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**A TREATISE OF LEGAL PHILOSOPHY  
AND GENERAL JURISPRUDENCE**

Editor-in-Chief: Enrico Pattaro

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Volume 10

**The Philosophers' Philosophy  
of Law from the Seventeenth  
Century to Our Days**

by  
Patrick Riley

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 Springer

A Treatise of Legal Philosophy and General Jurisprudence

Volume 9

A History of the Philosophy of Law in the Civil Law World, 1600–1900

# A Treatise of Legal Philosophy and General Jurisprudence

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A Treatise of Legal Philosophy and General Jurisprudence

Volume 9

A History of the Philosophy of Law  
in the Civil Law World, 1600–1900

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BERNARDO SORDI is professor of history of law at the Florence University School of Law, where he directs the Centre for the History of Modern Legal

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## GENERAL EDITOR'S PREFACE TO VOLUMES 9 AND 10 OF THE TREATISE

I am happy to present here the third batch of volumes for the *Treatise* project: This is the batch consisting of Volumes 9 and 10, namely, *A History of the Philosophy of Law in the Civil Law World, 1600–1900*, edited by Damiano Canale, Paolo Grossi, and Hasso Hofmann, and *The Philosophers' Philosophy of Law from the Seventeenth Century to Our Days*, by Patrick Riley. Three volumes will follow: Two are devoted to the philosophy of law in the 20th century, and the third one will be the index for the entire *Treatise*, which will therefore ultimately comprise thirteen volumes.<sup>1</sup>

This Volume 9 runs parallel to Volume 8, *A History of the Philosophy of Law in the Common Law World, 1600–1900*, by Michael Lobban, published in 2007.

Volume 10, for its part, takes up where Volume 6 left off: which appeared under the title *A History of the Philosophy of Law from the Ancient Greeks to the Scholastics* (edited by Fred Miller Jr. in association with Carrie-Ann Biondi, likewise published in 2007), and which is mainly a history of the philosophers' philosophy of law (let us refer to this philosophy as A).

In this Volume 9, the reader will find some chapters (Chapters 2 and 6, for example) mainly devoted to the jurists' philosophy of law (let us refer to this philosophy as B), and some chapters (Chapters 1 and 3, for example) mainly devoted to the legal philosophers' philosophy of law (let us refer to this latter philosophy as C). Volume 10 is expressly devoted, in the title itself, to philosophy A.

Of course, these rubrics—A, B, and C—only express broad categories with respect to all historical volumes, and carry a good number of simplifications. But the volume editors, in their respective prefaces, have specified how and where their volumes each relate to these rubrics.

For the reader's convenience, and by way of clarifying what was just briefly mentioned, I should recall here a few observations already premissed to Volumes 1 and 6. Thus, among the distinctions that from the outset served as guiding principles in planning out the *Treatise* project was the distinction between philosophy A and B. However, we thought it appropriate to introduce as well C, which may be considered the philosophy of law par excellence. Prior to the modern era there was no distinct discipline that could be called

<sup>1</sup> The first batch consists of the first five volumes of the *Treatise* (2005), and together they make up a theoretical treatment of the philosophy of law. The second batch consists of the first three historical volumes of the *Treatise* (Volumes 6, 7, and 8). On the *Treatise*'s overall framework, see the General Editor's prefaces in Volume 1, xix–xxx, and Volume 6, xv–xviii.



“philosophy of law,” and it was only in the modern age that scholars began to view themselves as philosophers of law.

The philosophy of law of the modern rationalistic natural-law school was the first classic instance of C. Now, there are of course theoretical differences that distinguish the legal philosophers in the natural-law school from one another, but then they all laid at the foundation of their doctrines a series of speculative questions from which they derived systems of ethics *ordine geometrico demonstrata* (Benedict de Spinoza, 1632–1677) or systems of natural law *methodo scientifica pertractatum* (Christian Wolff, 1670–1754). In other words, citing the title of a work by Wilhelm Leibniz (1646–1716), one of the fundamental aspects characterising the rationalistic natural-law school is a *nova methodus discendae docendaeque jurisprudentiae*, a new method for learning and teaching legal science, a method that leads to a systematic construction or reconstruction of law.<sup>2</sup> The rationalistic natural-law school—traditionally made to begin with Grotius (1583–1645)—developed in the 17th century, and in 18th it received its typical Enlightenment form.

The second classic instance of philosophy C in the history of legal thinking was German legal positivism, which at the end of the 19th century proclaimed the end of C as embodied in the rationalistic natural-law conceptions and replaced it, ironically, with the *Allgemeine Rechtslehre*, that is, with the general doctrine, or theory, of law.

Hence, from the 17th to the 19th century, philosophy C developed two rival orientations, and took two different names, natural-law school and legal positivism, but did so, however, following a formalistic path and taking as well a strong systematic approach. German formalistic and systematic legal positivism reached its most refined version in the 20th century, with Hans Kelsen (1881–1973), who gave us a very sophisticated representation of the legal system—a glorious and fragile representation of *das Recht* (“what is right”) *als Rechtsordnung* (“as a system of what is right”) that had the strengths and the weaknesses of a daring cathedral of crystal.<sup>3</sup>

<sup>2</sup> “The *Nova methodus* is aimed at reducing law to systematic unity, this by giving legal material an order that ascends to simple principles from which to obtain exceptionless rules. This material is, again, Roman law [it is so in Leibniz’s *Nova methodus*, but not with any of the other exponents of the new natural-law theory], the law which at that time [when Leibniz was writing] was in force in Germany as the *ius commune*, but a *ius commune* reordered on the basis of a new method, a method using which the law can be rationalized and hence endowed with the unity which in the Justinianian system it lacked. The system Leibniz envisioned and put forward must be such that, as a complete whole, it provides a solution for each question, and must do so through precise arguments expressed in a rigorous language, on the model of logical-mathematical procedure” (Fassò 2001, 189; my translation; cf. also *ibid.*, 186).

<sup>3</sup> On these questions, see Volume 1 of this *Treatise*. In the second half of the 20th century, Kelsen’s formalistic legal positivism spread not only in civil-law countries (even outside of Europe: in Latin America, for example), but also, in some measure, in common-law countries, this on account of the influence that Kelsen’s work and thought had beginning from the time of

By way of a summary, Volumes 6 and 7 bring out the twofold distinction between philosophies A and B. The two volumes are thus roughly parallel as to their chronology and complementary as to their subject matter.

In the two volumes being presented here (Volumes 9 and 10), as well as in Volume 8—covering among them the period from the 17th to the 20th century—the underlying distinction is instead the threefold distinction introduced above between A, B, and C. These three philosophies of law are treated in different ways and with different emphases in these volumes, albeit not always in explicit distinction from one another, the reason being that the distinction was meant to be a principle for each volume editor to interpret freely, according to his understanding of the purposes and contents of his volume.<sup>4</sup>

I am grateful to and pleased to thank the many people who, in different roles, have had a part in bringing out Volumes 9 and 10. Of course, the credit for the specific content, as well as a warm thanks, goes in the first place to the authors and volume editors: Damiano Canale, Paolo Grossi, Hasso Hofmann, and the various contributors to Volume 9; and Patrick Riley, for Volume 10.

Further, I should thank Gerald Postema, who as a member of *Treatise's* advisory board played a fundamental role by contributing with ideas, advice, and oversight; and also Nino Rotolo, assistant editor of the entire *Treatise*, for coordinating the work that made these two volumes possible: Had it not been for his generous and passionate commitment, the two volumes would not have come to light. And I should finally thank Corrado Roversi, who helped me manage relations with authors, editors, and the publisher, and who has had an active part, along with Nino Rotolo, in the academic discussions devoted to improving the way in which to organize the subjects treated.

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his emigration to the United States. Of course, as is well known, there is a native and very important empiricist legal positivism in Anglophone countries that traces back at least to Hobbes and was then developed in the so-called analytical jurisprudence, whose fathers are Jeremy Bentham (1748–1832) and John Austin (1790–1859).

