivism, for at least Austin leaves room for inner thought and reflection, while Hart gives us a violence '(fascism) of the mind'.⁴³

This framework of ontological violence is a secular ontology because Austin explicitly articulated the secularist basis of classical positivism, excluding God from law in that according to him, the 'laws of God' are not 'within the province of jurisprudence'.⁴⁴ But somewhat paradoxically, this violence is integrated with the use of theological language such as 'sovereign' and 'command', for sovereign is an attribute traditionally ascribed to God, as it is (particularly in the voluntarist tradition of Duns Scotus and its culmination in Hobbes) God who is a willing, superior being and has the power to enforce commands through the violent threat of punishments for disobedience.⁴⁵ Austin explicitly admits this much when he notes that God is the ultimate sovereign.⁴⁶ Hence, it seems Austin's theory of law is not only secularised and characterised by violence, but this violence is also linked to a kind of theology.⁴⁷

⁴⁰ Ibid 49-50.

⁴¹ Jacques Derrida, 'Force of Law: 'The Mystical Foundation of Authority'' (Paper presented on *Deconstruction and the Possibility of Justice*, Cardozo Law School, 1989) 10.

⁴² MacNeil, above n 39, 53-54.

⁴³ Ibid 58-60.

⁴⁴ Austin, above n 6, 8-9.

⁴⁵ Deagon, *From Violence to Peace*, above n 3, 99.

⁴⁶ Austin, above n 6, 18-19.

⁴⁷ Deagon, *From Violence to Peace*, above n 3, 10-11.

The paradox is explained by the fact that Austin's classical positivism has its roots in Hobbesian theological assumptions of primitive atomistic violence controlled by excessive sovereignty. In the Hobbesian framework the modern state attempts to sovereignly coerce peace as the mere absence of conflict between individuals. The ultimate power of the state and its monopoly on law to coerce obedience through violence caused Hobbes to characterise his version of the state as correlated to his theology: the state is the 'mortal god... under the immortal god'.⁴⁸ As I have noted elsewhere, the Hobbesian appeal to theology exposes the theo-mythical character of state sovereignty and the theological origin of the positivist, secular state: 'the vesting of absolute power in the state meant there was no longer any need to appeal to the authority of God, giving birth to the modern idea of the secular state and providing the conceptual framework for modern secular positivism'.⁴⁹

Thus secular positivism is actually a violent theology. Similarly, the assumptions undergirding the sign have theological aspects such as an ontologically prior violence or Hobbesian 'war of all against all' where people need to get ahead rather than give way.⁵⁰ According to this view, the only way to prevent people from dominating each other to achieve this is the greater violence of positing or imposing coercive and alienating law. As Milbank observes, this process can never produce genuine obedience as part of harmonious community: 'only an "effective" peace is possible, a "secular" peace of temporarily suspended violence or regulated competition'.⁵¹ Secular positivism really promotes a 'peace' of suspended violence where obedience to law is compelled by either physical or mental force, and tends to inhibit human flourishing by alienating the individual from the community. It establishes a spurious peace based on the suppression of an allegedly prior violence by even greater violence.

So using the schema I devised in *From Violence to Peace*, the sign promotes a secular ontology of violence in that it removes courtesy and higher moral or theological considerations from law (secularisation), draws boundaries between people as 'transgressors' (alienation) and imposes obedience (coercion) under the assumption of purely rational self-interest and atomistic

⁴⁸ Hobbes, above n 4, 116.

⁴⁹ Deagon, *From Violence to Peace*, above n 3, 99.

⁵⁰ Hobbes, above n 4, 86-87.

⁵¹ John Milbank, *Theology and Social Theory: Beyond Secular Reason* (Blackwell, 1990) 336.

individuality (antagonism).⁵² However, since the secular ontology of violence derives from contingent Hobbesian theological assumptions, it is subject to theological development and critique. Consequently the paper finally turns to articulating a theological alternative: a Christian ontology of peace through a theological natural law, and particularly the idea of courtesy facilitating obedience as part of the law of love. In this sense the instruction to 'give way' can be fulfilled without resorting to necessary ontological violence and coercion.