<sup>4</sup> Thus, Volume 8 is a history of the philosophy of law in common-law countries from the 17th to the 19th century and, as is observed by its author, Michael Lobban, it is “primarily concerned with jurists’ and legal philosophers’ understandings of law, rather than with those of philosophers.” Volume 9, as has already been observed, is mainly a history of the jurists’ and the legal philosophers’ philosophy of law from the 17th to the 19th century in civil-law countries. And Volume 10, even though it is in the first instance an ideal continuation of Volume 6, and hence a history of the *philosophers’* philosophy of law from the 17th to the 20th century, also discusses, for reasons rightly pointed out by Patrick Riley, some thinkers, such as Grotius and Pufendorf, whose philosophy of law might properly be described as a *legal* philosopher’s philosophy of law.

## PREFACE TO VOLUME 9

This volume is devoted to the understandings of law developed from the mid-17th century to the end of the 19th century by jurists and legal philosophers working in the *civil-law* tradition.<sup>1</sup> This makes the volume complementary to Michael Lobban's Volume 8 of this *Treatise*, where the same subject matter and the same period are covered, but from a *common-law* perspective instead.

This peculiar combination of subject matter and period has made it necessary for us as volume editors to make certain choices in treating the civil-law tradition: These choices concern the volume's overall design as well as the framing of its single chapters.

Which is to say that the thinkers and schools of thought covered are not arranged along a strictly chronological line of development, nor is there an attempt to show how different thinkers and schools of thought have offered different solutions to the same basic questions, concerning the nature, the distinctive traits, and the function of law, since that would not have made it possible to bring out how complex the development was that legal thought went through during the arc of time in question: Such a development cannot be reduced to a linear sequence of theories and ideas, for it is instead broken up by significant discontinuities. One need only recall here, by way of example, how an understanding of law still tied to the late-medieval world eclipsed during this period, making it possible for modern legal science to progressively take hold; or how the institutions of the Ancien Régime fell apart and the modern state became fully established politically as well as administratively; or how legal pluralism survived in Europe until the end of the 18th century, when legal monism came into being with the 19th-century codifications. This makes it necessary—as we take into view the jurists' and legal philosophers' understandings of law in the historical period in question—to speak of different *epochs* of development rather than of different stages within the same epoch.

Add to this that the discontinuities just mentioned were marked by different characteristics, came to pass at different times, and had entirely different consequences depending on which levels legal discourse, which areas of cultural influence, and which parts of the legal system we are considering.

Let us take a few examples to briefly consider, in the first place, what this means with respect to the different levels of legal discourse. There was the discourse of the practical jurists on the one hand and that of the theoretical ones on the other. And it can be observed in this regard that, while the jurists'

<sup>1</sup> On the distinction between the jurists' and legal philosophers' philosophy of law, see the general editor's prefaces to this volume and to Volumes 1 and 6 of this *Treatise*.

*practical* discourse offered an important basis of continuity for Europe's legal culture—so much so as to make it look for a long time as though this culture was immune from the social and political upheavals the Continent went through in the 18th and 19th centuries—those among the *theoretical* jurists who were sensitive to the calls for change and emancipation that marked this historical period played a prominent role in the effort to set on a new foundation the science of law and the government of society. These theoretical jurists not only left an indelible mark in the history of European legal thought but also helped modify the institutional context in which the practical jurists worked, and in this way the theoretical discourse undertaken by some jurists acted to indirectly influence the practical activity of the others.

And let us consider, in the second place, how the different branches of the law, in their historical development, came under the influence of the principles of natural law: These principles were in the first place received and assimilated into doctrines of public and criminal law as well as into administrative science over the course of the 17th and 18th centuries, apparently not encroaching upon the basic concepts of civil law, or of business law, admiralty, and so on; but at the same time, this assimilation changed the structure and function of the legal system as a whole, and did so as well with respect to the different branches and areas of the law. The 19th-century bourgeois person (the person recognized by law as a subject of rights and duties) developed in this sense out of a series of transformations affecting the way all the areas of the law in the period in question were understood overall. These very transformations, however, eventually brought on the crisis of legal science itself, which in the following century would take some radical and unexpected turns.

It was thus by reasoning on multiple levels of discourse, as well as on different normative planes and in different areas of practical interest, that the jurists and the legal philosophers of the modern age came at their understandings of the law—and it is in order to reflect this multiplicity that we have seen fit to organize this volume on the basis of a thematic criterion. What is offered here is not a history of legal philosophers or of legal theories but a history of the basic legal concepts and of the disciplines that systematized them in a set form in the legal thought of Continental Europe.

With this method that we have chosen come at least three cautions for the reader:

(1) The authors treated and their works will be considered not only for the original ways in which they offer to solve traditional problems in the philosophy of law but also, and in the first place, for their contribution in framing these very problems, in understanding the social phenomena out of which they originated, and in founding the disciplines that made it possible to impart an organic unity to such an understanding. The same goes for the phi-

losophers properly so called, such as Leibniz, Pufendorf, Kant, and Hegel: It is in other volumes of this *Treatise* that their thought is presented, and so in this volume they will be taken up mainly for the influence they exerted on the science and practice of law.

(2) The volume's different chapters may have some historical overlap in their discussion of different themes and topics. The historical development of European constitutionalism, for example, stretches across the entire time span covered by this volume, and for this reason it crosses paths with the topics treated in the other chapters, and yet it carries a conceptual identity of its own that warrants a discussion apart in a dedicated chapter. And so it is that each chapter in the volume rounds out the discussion undertaken in the others before it as well as in the ones that follow.

(3) Each topic and issue will primarily be addressed by reference to the geographic area out of which it originated, with only a cursory treatment of the way in which the related concepts and ideas spread across other territories. Then too, reference is made in some chapters to the common-law tradition, since it proved necessary to point out its ongoing cultural exchange with the civil-law tradition in the historical period in question. (The reader is referred to Volume 8 of the *Treatise* for an exhaustive discussion of these cross-connections.)

Having said that, here is a run-through of the themes and topics treated in this volume. The first two chapters discuss the way the scientific method elaborated and firmed up by modern natural-law theory was received into European legal science in the period leading to the French Revolution, with Chapter 1 focusing on the Germanic area, where the universities acted as the main conduit for this reception, and Chapter 2 focusing instead on the French area, where a decisive role was played by the legal practitioners.

Chapter 3 is devoted to that fervent crucible of conceptual production that was the European legal Enlightenment, and to the reverberations this movement had on the culture as well as on the politics of law.

Chapter 4 discusses the codification of law, describing in what ways and in what degree codification shaped the structure of Europe's legal systems and the organization of its society through law.

Chapter 5 traces out the development of German legal science through the crisis of modern natural-law theory and the birth of the great European codes, considering in particular the birth of the Historical School of law and its later development with Puchta.

Chapter 6 reconstructs the birth and evolution of the modern science of administration, which played a central role in helping the institutions of the modern state become woven into the social and economic fabric.

Chapter 7 is dedicated to the history of European constitutionalism, as previously mentioned.

Chapter 8 discusses the crisis of conceptual jurisprudence, the voluntarist and vitalistic conceptions this crisis led to, and the birth of neo-idealist movements in the late 19th and early 20th centuries. The discussion turns in conclusion to the judgment the young Gustav Radbruch had of the jurists' and the legal philosophers' understandings of law in the period covered in this volume: It is a judgment that offers in retrospect great insight on this historical period, at the same time as it sets up some central issues the philosophy of law would be taken up with in the 20th century.

It must be recognized, by way of a conclusion to these introductory remarks, that this entire volume is the outcome of a unitary project, the outcome of a discussion that has engaged, in addition to the volume's editors and authors, Enrico Pattaro, Gerald J. Postema, Patrick Riley, Antonino Rotolo, and Corrado Roversi: A special word of thanks goes to them for contributing ideas and insights that have been essential in writing this volume, as has the effort they have expended in coordinating the entire work. Also, as much as the volume may be cast in the mould of a unitary plan, the contributors have each investigated their subjects on their own, each bringing to bear their own historiographical sensibility and each working in a distinctive style of research and presentation. We believe these many voices afford in combination a broad and rich perspective on a historical period that crucially shaped the course of European history, in an equal degree as it presented a multitude of facets evincing a complexity much deeper than we might otherwise be able to appreciate.

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## Chapter 1

# SCIENTIA IURIS AND IUS NATURAE: THE JURISPRUDENCE OF THE HOLY ROMAN EMPIRE IN THE SEVENTEENTH AND EIGHTEENTH CENTURIES

*by Merio Scattola*

### 1.1. Introductory Remarks

A history of legal philosophy in the territories of the Holy Roman Empire in the seventeenth and eighteenth centuries can begin with three general statements.

“Natural law was the first modern philosophy of law.” The idea that the whole complex of the laws in a country should derive from one principle, that it should build a coherent system, that it should be organized into a deductive connection, that we can go from a superior point to an inferior one by means of a single uninterrupted inference—this had all been a main concern of natural law since the late seventeenth century. Of course, principles of law and system were not new, but the idea that law should adopt the structure of a theory was a product of the late seventeenth century and could be developed only on the basis of a Cartesian methodology.

“The first philosophy of law could only be modern.” Natural law was a philosophy of law because it reduced the whole complex of rules directing outward human behaviour under a systematic structure. Natural law was therefore a concept, or a conceptualized law, and had a theoretical essence. It was a rule that was made of thought and derived its validity, its ability to oblige people to act in a certain way, from the fact that it was consistent with itself and with its premises. Thenceforth, natural law had to be “essentially” systematic, since law can be a logical construct only within a strictly deductive framework.

“Modern philosophy of law requires a particular form of human knowledge.” Natural law is based on a systematic concept of rights and jurisprudence, this in contrast to previous ideas of justice, which proceeded on a different notion of human understanding. We can therefore identify two different epochs in the history of legal thought. While the modern idea of law insists on the deductive consistency of premises and conclusions, medieval and early modern doctrines (or theories) used the method of dialectics to merge different arguments and points of view into a single argumentation. Ancient doctrine of law was based on a variety of principles and materials, was arranged into a collection of commonplaces, and put forward its arguments using dialectics as its method. By contrast, modern legal philosophy assumes the

existence of a single principle, organizes its rules into a deductive system, and applies the methods of logic.

These introductory remarks warrant two general conclusions about philosophy of law in the Holy Roman Empire during the seventeenth and eighteenth centuries. Firstly, modern legal philosophy describes law and the doctrine of law as an independent part of human knowledge and finds the basis for this independence in the doctrine's formal qualities. For the first time in the Western tradition, law has been defined not substantively, that is, by reference to justice, but only formally, through the way the content of justice is elaborated. But if a single law can be described as such through its formal qualities alone, then the same can be done for the whole of jurisprudence, and we then have a criterion for identifying jurisprudence as a branch of human knowledge and separating it from all other disciplines.

Secondly, if natural law could define law formally for the first time, if it could clearly distinguish jurisprudence from other branches of practical knowledge, if for the first time it proposed a real philosophy of law, it marked a major difference in the history of legal and political ideas, introducing an entirely new paradigm. Compared with this main feature, all other differences within the modern tradition appear relative and secondary. All schools of natural law share the same theoretical core and agree on a basic conception of deductive rationality—a conception of system and logical constraint—and on the need to have a single first principle. These elements build a methodological set that identifies a peculiar experience of law and knowledge and differs fundamentally from previous legal conceptions. All the differences between the modern schools are therefore variations or varieties within a common basic conception, as in the case of the classical distinction between voluntaristic and intellectualistic positions.

The introductory remarks just made will serve as a basis for the reconstruction that follows. A history of German legal doctrine in early modern times will accordingly be outlined here around four main subjects: the general features of legal doctrine in the early seventeenth century, the history and structure of this tradition, the history of modern natural law in late seventeenth and eighteenth centuries, and the systematic features of this new legal philosophy.

## **1.2. Main Characteristics of Legal and Political Thought in the Early Seventeenth Century**

### *1.2.1. An Academic Discipline*

German doctrines of law show two main characteristics in the early seventeenth century. Firstly, jurisprudence was very close to politics, so close that their margins were uncertain and could be merged or confused. In fact, both



were expressions or consequences of the same order of justice. Secondly, both politics and jurisprudence were first of all academic disciplines and expressed themselves in the genres and codes of academic life. This relation to the universities was so pregnant that it can be seen as a typical element of legal and political thought in Germany in early modern times.

The history of legal philosophy in the Holy Roman Empire of the seventeenth and eighteenth centuries can be described from different points of view. If we observe the contents handed down by way of legal works, like commentaries, dissertations, and treatises, in early modern times, Germany too will be seen to shift along the show a traditional pattern, from the *mos Italicus* to the *mos Gallicus*; then to the Ramistic method; and finally to a positive, historical, and practically oriented method, called *usus modernus Pandectarum* (Stryk 1690), which can be regarded as the real foundation of a German “science of jurisprudence” (Stintzing 1884, 1–31; Wieacker 1967, 203–5). In tracing out this history we ask about the “What” of legal philosophy, but we can also ask about the “How,” considering first of all three main questions, about the “Who,” the “Where,” and the “Why” of legal philosophy (Scattola 2003b, 5–8; Scattola 2006, 35–41). More to the point, we can investigate “Who” elaborated legal and political knowledge: Professional jurists, gentlemen and politicians, secretaries, academicians and professors? Secondly, we can ask in what places and institutions legal knowledge was produced. And finally, we should clarify why or for whom legal literature was written.

These three questions can be used to describe legal and political discourse in the late sixteenth and early seventeenth centuries. This will make it possible to see that different ways of arguing competed in a larger common space, and that around each of these ways there developed a particular learned community with its own rules, its actors, its designated places, and its addressees—a community with its Who, its Where, and its Why. These groups in European learned discussion can be described as closed communities, each of which used a particular code and roughly stretched over a national territory. In fact, each of these communities can also be depicted as a “quotation society,” formed by members who would quote one another as literary sources and would recognize one another as authorities in scholarly discussion.

So viewed as a community with peculiar codes and institutions, the Holy Roman Empire reveals a characteristic outline. If we ask who developed political and legal doctrines in early modern times, as well as where and why such doctrines were developed, we will easily see that the German authors were all public professors, that they taught at the universities, and that their teachings were developed not only *in* but also *for* academe (Gundling 1736: 5990–6033). During the great conflict of the Thirty Years’ War, for instance, the constitutional alternatives at the centre of the political and religious struggle were shaped in the context of academic debate. In this way, the conflicts on the battlefield corresponded to similar struggles in the universities be-

tween different legal models, which interpreted the constitution of the Holy Roman Empire as a monarchy (Gryphiander 1612; Arumaeus 1615, 7; Reinkingk 1659, 59), or a mixed constitution (Lampadius 1620; Clapmar 1644, 281–3; Limnaeus 1645, S1r–V1r), or an oligarchy (Paurmeister 1608, 322–4), or an aristocracy (Bodin 1951, 188b–189a; Chemnitz 1640, 241–7).

In the same period, during the first decades of the seventeenth century, German universities even introduced specific academic curricula for the education of the statesman and exerted a deep influence on the organisation of knowledge. It was now possible to think of an independent teaching of statecraft and politics, and in fact chairs in politics were introduced in many German secondary schools in the two first decades of the seventeenth century (Denzer 1972, 300–7; Maier 1985, 40–50). The institutionalization of the teaching of politics was then followed by a huge production of corresponding writings in the form of the academic genres: practice disputations, disputations for attaining a degree, dissertations, treatises, textbooks, handbooks, and encyclopaedias (Dreitzel 1970, 412–4; Stolleis 1988, 104–12; Weber 1992, 9–89; Scattola 2003b, 59–165). New literary genres were developed and flourished in the first half of the century, beginning with introductions to the study of jurisprudence and politics (Caselius 1631a, 1631b, 1631c; Bornitz 1602; Clapmar 1611; Grotius 1636; Scattola 2003a, 35–40). Finally, the introduction of politics at the faculty of philosophy came along with a number of similar changes at the faculty of law, and most important among these was the institution of German public law. Two parallel innovations thus took place contemporaneously within the universities and contributed to shaping legal and political discussion in the Holy Roman Empire before and during the religious conflict of the Thirty Years' War (Stintzing 1884, 32–54; Stolleis 1988, 141–6).