V A THEOLOGICAL NATURAL LAW ALTERNATIVE: 'COURTESY' AND THE LAW OF LOVE

The theological law of love exhorts members of the community to 'love your neighbour as yourself', which is specifically the law of love articulated by the Apostle Paul in the New Testament.⁵³ This fulfils the codified law since 'love does no wrong to a neighbour'.⁵⁴ As a first (and very crude) approximation, law can be understood as a principle or set of principles which govern individual relationships within a community. Love, as modelled by Christ, involves the voluntary sacrifice of oneself for another. So the law of love, to 'love your neighbour as yourself', is the voluntary giving of oneself for another as the principle which governs individual relationships within a community. It consequently encourages love for one's neighbour in terms of humility and sacrifice. Importantly, this is not forced or coerced (for this would necessitate violence), but rather freely volunteered as an imitation of Christ, and its end is to produce a legal community of peace.⁵⁵

This theological notion of peace has its foundation in Augustine, and has been framed more recently by John Milbank. According to Augustine the heavenly peace is unique in that it

...is so truly peaceful that it should be regarded as the only peace deserving the name, at least in respect of the rational creation; for this peace is the perfectly ordered and completely harmonious fellowship in the enjoyment of God, and each other in God. When we arrive at that state of peace, there will be no longer a life that ends in death, but a life that is life in sure and sober truth.⁵⁶

⁵² See Deagon, *From Violence to Peace*, above n 3, 3 where the schema is used.

⁵³ Romans 13:9.

⁵⁴ Romans 13:10.

⁵⁵ See Deagon, *From Violence to Peace*, above n 3, 7-8.

⁵⁶ Augustine, above n 28, 878.

The key here is ‘perfectly ordered and completely harmonious fellowship’ in the enjoyment of God and each other, which leads not to death or violence, but rather to peace and the good. This problem of whether there can be a harmonious human order is central – whether one can assign to their respective tasks and places many different activities, desires, and social formations.

As I have argued elsewhere, theological perspectives are important and appropriate to inform public policy and the framing of law for pursuing the common good in a liberal democracy.⁵⁷ In this sense, my paper here can be considered as offering a general reconsideration of the modern legal system from a theological perspective, framed through the specific issue of ‘giving way’ as a courtesy, which is in turn a function of the law of love. So at the general level, Augustine argues that the eternal city, or the Christian community, possesses the heavenly peace by faith, and ‘lives a life of righteousness based on this faith, having the attainment of that peace in view in every good action it performs in relation to God, and in relation to a neighbour, since the life of a city is inevitably a social life’.⁵⁸ In other words, this ideal heavenly peace is attainable, at least in part, on earth and refers to an ordered harmony in the community of the city, where all citizens contribute and fulfil their role.⁵⁹ In such a community, the individual is not alienated and antagonised, but loved by the community comprised of individuals as a function of the law of love, and performs their designated role as an act of love towards all other individuals comprising the community.

For

... just as the individual righteous man lives on the basis of faith which is active in love, so the association, or people, of righteous men lives on the same basis of faith, active in love, the love with which a man loves God as God ought to be loved, and loves his neighbour as himself. But where this justice does not exist... there is no commonwealth.⁶⁰

Augustine in fact concludes that without the 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, for Augustine, not only is the theological law of love the most desirable

⁵⁷ See Alex Deagon, ‘Liberal Secularism and Religious Freedom in the Public Space: Reforming Political Discourse’ (2018) 41(3) *Harvard Journal of Law and Public Policy* 901-934.

⁵⁸ Augustine, above n 28, 878-879.

⁵⁹ *Ibid* 876.

⁶⁰ *Ibid* 890.

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 make peace, and it is rendered inherently violent in its attempt to keep violence at bay.

This exposes the radical contrast between Hobbesian assumptions of primitive atomistic violence controlled by excessive sovereignty, and the loving and peaceful Christian community. As mentioned previously the modern state attempts to sovereignly coerce peace as the mere absence of conflict between individuals, but the framework of the *ecclesia* 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.⁶¹ Rather than the state establishing a spurious peace based on the suppression of an allegedly prior violence, the church as a community instantiates harmony through the law of love and peaceful persuasion.