Early evidence of the new discipline is the *Disputatio de iure publico*, by Arnold Clapmar in 1602, which tried to derive the contents and arguments of public law from the lesson of history, and above all from Cornelius Tacitus and the neo-Stoic tradition (Clapmar 1602; Gentili 1598). The need for a new discipline expressed itself at first in the publication of vast collections of public laws, contracts, and manifestos, as well of old treatises and dissertations about the prerogatives of the Roman emperor, of the pope, and the Christian kings (Freher 1600–1611; Goldast 1607, 1609, 1611; Schardius 1609; Hortleder 1645a, 1645b). From 1610 to 1620 the study of German public law developed into a true academic subject and was introduced at many German universities. At first, much interest was devoted to the question of jurisdiction, which established the competence of the emperor and the powers of the princes and the inferior magistrates (Obrecht 1589; Gentili 1601; Paurmeister 1608; Bocerus 1609; Besold 1616a; Hunnius 1616; Lampadius 1620). The materials discussed in disputations and treatises was then gathered into collections, like those of Dominicus Arumaeus (1615), and was summarized and ordered systematically in textbooks, like those written by Daniel Otto, Iohannes

Limnaeus, and Christoph Besold (Otto 1617; Limnaeus 1645; Besold 1646; Hoke 1968). In this way, during the Thirty Years' War, the new discipline of imperial public law shaped the discussion on the constitutional form of the Holy Roman Empire.

### 1.2.2. *Jurisprudence and Politics*

The academic teaching of public law and politics alike claimed to offer an adequate knowledge of the same subjects, and it was therefore inevitable for them to enter into an academic conflict, each trying to prevail on the other. The conflict was acutely felt in both faculties and affected the organisation of the academy (Scattola 2003a, 13–20).

Some authors, such as Iohannes Althusius and Christoph Besold, cultivated both disciplines but kept them separate, without merging their arguments into a third, new, intermediate form of knowledge, a kind of legal philosophy. An initial attempt to merge politics and jurisprudence into a comprehensive doctrine can perhaps be seen in the *Iuris Romani libri duo*, the first textbook of civil law by the young Iohannes Althusius, which begins with a brief account of public law and with a pure Bodinian doctrine of state sovereignty (Althusius 1586, 18–20; Scattola 2002b, 234–42). Yet this early attempt would later be strongly rejected by Althusius himself, who in the preface to his major work, the *Politica methodice digesta*, of 1603, declared what the true boundaries of both disciplines should be: “Where ethics ends, there begins theology, and where ends physics, there begins medicine, and where ends the politician, there starts the lawyer” (Althusius 1603, a3v). More accurately, the goal of politics “is to establish and preserve the political association or the human society and the social life for the sake of our own good with all the means that are suitable, useful, and necessary to this purpose” (ibid., a4r). Anything that may stand in contradiction to this goal or is alien to it must be excluded from politics. The goal of jurisprudence, by contrast, “is to deduce deliberately the right from the fact and to judge in this way about the right and the relevance of the fact in human life” (ibid., a4r). But facts, which give the premises for the lawyer’s deductions, do not belong to jurisprudence itself: They instead come from other disciplines, and especially from politics (ibid., a4r–v). Politics is thus superior to jurisprudence. Althusius discussed the same question in his great legal work *Dicaeologica*, in which he applied the same distinction between fact and right but came to quite a different conclusion, placing the science of justice at the top rung of human knowledge and deducing from it both jurisprudence and politics (Althusius 1967, 1a).

Similar fluctuations between politics and jurisprudence can be found as well in other authors of the early seventeenth century. Christoph Besold made a comparison between politics and physics in his introductory dissertations (Besold 1614; Besold 1625, 82–3) in a quite stringent way, concluding that ju-

jurisprudence applies to a commonwealth the general conclusions of politics and is therefore dependent on and subordinate to politics, as medicine is with respect to physics (Besold 1625, 83; Goclenius 1601, 122–3; Horneius 1625, 575–6; Heidmann 1638, 6–7; Witzendorf 1642, 76; Scattola 2003a, 312–3): Politics “is supposed to be princess and mistress of all other faculties and sciences,” and Aristotle expressed a correct opinion when he called it “the most architectonic one” (Besold 1625, 82; Keckermann 1608, 4; Timpler 1611, a2r–3r; Matthiae 1611, 4). Besold then reiterated the same argument in his 1612 *Templum iustitiae*: This time, however, he was referring not to politics but to jurisprudence, which he presented as “the most architectonic” discipline, superior to politics (Besold 1616b, 20).

In the history of universities the political curriculum prevailed from 1600 to 1610, when politics imposed itself as the first academic study of the commonwealth. In the following decade it secured its primacy, but at the same time public law gained the status of an independent doctrine and emerged as a plausible alternative, until the passage from politics to jurisprudence was completed during the Thirty Years’ War (Scattola 2003a, 13–20; Weber 1997, 98–102; Weber 2004, 366–9; Friedeburg 2006, 209–15).

Two explanations can be offered for the dominance of jurisprudence over politics in the middle of seventeenth century: The first explanation is the “juridification” of the political debate (Stolleis 1988, 127–30) and the second the transformations introduced by natural law. Jurisprudence triumphed as the main study in the education of public servants because the Thirty Years’ War ended with a constitutional compromise that implied a hefty use of legal means. In fact the Holy Roman Empire was for the most part a juridical construction that assumed a permanent legal negotiation. This solution had been put forward in learned discussion by Jakob Lampadius (1620), a leading figure among the Protestants during the peace conference in Westphalia, who actually expunged the problem of sovereignty from the debate over the empire and transformed it into a technical question about the Empire’s jurisdiction and its true subjects in the German territories.

The second reason for the ascendancy of jurisprudence can be found in a general transformation of practical knowledge, a transformation involving both politics and jurisprudence. In fact, the Aristotelian tradition of a single discipline was substituted by a distinction between theoretical reflection and practical application, and in this new context the leading role was attributed to natural law, the new “architectonic” discipline, which reduced other disciplines to a subordinate function.

### 1.3. Legal Doctrine in the Early Seventeenth Century

#### 1.3.1. *Dialectics and Law: The System of Academic Teaching*

The closeness to the university had important consequences for both the form and the content of German legal philosophy. An academic discipline was a system not only of doctrines—of knowledge gathered through the centuries—but also of forms that classified and distributed the contents inherited from tradition. A discipline was of course in the first instance a collection of answers, that is, of arguments approved by authorities and selected during over the long period, but it was also at the same time a collection of questions, of all possible problems in a particular field of knowledge. And such knowledge was to be gained in a given order, or in the right “disposition” (*dispositio disciplinae*), which was also called a method.

Speaking of method, the authors of the early seventeenth century explain to us that every discipline had to be conceived as a closed and finite number of arguments inherited from the past (Althusius 1603, a2r; Keckerman 1613c, 1700a–b; Scattola 2005, 21–8). Indeed, humans have been developing all manner of knowledge since creation, and it is therefore plausible that in so long a period they have gathered all true arguments and identified all false conclusions: Human knowledge is in this sense complete and closed, embracing a finite number of true arguments. But at the same time, the arguments available to us can all be put together and arranged in an infinite number of ways. Premodern knowledge is therefore finite in its arguments and infinite in its combinations, or finite in materials and infinite in forms (Scattola 2006, 76–86).

Clearly, in this case legal authors would argue by dialectical means and conceived their task as a continuing effort to work on traditional notions so as to find the best fit among all the elements of knowledge. Indeed, if the same materials can be arranged in different ways, they will yield a certain number of concurrent orders varying by the amount of arguments they can hold together. The greater the number of arguments an arrangement can freely combine, the better it will be. And the best arrangement of a discipline, like jurisprudence, will be the one that takes in all the positions inherited from the relevant tradition. Innovation was in no way an advantage—in fact it was denounced as *novitas* (Morhof 1688, vol. 2: 50–256; Pasch 1700)—and early-seventeenth-century authors pointing out the merits of their work would emphasize the originality not of their ideas, which were ancient, but of their presentation. Iohannes Thomas Freigius (1543–1583) summarized the duty of a legal author in a very effective way saying that: “Nor you can praise here any personal invention of the author (actually all contents are taken from the writings of the ancient lawyers), but only the disposition and the light of method and the explanation of the proposed arguments” (Freigius 1581, A3v; Vulte 1586, 2–3; Althusius 1967, a2r–v).

Dialectics was therefore the leading science in the sixteenth and early seventeenth centuries, and it determined the method and structure of all parts of practical philosophy, including jurisprudence. It exerted its influence not only by setting up a characteristic mode of argument but also by changing at the core the structure of knowledge itself. In the classical tradition, from Aristotle to Cicero and Boethius, commonplaces were in fact a general scheme for treating a discourse. But at the same time, a method gave the manner of proceeding from unknown ideas to known ones and in this sense was different from order, which arranged and conveyed ideas already known (Zabarella 1578, 93; Capivaccio 1603, 1023 B). Still, arguments would constantly be confused with commonplaces, and order with method, and for this reason it was usually opined that the task of jurisprudence was to find the best possible commonplaces, those forming its proper method. A discipline therefore consisted in the list of its commonplaces or in its method, which Rudolf Goclenius and Bartholomaeus Keckermann also called “arrangement of the whole discipline” (Zwinger 1566, 18; Günther 1586, 25r; Keckermann 1600, 591 = Keckermann 1613a, 309; Keckermann 1601, 146; Keckermann 1613b, 962a; Goclenius 1613, 684; Scattola 2002a, 278–87; Scattola 2003b, 5–39).

That is how jurisprudence mainly conceived itself at the beginning of the seventeenth century: as a topology of arguments, which could also be called a “system” (a system of legal arguments, topics, and commonplaces). Two collections of the early seventeenth century attempted to gather all possible knowledge in the legal tradition and present it systematically, that is, alphabetically: The first of these was Sebastian Naeve’s 1608 *System of Legal Questions* and the second Iohannes Steckius’s 1619 *System of Feudal Jurisprudence*. Naeve argued that lawyers faced with a huge and growing number of legal writings needed a guide or an inventory to find their way (Naeve 1608, a2r–v). Satisfying this urgent need for a legal directory made it necessary to use the order of the commonplaces, but jurisprudence already had a proper distribution for all its subjects: It was all worked out in the titles and rubrics of the *Corpus iuris civilis*, which really sets out a true system of legal topics, or topoi. Under its guide, all possible opinions and sentences of all legal authors in ancient and modern times can be put in a proper order showing the internal frame of jurisprudence (ibid., a2v–3r). A system of jurisprudence is in this sense a comprehensive card catalogue, in which all the components of all legal writings since the birth of jurisprudence are sorted out, placed under the appropriate rubrics, and arranged in the best order—that is what at the time was meant by such expressions as *Oeconomia iuris*, *Bibliotheca iuris*, and *Dicaeologica*.

The lists of commonplaces built the internal frame of jurisprudence and organized its materials for academic teaching. Its exterior reflection was a corresponding system of literary genres. The collections of commonplaces set up a proper scheme of question and answer, identified special problems, and used particular sets of arguments. The commonplaces could therefore be



treated in separate chapters, disputations, dissertations, or treatises. The writings in each such grouping all had a similar internal structure and made up their own independent genre within the discipline, fitting neatly into the wider topological system of arguments and commonplaces (Scattola 2003b, 17–20; Scattola 2003c, 185–9). Most of the arguments and topics that can be classified as legal philosophy were treated, for instance, in disputations, dissertations, and treatises *De iustitia et iure*, introducing students to the study of jurisprudence and presenting its characteristic epistemological issues (Obrecht 1584; Goeddaeus 1596; Godefroy 1596; Stephani 1604; Hunnius 1609; Hoen 1614; Scattola 1999, 156–61).

### 1.3.2. *A Topological Philosophy of Law*

The foregoing discussion leads to two conclusions about the general character of legal theory in the sixteenth and seventeenth centuries: Firstly, jurisprudence and politics were mixed up to some extent and, secondly, they shared with all other branches of practical philosophy a strong dialectical structure and were organized into a classification of commonplaces and into a system of literary genres. Given these conditions, there was only one way in which philosophy of law could be conceived in the sixteenth and early seventeenth centuries, namely, as legal topology or dialectics; and its main interest could only be in the correct disposition of inherited materials, a problem that in the scholarly language of the time was understood as one of method. Philosophy of law—that is, a conscious reflection on the essence of law, as well as on its terms, foundations, sources, and divisions—was concerned not with the question “What *is* law?” but with the question “What is law *like*?” (“What is the *shape* of law?”) And while the former question necessarily led to the question “*Is* there any law?” the latter question proceeded, in answer, on the assumption that “there *is* law.”

Philosophy of law in early modern times, if there was one at all, had no interest in the foundation of rights, duties, and rules because the whole discussion started from the assumption that law existed and operated in the human world. Modern philosophy of law, on the contrary, is concerned in the first place with the question of the law’s origin and foundation. It therefore concentrates on the principle of law: on the principle, or source, that should then generate the entire system of legal rules. Once philosophy has found a suitable beginning, the rest will be only secondary and will flow into the tasks of a theory of law that takes the principle for granted and applies it to all the lower levels of theory. But if the point of origin is already given, a general theory of law (a general doctrine) can only be concerned with the division, distribution, and disposition of legal materials, as well as with their hierarchy and consistency or inconsistency. In this sense, a general doctrine of law in early modern times could only be conceived as a methodology of law. But we

have seen that the discussion about method, principles, and system was exclusively concerned with commonplaces. Consequently, a general doctrine of law in early modern times could only come in the shape of a topology (a science of place, that is, of the proper place of legal topics and arguments), and this in two different ways: first as a legal methodology, an empty scheme or framework, and then as the completion of such an abstract disposition. In the first case, a general doctrine generated a legal dialectics; in the second, a literary genre often called a “method.” In the first case, the doctrine operated with commonplaces; in the second, with the order of a discipline or with arguments (Mazzacane 1971, 1998; Viehweg 1974; Piano Mortari 1978, 1987; Schmidt-Biggemann 1983, 1996; J. Schröder 2001, 23–31).

The first type found its main vehicle of expression in the literary genre of *topica legalis* or *dialectica legalis*. The first modern work in this group was the *Legalis dialectica*, published in Bologna in 1507 by Pietro Andrea Gambaro. A spate of similar books soon followed, particularly in the Holy Roman Empire. Among them were Nicolaas Everaerts’s *Topicorum seu de locis legalibus liber* (1516), Claudius Cantiuncula’s *Topica legalia* (1520), Christoph Hegendorff’s *Libri dialecticae legalis quinque* (1549); Johann Apel’s *Methodica dialectices ratio ad iurisprudentiam adcommodata* (1535), Johann Oldendorp’s *Topicorum legalium traditio* (1555), Iohannes Ramus’s *Oikonomia seu dispositio regularum utriusque iuris in locos communes* (1557), and Nikolaus Vigel’s *Dialectices iuris civilis libri tres* (1573), perhaps the most detailed book in this genre; then came Jean de La Reberterie’s *Topikon iuris libri quatuor* (1575), Iohannes Thomas Freigius’s *Logica iureconsultorum* (1582; cf. Freigius 1590), Lorenz Neidecker’s *Dialectica iuris civilis* (1601), and Matthias Stephani’s *Dialectica iuris exactissima et absolutissima* (1610). Many of these works were then gathered in the great collections of sixteenth-century legal treatises, like the *Tractatus ex variis iuris interpretibus collecti* (1549).

Most of these works, like those by Gambaro, Cantiuncula, Apel, and Hegendorff, explain the basic ideas in dialectics; they then offer a traditional list of commonplaces, drawing on Cicero or Boethius; and finally they offer some brief examples, since their purpose was to illustrate a skill for readers to practice on their own (Gambaro 1549). On this basis it was possible to enrich the ancient scheme of commonplaces or even to dissolve it into a large collection of arguments.

A good example of this first type of topology in the early seventeenth century is Matthias Stephani’s *Dialectica iuris exactissima et absolutissima*, published in 1610. The work is divided into three books. The first of them presents a complete theory of dialectics, by which the author means a theory of logic or a theory of knowledge, especially as it applies to practical philosophy. This first book is introductory and general and uses the synthetic method, which starts from the simplest parts and compounds them into increasingly complex definitions. The exposition begins with a definition of dia-





Samuel Pufendorf (1632–1694)

lectics itself and then divides dialectics into two parts: a critical one and a topological one (Stephani 1610, 1–5). In the critical part Stephani introduces five *praedicabilia* and ten *praedicamenta*; he then explains the theory of the simple theme and of the proposition, and he finally presents the theory of argumentation (ibid., 5–105). The topology—the second part of dialectics—takes up the second book. Here Stephani starts out defining a commonplace as the place where the arguments pertaining to a certain question are to be found (ibid., 106–7). He then divides legal topics into nine external commonplaces and 176 internal ones: Each of these commonplaces (whether external or internal) singles out a right, grounds it in the content of an argument, and finds the proper place for it as a subject of jurisprudence (ibid., 108–9). The high point in this evolution in the Holy Roman Empire was reached around 1630 by Johann Jakob Speidel, who compiled two huge collections of legal and political questions and gathered more than 14,000 arguments arranged in alphabetical order: He called them *Collections of Legal and Political Questions* (Speidel 1629 and 1631).