More specifically in the context of courtesy as a framework for giving way to buses, the 'law of love' approach seeks to create a harmonious space where a person allows the bus to go ahead because they love their neighbour, rather than letting it go ahead because of external imposition or threat by law. Charity (love) or 'doing good' requires going beyond boundaries or precedents, something 'creative'.⁶² 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'.⁶³ In particular, we need to go beyond mere legal duty (for example, to just give way because we must for the purpose of avoiding legal punishment) and selfish interest (the aggressive pursuit of our own agenda without due consideration for others, or the prideful need to be seen as more important), desiring to truly act with humility, patience, love and sacrifice just like Christ did in humbling himself to death on a cross for our forgiveness:

Do nothing from selfish ambition or conceit, but in humility count others more significant than yourselves. Let each of you look not only to his own interests, but also to the interests of others. Have this mind among yourselves, which is yours in Christ Jesus, who, though he was in

⁶¹ James K A Smith, *Introducing Radical Orthodoxy: Mapping a Post-Secular Theology* (Baker, 2004) 236-237.

⁶² John Milbank, *The Word Made Strange: Theology, Language, Culture* (Blackwell, 1997) 134.

⁶³ *Ibid.* See Deagon, *From Violence to Peace*, above n 3, 188-193.

the form of God, did not count equality with God a thing to be grasped, but emptied himself, by taking the form of a servant, being born in the likeness of men. And being found in human form, he humbled himself by becoming obedient to the point of death, even death on a cross.⁶⁴

In this practical sense courtesy as love of neighbour means displaying humility by considering the driver and passengers in the bus as more important and significant than yourself, displaying patience and kindness by correspondingly giving way to them, and engaging in self-sacrificial action by graciously accepting the inconvenience that will result from you giving way to them. In this sense love of neighbour eschews ‘anger, wrath, [and] malice’ and pursues ‘kindness, humility, meekness and patience’ with honesty, forbearance and compassion.⁶⁵ This approach after the model of Christ will produce a harmonious community where people graciously sacrifice themselves for others in accordance with the law of love.

Importantly, this harmonious community is implemented not through legal coercion but through persuasive persuasion, or *faith-as-pistis*. In this sense the Apostle Paul promotes a polity governed by faith or trust, persuasion by *aletheia* or the divine revelation of truth. He also stresses that this rule of trust constitutes a more fundamental mode of eternal law, situating this framework in the context of a theological natural law.⁶⁶ Such trust is a ‘vertical’ trust that God is just to an eminent and infinite extent that we cannot begin to fathom and a trust that this justice will eventually triumph so that a harmony of peace and order will embrace humanity.⁶⁷ It is also a ‘horizontal’ trust and mutual dependence between each member of the community, which provides a structure for harmonious existence and the embrace of self-sacrifice without assimilation or alienation. Milbank reasons:

It may appear that trust is weak recourse compared to the guarantees provided by law, courts, political constitutions, checks and balances, and so forth. However, since all these processes are administered by human beings capable of treachery, a suspension of distrust, along with the positive working of tacit bonds of association, is the only real source of reliable solidarity for a community. Hence to trust, to depend on others, is in reality the only reliable way in which the

⁶⁴ See Philippians 2:3-8.

⁶⁵ See Colossians 3:8-9, 12-13.

⁶⁶ John Milbank, ‘Paul Against Biopolitics’ in J Milbank et al (eds), *Paul’s New Moment: Continental Philosophy and the Future of Christian Theology* (Brazos Press, 2010) 49-50.