As a theory based on the idea of commonplaces, the first type of ancient legal doctrine offered an exterior order, an order that classified the whole of a discipline from an external point of view. But in fact, this type of doctrine was mainly concerned with describing the reality of law through a complete list of the law's arguments or through a comprehensive enumeration of its features. Hence this method, in its effort to faithfully reproduce every possible case within a frame of commonplaces, wound up multiplying the rubrics it used, tending to make them as numerous as the juridical circumstances to which they applied. As new categories were added, their logical extension closed a tighter and tighter circle around the singularity of the relative legal cases, thus reducing the gap between the boundless variety of legal materials and their description by juridical means.

The second main orientation in the ancient study of legal topoi was bent in the opposite direction, for it sought to find the *internal* order of legal teaching: Instead of observing all legal questions from the outside—looking to describe all the particulars within an extensive system of categories—this method proceeded on the idea of an essential core or simple unit constituting the very essence of jurisprudence, to be applied over and over again until it generated the entire discipline. In this sense, following the doctrine of Philipp Melancthon, authors like Johann Apel and Christian Hegendorff focused on that part of dialectics which dealt with the “simple theme” and was called “topics” in the strict sense (Hegendorff 1549, 237vb). To this “simple theme” they then continually applied the same simple operation, thereby progressively dividing and defining the theme, so as to ultimately be able to explain the discipline in its entirety (Vigel 1573, 5).

The *Dialecticae legales* of this type drew on Plato's diairetical, or divisional, method; on Cicero's authority, whose *Topics* was transformed by Boethius into

a kind of dichotomous process (Boethius, *De differentiis topicis*, 1201–1202); on Galen’s “definitional method”; and on the Ramistic programme of the late sixteenth century. By a repeated division of a simple definition, they reached an “artificial” description, entirely based on the internal commonplaces (Vulte 1598, 54–6). By the late sixteenth and early seventeenth century it was common to call these types of works *Methodus* (Troje 1977, 741–54). Examples are Konrad Lagus’s *Iuris utriusque traditio methodica* (1552), François Connan’s *Commentarii iuris civilis* (1557), Nikolaus Vigel’s *Methodus iuris civilis* (1565), Iohannes Thomas Freigius’s *Quaestiones Iustinianae* (1578) and *Partitiones iuris utriusque* (1581), Hermann von Vulte’s *Idea methodi iuris civilis Iustinianei logica* (1586) and *Iurisprudentia Romana* (1598), Matthias Stephani’s *Oeconomia practica iuris universi civilis, feudalis et canonici* (1614), and Iohannes Althusius’s *Iuris Romani libri duo* (1586) and *Dicaeologicae libri tres* (1667).

This inquiry into the proper order of legal doctrine inevitably led the jurists to identify some basic ideas: These ideas could be combined, and they came to be understood as the principles of legal doctrine, for which reason early modern literature on the “method” of law was quite akin to the literature on the “principles” of law. Examples of such “crossover” literature are Jean de Coras’s *De iuris arte liber* (1582), Joachim Hopper’s *De iuris arte libri tres* (1582) and *Seduardus* (1590), and Georg Obrecht’s *Theses* (1585), *Disputatio* (1589), and *Tractatus de principiis iuris* (1619).

### 1.3.3. *The Transformation of Jurisprudence in the Seventeenth Century*

We have so far seen that legal doctrine developed under two basic conditions in the early seventeenth century, these being that jurisprudence and politics were both concerned with the virtuous life and thus formed a single complex, and that the doctrine of law took on a topological structure laid out in its collections of commonplaces and in methodological works. These two conditions made inconceivable any *philosophy* of law in modern sense, the only possibility at that time being a *general doctrine* of law. A new period in the history of legal doctrine did not begin until that complex of practical disciplines shed its unity, a process that corresponded to the birth of modern natural law and to the invention of a philosophy of law in the modern sense.

At the beginning of the seventeenth century politics was regarded as civil prudence; it was a virtue; it was one of the five intellectual abilities of the Aristotelian tradition, and its end was to govern the good behaviour of virtuous citizens in the public sphere through laws and appropriate deliberations (Bornitz 1602, A9r–v). But since politics operated in the practical world of human actions, dominated by contingency and chance, it could not identify any universal principles or any generally valid theoretical knowledge, but rather offered a perception of each case in its singularity (Caselius 1631a, 106). On the other hand, the infinite differences in the practical world had to

be reduced to a thinkable number of possibilities, and the apparent disorder had to be transformed into some kind of order. The system of commonplaces furnished this orientation in the practical world, and topology was thus the kind of knowledge peculiar to the world of chance and prudence. This idea of jurisprudence and politics as a prudence related to the good life, based on a topological order of commonplaces, formed the core of education in German universities in the first half of the seventeenth century. It began to wane after the Thirty Years' War.

We can clearly perceive this epistemological change considering how a famous passage of the *Nicomachean Ethics* was interpreted during the first half of the seventeenth century. Aristotle begins his book by commenting that, of all the sciences, politics must be regarded as the “most architectonic one” (EN, 1094a 27). What does it mean to present politics as architectonic? In 1600, Iohannes Caselius argued that politics must be called architectonic because it pursues the good life, the highest among human ends, and so coincides with ethics (Caselius 1631a, 57). Some time later, Otto Melander and Bartholomaeus Keckermann offered a different interpretation, claiming that politics is architectonic among the sciences because it teaches the art of governing cities and therefore points out the good doctrines to be taught and the dangerous ones to be fought (Melander 1618, 14; Keckermann 1608, 4). In 1662 and 1663, Hermann Conring offered a third explanation, claiming that politics is architectonic because it lays the foundation for a commonwealth in the same way as an architect plans a house and has command over all the hands that build the house: Politics is architectonic in this third sense as a doctrine of constitution-making (Conring 1662, 69; Conring 1663, 181). In these three interpretations, politics progressively shook off its relation to prudence and the good life and became a science: It started out as the practice of being virtuous; it then morphed into the art of exercising command; and finally it came to be the science of constitution-making.

Actually, Hermann Conring himself thought politics to be a science, and so a discipline that to some extent can rest on universal principles and reach necessary conclusions. The old idea of politics as a prudence of the good life thus had to be rejected (Conring 1662; 120–33; Conring 1663, 45–54; Scattola 2003a, 189–202). The same definition was taken up in the second half of the seventeenth century by a group of political writers. They agreed with Conring that politics can lay the foundation for every commonwealth because it is a science and so rests on general principles. It must therefore include two different parts: a theoretical one, containing universal and scientific principles, and a practical one, applying them to a particular context (that of the commonwealth). It was Johann Friedrich Horn (1629–1665), Johann Christoph Beckmann (1641–1717), Adriaan Houtuyn (died after 1690), and Johann Nikolaus Hertius (1651–1710) who proposed dividing politics in this way: They called the theoretical part *politica architectonica* and the practical one

*politica administrativa* (Horn 1672; Beckmann 1679a; Beckmann 1679b; Houtuyn 1681; Hertius 1700; Hertius 1703).

With that doctrine politics reached a high point in the seventeenth century: The world of law and morality was recognized as having two parts, a theoretical one and a practical one, but while these parts existed separately, they still belonged to a single discipline. The next step was to separate these two internal parts into two different disciplines, an epistemic turn in the history of moral theory that really took place in the second half of the seventeenth century.

In 1672, Ulrik Huber published a work under the title *Three Books on Political Law* (*De iure civitatis libri tres*). Huber maintained that the theory of the first principles of political society does not belong to politics and should therefore be an academic subject in its own right, forming a part of jurisprudence. He called this new discipline “political law” and held it to be a science, forming that part of natural law which deals with the commonwealth. This science, which would later be called “universal public law” (*ius publicum universale*), proceeded on the basis of a state of nature inhabited by free and equal rational individuals: It thus used the artifice of a covenant to explain how human beings so conceived can create a commonwealth, as well as to explain what this commonwealth is, how it works, and which rights and duties pertain to the sovereign and which to his subjects. In establishing the commonwealth, its individual framers act only according to the rules of reason, and the science that explains their behaviour must therefore be rational too, a science devoted to the study of rational beings. Universal public law was thus a science, not a kind of prudence: It set out rules valid for every republic and every kingdom. Politics, for its part, worked in the opposite direction, borrowing these rules from universal public law and applying them to this or that kingdom so as to make its government effective. It was therefore a *particular* skill that the professional politician was trained in: It was the ability to manage affairs of state, or statesmanship (Huber 1698, 9–17).

This model proved greatly popular. Johann Nikolaus Hertius and Justus Henning Böhmer wrote handbooks in *ius publicum universale*, or *allgemeines Staatsrecht* (Hertius 1700; Böhmer 1726), which found a place in many systems of natural law (Gerhard 1712, 274; Darjes 1745, 373–452; Nettelblatt 1785, 461). Christian Wolff entitled *On the Right of Cities or Universal Public Law* the eighth part of his great work on natural law (Wolff 1968). During the eighteenth century, universal public law became the most important part of the so-called systems of political sciences, aiming to embrace in a single sweep the entire body of knowledge relating to state and society (Scattola 1994, 41–74; Scattola 1996). During the same period, as universal public law grew more important, politics kept sliding back: It came to be regarded as an “art of state”—a “prudence of state” or an “art of government”—and was ultimately confused with the reason of state, a practice aimed at achieving particular

ends irrespective of the means used, regardless of whether these means were moral or immoral (Fischer 1783, 8).

The transformation of politics in the seventeenth and eighteenth centuries had a direct impact on the idea of law. It largely took place in jurisprudence itself and affected it in two ways. Firstly, the decline of politics as single discipline devoted to the civil life broke up the traditional unity of moral disciplines. Two different spheres now clearly emerged—universal public law on the one hand, politics strictly understood on the other—each of them having its own epistemological status that set it apart from the other: As a part of natural law, universal public law conceived itself as a science proper, one based on general principles and rational procedures; politics, by contrast, was an inferior and applied skill. In this way, human life was divided into two different spheres of knowledge—into theory and practice—and natural law, dealing as it does in general principles, claimed the theoretical sphere for itself. Secondly, universal public law could not be a true science of legislation unless it could identify the basic conditions for rights, law, and legitimate actions. But the only possible source of effective constraint within a civil society now appeared to be the state, which therefore had to be conceived as the first and fundamental premise for any theory of law describing itself as scientific. The state and the sovereign thus became necessary for legal argumentation itself, and law was no longer thinkable without the state.

Universal public law could effect this necessary passage from law to state on the basis of the principles and arguments worked out by natural law, which thus served as a meta-discipline and in this way established itself as the only form of jurisprudence offering a rational theory of action. But three conditions had to be satisfied in order for this to happen. The first condition was that natural law, or universal public law, had to offer a sufficient constraint on human behaviour. This entailed the second condition, for it then had to develop a rational theory of human action. And this, in turn, was possible only if natural law proceeded on a pure rational method. But a new method in natural law meant the end of topology and dialectics, which had hitherto been the unchallenged, *de facto* basis for knowledge of the practical world.

#### **1.4. The History of Natural Law in the Late Seventeenth and Early Eighteenth Centuries**

There is an important element of continuity that modern natural law, since its inception in the late seventeenth century, retained with jurisprudence and politics despite the fundamental differences introduced with that very development. In the Holy Roman Empire, natural law was in the first place an academic discipline and continued the German tradition of discussing political subjects within the universities. So, aside from the deep change, which really gave birth to a new way of reflecting on law and society, German legal dis-



course maintained an even deeper continuity in the forms of learned communication, and since the same forms were reproduced for centuries thereafter, the whole history of legal thought in Germany can be written as a history of the disciplines introduced over time in answer to the needs of new political forms.

The beginning of natural law at German universities can be clearly dated to the year 1661, when Karl Ludwig, prince elector of the Palatinate, created in Heidelberg the first chair for the teaching of natural law and offered it to Samuel Pufendorf (1632–1694). Pufendorf had already written in 1660 his *Two Books of the Elements of Universal Jurisprudence*, in which he applied a pure synthetic method to describe a scientific theory of human action (Pufendorf 1999). But the idea of setting jurisprudence on a new, philosophical foundation had broad appeal in German learned culture at that time. In 1663 Johann Christian von Boineburg (1622–1672), prime minister of the prince elector of Mainz, invited Christoph Forstner (died 1667), Hermann Conring (1606–1681), Johann Heinrich Boeckler (1611–1672), and the same Samuel Pufendorf to write with him a history of the imperial legislation and a corpus of natural jurisprudence (Thomasius 1972, 91; Palumbo 1990; Hochstrasser 2000, 47–60). The participants in this correspondence represented three different options in the history of legal and political thought: Conring was the most famous proponent of “political Aristotelianism”; Boeckler was inclined to neo-Stoicism and Tacitism, followed the example of Justus Lipsius, and emphasized doctrines of exceptionalism, such as reason of state; and Pufendorf had already formulated his project for an exact science of morals and jurisprudence. They reacted in three different ways to Boineburg’s invitation: Conring published the *Propolitica* (1663), where he expounded his theory of architectonic politics drawing on the work of Joachim Hopper (1523–1576), and Boeckler edited a commentary on Hugo Grotius (1663). Only Pufendorf took up Boineburg’s invitation, subsequently bodying forth his program with three works on natural law: *On the Law of Nature and Nations* (1672), *On the Duty of Man and Citizen* (1673), and *The Swedish Quarrel* (1686).

Pufendorf’s theory seems to be founded on contradictory conjectures because, on the one hand, he followed Grotius (1925, 11; 53) and accepts human sociability as the first principle of natural law (Pufendorf 1927, 19), but at the same time he claimed that human beings are naturally unsocial and inclined to hurt one another. The contradiction was already present in his formulation of the first natural law:

Thus then man is indeed an animal most bent upon self-preservation, helpless in himself, unable to save himself without the aid of his fellows, highly adapted to promote mutual interests; but on the other hand no less malicious, insolent, and easily provoked, also as able as he is prone to inflict injury upon another. Whence it follows that, in order to be safe, he must be sociable, that is, must be united with men like himself, and so conduct himself toward them that they may have no good cause to injure him, but rather may be ready to maintain and promote his interests. (Pufendorf 1927, 19)

This theory of Pufendorf's can be considered with regard to the ideology it represents, in which case it is amenable to different interpretations (Denzer 1972; Palladini 1990; Behme 1995), but if we consider it with respect to its methodological elements, and within a history of the moral sciences, it seems a perfect way to follow through on Thomas Hobbes's scientific programme. Pufendorf criticized Hobbes for his radical and pessimistic view of the human condition (Pufendorf 1934, 158–60), and yet he rejected the dialectical and topological way of arguing that was a fundamental condition in Grotius's legal theory and in the old tradition (Scattola 1999, 205–17). He instead followed Hobbes's methodological program, under which any doctrine of law should be deduced through the twofold method of analysis and synthesis (Hobbes 1962a, 68–75), and then he integrated this basic method with two decisive elements.

The first move was to deduce the whole of natural law before proceeding to the establishment of a sovereign power. In fact, in the original account by Hobbes, legal theory was threatened by a paradoxical consequence, in that any rule in a commonwealth could only be conceived as the sovereign's will. Therefore, civil laws did not enjoy any kind of independence and could constantly be suspended by political decision (Hobbes 1962b, 250–53). This made it so that law could exist only on the contradictory condition that it could at any point be undone. Pufendorf was interested, on the contrary, in preserving law's rational or ontological independence from politics. And that explains why the entire complex of legal institutions could only be deduced *before* establishing the foundation of sovereignty and the commonwealth. Secondly, Pufendorf transformed natural law theory into an academic subject, with its proper questions, arguments, and literary genres. In this sense, he claimed for natural law "the right form of an art" (*iustae forma artis*), although he ascribed to Hugo Grotius the merit of being first to achieve this result (Pufendorf 2002, 123; Bobbio 1980, 491–7; Bobbio 1999, 169–74). Modern natural law, that is, modern philosophy of law can thus be said to have originated in three elements: first, the Hobbesian question; second, an interest in jurisprudence; and third, the form of an academic discipline.