⁶⁷ *Ibid* 53.

individual can extend his or her own power... the legitimate reach of one's own capacities, and also the only reliable way to attain a collective strength.⁶⁸

The proposal for sacrifice, trust and humility to characterise giving way to buses, or social interactions in general, might be viewed as problematic due to the unscrupulous. What if people selfishly take advantage of the humility and sacrifice offered? Paradoxically obvious yet strange, the Christian answer is located in the crucifixion of Christ, who voluntarily allowed himself to be taken advantage of as part of his act of sacrifice.⁶⁹ 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.⁷⁰

So truth is most effectively revealed and people most ably persuaded by what attracts, namely Christ's refusal of violence which draws people to the peace of Christianity. Jesus himself said 'when I am lifted up 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'.⁷¹ There is something irresistible (in the sense of peaceful persuasion) about the steadfast maintenance of humility, love, trust and sacrifice even in the midst of the most horrific mistreatment. Jesus cried out 'Father, forgive them! For they know not what they do'; he called upon the Father to forgive the ones who were at that moment crucifying him.⁷² The answer to the question posed is, therefore, indicative of the radical and paradoxical nature of Christianity. The Christian response to people taking advantage of humility, sacrifice, trust and forgiveness is to continue offering that humility, sacrifice, trust and forgiveness as the concretely instantiated revelation of Christ, the truth. As people see this truth revealed, their minds are transformed and they are peacefully persuaded to do likewise. More

⁶⁸ Ibid.

⁶⁹ See Deagon, *From Violence to Peace*, above n 3, 127-132.

⁷⁰ Milbank, *Word Made Strange*, above n 62, 250.

⁷¹ John 12:32-33.

⁷² Luke 23:34.

particularly, as people see the communal solidarity which results from a law of love approach, they will be persuaded to give way themselves without the requirement for legal coercion.

Here resides the desirability of the Christian natural law approach: the law of love reveals the nature of Christ and peacefully persuades individuals in a community to act in accordance with it, hence in Christianity truth persuades to the good without coercion. 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.⁷³ 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 space where people sacrificially give way for others.⁷⁴

It might be objected that this framing of Christian natural law fails to take proper account of Romans 13:1-7, which proceeds as follows:

Let every person be subject to the governing authorities. For there is no authority except from God, and those that exist have been instituted by God. ² Therefore whoever resists the authorities resists what God has appointed, and those who resist will incur judgment. ³ For rulers are not a terror to good conduct, but to bad. Would you have no fear of the one who is in authority? Then do what is good, and you will receive his approval, ⁴ for he is God's servant for your good. But if you do wrong, be afraid, for he does not bear the sword in vain. For he is the servant of God, an avenger who carries out God's wrath on the wrongdoer. ⁵ Therefore one must be in subjection, not only to avoid God's wrath but also for the sake of conscience. ⁶ For because of this you also pay taxes, for the authorities are ministers of God, attending to this very thing. ⁷ Pay to all what is owed to them: taxes to whom taxes are owed, revenue to whom revenue is owed, respect to whom respect is owed, honor to whom honor is owed.

It seems inescapable that, at the very least, Paul is invoking some kind of threat of physical violence ('judgment', 'bearing the sword') to justify obedience ('good conduct') to the civil authorities. In this context obedience to the good is effectively coerced by the state through

⁷³ Milbank, *Word Made Strange*, above n 62, 251.

⁷⁴ Deagon, *From Violence to Peace*, above n 3, 183.

violence, which is problematic in light of the preceding argument that a Christian approach persuades to the good without coercion and violence. A further and related problem is how my proposal in this paper works practically. Given we live in a fallen world, is it really possible to persuade people to the good without coercion? Bearing in mind Romans 13:1-7, is it not the case that sanction and threat of enforcement are necessary to secure the good sought through obedience to the law from a Christian perspective? I have engaged with these problems in previous work without clearly explaining how they might be resolved together and reconciled with the main argument articulated above.⁷⁵ This paper provides an opportunity to do that.

As I have noted in previous work, interpretation of Romans 13:1-7 must be contextualised by Romans 13:8-10:

Owe no one anything, except to love each other, for the one who loves another has fulfilled the law. For the commandments, "You shall not commit adultery, You shall not murder, You shall not steal, You shall not covet," and any other commandment, are summed up in this word: "You shall love your neighbor as yourself." Love does no wrong to a neighbor; therefore love is the fulfilling of the law.

In *Rendering to Caesar and God*, I advanced three propositions in this respect.⁷⁶ First, 'Paul uses the law of love as the foundation for obeying the civil law in Romans 13.'⁷⁷ In verse 7 Paul states that all which is owed should be paid, including taxes, revenue, respect and honour. It does not seem a stretch to say this includes (or perhaps comprises) obedience. But then in verse 8 Paul paradoxically states to owe no one anything except love! He explains the paradox with the proposal that love fulfils (obeys) the law, and expands on this in verses 9 and 10. It follows that obedience to the law of the civil authorities 'has its basis in the law of love'.⁷⁸

Second, in verses 1-2 'obedience of the civil law is premised on the fact that the civil law is ultimately instituted by God, so that disobeying the civil law is equivalent to disobeying God'.⁷⁹ As Jesus articulated in Luke 10:25-37 and John 14:15, full obedience to the law by the law of

⁷⁵ See Deagon, 'Rendering to Caesar and God', above n 20, 490-493, 499-502; Deagon, *From Violence to Peace*, above n 3, 141-142, 176-177, 180-181, 185-187.

⁷⁶ See also Deagon, *From Violence to Peace*, above n 3, 141-142.

⁷⁷ Deagon, 'Rendering to Caesar and God', above n 20, 490-491.

⁷⁸ Ibid.

⁷⁹ Ibid.

love necessarily includes love of God Himself in conjunction with love of neighbour, and love is a precondition of obedience. Therefore, if obedience to the civil law is equivalent to obeying God, and love is a precondition of obedience, it follows that the law of love produces obedience to God and the civil law. Finally, and it is worth quoting the third proposition in full:

The law of love is the contextual precondition of obedience to the civil authorities in the passage immediately preceding Romans 13:1–10. In Romans 12:17–21, Paul states that one should not repay evil for evil, but overcome evil with good, doing good to one’s enemies and loving them. This is the essence of the law of love, and its most extreme application – in the context of the law of love, Christ in Luke 10:25–37 explains in the Parable of the Good Samaritan that one’s neighbor can be even their most bitter enemy. Thus, to avenge one’s enemy is contrary to the law of love, and so Paul implies that instead of taking personal revenge, one should be subject to the civil authorities. Since the law of love is Paul’s argument for not taking personal revenge, it follows that the law of love is the foundation for the fulfilling of the civil law in Romans 13.⁸⁰

So the conclusion is that the law of love is the foundation for coerced obedience to the civil authorities in Romans 13. However, this still does not resolve the question of how persuasion to the good without violence can be reconciled with coercion to the good using violence, with the law of love as the foundation. The question can again be resolved through integrating some of my previous work. In *From Violence to Peace*, I consider contexts where some kind of violence may be appropriate yet compatible with ontological peace grounded by the law of love. Violence may be ‘allowed’ to ‘facilitate educational redemption and ultimate peace’.⁸¹ In a fallen world where there are some recalcitrant individuals, ‘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’.⁸² A resolute pacifism or refusal to (violently) intervene to stop violence may result in even greater violence. Just as Christ volunteered to allow violence for a redemptive purpose in his crucifixion, so the reality of evil in the world necessitates a ‘redeeming violence’ in the pursuit of final, perfect peace.⁸³ Yet this violence is not the ‘unrestrained and evil’ violence which presupposes conflict as an ontological and inevitable necessity and ‘detracts from the good’, but violence ‘that is gift or strengthening’ and which

⁸⁰ Ibid.

⁸¹ Deagon, *From Violence to Peace*, above n 3, 176.

⁸² Ibid 185.

⁸³ Ibid 185-186.

'communicates some substantive good'.⁸⁴ The existence of evil means our scenario is 'apocalyptic' rather than 'utopian', and 'we may require violence to bring the ultimate good of repentance, redemption and reconciliation'.⁸⁵

Thus, the solution is to view the violence described in Romans 13:1-7 as a 'redeeming violence' necessary to bring about the substantive good of obedience to the law as a function of the law of love. The law of love is the foundation of obedience to the law in the context of pursuing ontological peace. Instantiating the law of love fulfils the law by persuasion to the good. However, in a fallen world where evil exists, redeeming violence may be necessary on the path to achieving the good and perfect peace, on the condition that this violence is recognised as redemptive and contingent. This approach also addresses the problem of practical application. The law of love persuades to the good without coercion, but where ultimate good and perfect peace is endangered 'persuasion' in the form of redeeming violence may be necessary. This is distinct from violent coercion through secular law which assumes the primacy of ontological violence, but instead can be viewed as another kind of loving persuasion with obedience and final redemption as the goal. For example, rather than 'it's not just courtesy, it's the law', a sign might ask whether failing to give way is loving. The fundamental appeal is to love rather than violence.

As such this Christian perspective produces a space for a harmonious 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'.⁸⁶ These Christian virtues are beyond law and yet fulfil the law by their nature. Again, we see this through the Apostle Paul's exposition of the law of love in Romans 13:8-10. Paul demonstrates that the law of love provides the content which can ultimately inform a harmonious legal community. 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 and steal and the like 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 maxim to love your neighbour as yourself can plausibly provide the content of 'doing no wrong to a neighbour' from which a harmonious legal community can be created.

⁸⁴ Ibid 180-181.

⁸⁵ Ibid 181.

⁸⁶ Galatians 5:22-23.

Christianity therefore abides the desirability of peace without the violence of coercion.⁸⁷ Manifesting this alternative framework for giving way, governed by love beyond mere legal requirements, will persuade people there is another way to true peace and it is desirable.⁸⁸

This ‘new creation’ of the law from its very spirit leads 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. It seems that the argument of the Apostle Paul in Romans 13:8-10 that the law of love fulfils the law since love does no wrong to a neighbour can plausibly be extended to all areas of law, such that a Christian theology of peace can be translated into a legal ontology of peace.

VI CONCLUSION: ‘IT’S NOT JUST LAW, IT’S THE LAW OF LOVE’

This paper argued the phrase ‘it’s not just courtesy, it’s the law’ establishes a secular ontology of violence under the auspices of classical positivism in three ways. First, the stark distinction between courtesy and law implements the classic positivist separation of law and morality, and in particular the secular separation of law from theology. Second, the phrase assumes courtesy is insufficient to facilitate obedience to the ‘give way’ instruction, which assumes a primitive, violent existence of clashing atomistic individuals selfishly desiring to get ahead rather than give way. Third, and consequently, the phrase effectively gives law the function of enforcing obedience through violence and coercion. In fact there is at least one further related point which supports the argument. Merely requiring obedience to law in the form of secular rules or commands posited by a sovereign authority inevitably results in transgression, for then the law requires a standard that can never be attained by natural means. A law categorising people as selfish atomistic individuals requiring coercion to do what ought to be done as a matter of courtesy invites transgression by articulating itself in terms of formal boundaries which alienate; in other words, such a law is intrinsically violent. I have identified this in other work as the problem of juridification.⁸⁹

⁸⁷ Deagon, *From Violence to Peace*, above n 3, 194. See also John Milbank, *Beyond Secular Order: The Representation of Being and the Representation of the People* (Blackwell, 2013) 228-236.

⁸⁸ Deagon, *From Violence to Peace*, above n 3, 194.

⁸⁹ See Deagon, *From Violence to Peace*, above n 3, 187; Deagon, *On the Symbiosis of Law and Truth*, above n 33, 608-609; Deagon, *Rendering to Caesar and God*, above n 20.

So 'just' or 'mere' law invites transgression and therefore violence. To (mis)quote Genesis 2:18, it is not good for law to be alone. This paper has argued that a better alternative is a Christian theological natural law, or a law informed by and imbued with theological richness: specifically, the 'law of love'. The law of love produces obedience not fundamentally through coercion, but through peaceful persuasion. Redeeming violence may be needed but it is not ultimate or inevitable. In particular the law of love paradoxically fulfils the law by transcending the law through the practice of Christian virtues such as humility, patience and self-sacrifice. This instantiates a Christian ontology of peace, or a more fundamentally harmonious mode of existence involving relational solidarity in community. Hence there is no need to give way to alienation, coercion and violence imposed by law. By courteously giving way to others as a function of the law of love, we can to some extent make the heavenly aspiration of perfect peace expressed by Augustine part of our earthly reality for the good of our community.