The threat implicit in the new method was immediately perceived by the academy, which reacted to Pufendorf's proposal in a resolute way. The main discussion actually revolved around two epistemological questions, the first one concerning the theory of innate ideas and the second one the possibility of an ontologically independent morality (*perseitas moralis*). The initial attack against Pufendorf came in 1673 from Josua Schwartz (1632–1709), after which came the polemical writings of Friedrich Gesenius (died 1687) in 1673–1675, Valentin Veltheim (1645–1700) in 1674–1675, Nikolaus Beckmann (died after 1678) in 1677, Valentin Alberti (1635–1697) in 1678, and Johann Joachim Zentgraf (1643–1707) in 1681. Pufendorf responded on several occasions and tried to settle the matter with a systematic exposition in



his *Essay of the Controversies on Natural Law* (1678) and then in *Gleaning of the Controversies* (1680), which he finally edited together with the *Swedish Quarrel* (1686). In part, the dispute ended in 1688, when Christian Thomasius (1655–1728) published his *Institutions of Divine Jurisprudence*, where, in the first book, he defended Pufendorf against the objections put forward by Alberti (Thomasius 1963b): On the one hand, this put an end to the debate about Pufendorf's natural law, but on the other hand it gave rise to a new, bitter debate between Thomasius and Lutheran theologians, which led to the expulsion of Thomasius from Leipzig and to the foundation of a new university in Halle (Thomasius 1972, 93–124).

The controversy about Pufendorf's natural law reveals something important—a misconception, really—about the history of this discipline. Already the first histories of natural law, beginning with Pufendorf's brief account of in *Swedish Quarrel* (Pufendorf 2002, 123) and Thomasius's *Small History of Natural Law* (Thomasius 1972, 58–80; Reimmann 1713a: 1–111; Kemmerich 1714: 1577–613; Stolle 1724: 627–58), tell a chronologically simplified story. According to this common account, the Middle Ages and the sixteenth century were dominated by the obscurities of Scholastic philosophy, making it so that natural law was generally confused with theology. Only Hugo Grotius managed to work all these scattered materials into a complete system, thus establishing the modern form of this discipline. He was immediately acknowledged and honoured as the father of this discipline: His theory was taught in several universities and spread widely through a great number of commentaries (Buddeus 1701, 27–8; Barbeyrac 1706, LXXVII–LXXVIII; Proelus 1709b, 91–122; Hackmann 1712, 305–17; Kemmerich 1737, 18–9; Gebauer 1774). Later on, Thomas Hobbes and John Selden (1584–1658) put forward rival theories but could not overthrow the hegemony of Grotius, so a true change did not happen until Pufendorf, who really gave a new and systematic order to this discipline. His scholarly success is demonstrated by his reception in Scotland with Gershom Carmichael (ca. 1672–1729); by the German, French, English, and Italian translations of his work (Pufendorf 1997, 1998, 1706b, 1707, 1703, 1767); and by the many commentaries on his major works (Pufendorf 1700; 1706a, 1717, 1719, 1721; Titius 1703; Wernher 1721a), which finally displaced those of Grotius in academic education.

This account is wrong in its fundamental assumption that Pufendorf succeeded Grotius in the universities of the Holy Roman Empire, when in fact the study of Grotius came in *response* to the natural law of Pufendorf and possibly of Hobbes. Grotius thus came not before but *after* Pufendorf, and it was the theologians who are to account for this, since they, more than anyone else, saw in Grotius's work an instrument against the menace represented by a rational theory of natural law. Our perception of the history of the moral sciences has therefore, in this case, been fundamentally shaped by subsequent historiography, which simply relied on chronology and in this way obfuscated

the “reactive” or “restorative” import involved in the appeal to Grotius. This much had already been suggested by Christian Thomasius in his *Small History of Natural Law* (1719), where he observed that there were two ways in which theology reacted to Pufendorf: It would either prohibit the study of natural law altogether (Prasch 1688a, 1688b, 1689; Michaelis 1704), or it would warn against the “bad natural law” of Pufendorf and recommend the “good doctrine” of Grotius instead (Alberti 1678; Pufendorf 2002, 152–3). Indeed, Grotius allowed theology to save the doctrines of intrinsically moral actions and of innate ideas, and since it was these two questions that his commentators were mainly interested in, Pufendorf became the target of their polemical stance. In the words of Thomasius:

Of course, the consequence of this method of learning was that the Scholastic doctrine of the intrinsically good and bad actions, which Grotius had combined with his doctrine of sociability, could be saved in a way from its complete defeat. And by writing their commentaries on Grotius, all those authors, who really had no idea of natural jurisprudence, could keep on talking and debating at least some matters growing out from the obscurity of Grotius or from some theological questions that others had put forward in their annotations. But the pupils, once they had heard their lectures on Grotius or read all the different tables, surveys, and observations upon him, were more insecure than before. But in this way the authority of the traditional doctrines and of the old teachers remained safe and sound. (Thomasius 1972, 126–7)

The conclusion that the chronological account was a subsequent and inaccurate reconstruction, and that the interest in Grotius grew mainly out of a reaction to Pufendorf, can be validated by considering the literature on Grotius in the second half of the seventeenth century. Although Grotius’s *Three Books on the Law of War and Peace* were first published in 1625, and went through several new editions after 1631, it took some time before anyone would comment on his work in Germany: This happened when, in Helmstedt in 1653, the mathematician and philosopher Johann von Felden (died 1668) wrote *Annotata in Hugonem Grotium De iure belli et pacis*, a publication that prompted Theodor Graswinkel (1629–1666), a lawyer from Delft, to come out with a comment in response (Felden 1653; Graswinkel 1654). The first systematic treatises on Grotius’s doctrine appeared 1663, that is, after the publication of Pufendorf’s *Elements* and after Boineburg’s correspondence. In that same year, Johann Heinrich Boeckler published a commentary on Grotius, after which came similar works by Johann Jakob Müller (1664), Jan Klenck (1665), and Kaspar Ziegler (1666), all of whom had a strong interest in public and international law. Then in 1671 Johann Adam Osiander (1622–1697) published *Observationes maximam partem theologicae*, and thus began a new phase, in which Grotius’s fame in Germany was tied to the dominant philosophical and theological problems of the day: the principle of law, its method, the self-sufficiency of human reason, innate ideas, and the *perseitas moralis*. Grotius was seen in this literature as offering an alternative to

Hobbes and Pufendorf, an alternative particularly appreciated by theologians. In the same way, the commentators of the late seventeenth century wrote their works under the influence of the longstanding disputes about Pufendorf's and Thomasius's doctrines. This was the case of Heinrich Henniges (1673), Valentin Veltheim (1676), Johann Joachim Zentgraf (1677), Johann Georg Kulpis (1682), Johann Georg Simon (1688), Johann Ludwig Prasch (1688a), Johann Heinrich Schweitzer (1689), Veit Ludwig von Seckendorff (2006), Johann Gerhard Scheffer (1693), Johann Jakob Müller (1696), Johann Reinhard Hedinger (1699), and Philipp Reinhard Vitriarius (1701). The same historical fate can be observed even in the case of Grotius's younger brother, Willem de Groot (1597–1662). Apart from some juridical commentaries, he wrote a treatise titled *Brief Manual on the Principles of Natural Law*, commenting his older brother's major work and offering a legal epistemology compatible with the jurisprudence of the early seventeenth century (Scattola 2004a): This treatise, published posthumously in 1669 in Holland, would soon draw the attention of German theologians, especially in Jena, and was republished three times by Georg Goetze, Johann Georg Simon, and Johann Jakob Müller (Groot 1667, 1669, 1674, 1675; J. J. Müller 1696), all of whom would later have a direct part in the German debates on Hugo Grotius and Samuel Pufendorf (Veltheim 1676; Simon 1688).

Apart from commenting on Grotius—in reaction to Pufendorf's theory or simply in the effort to put forward an alternative to it—German universities developed toward the end of the seventeenth century two parallel and interrelated doctrines of natural law, both of them drawing on Grotius. On one side were the theological accounts of Valentin Alberti (1668, 1676) and Veit Ludwig von Seckendorff (2006), who as Thomasius pointed out, continued some old, sometimes medieval schemes, maintaining that the principles of natural law were actually ideas existing in the human soul and corresponding to the Ten Commandments (Scattola 2007b, 104–5). On the other side were Samuel Rachel (1628–1691) and Johann Christoph Beckmann (1641–1717), who looked to Hugo Grotius to develop a theory of politics and international law. Rachel, who studied and taught in Helmstedt with Conring, wrote in 1664 a series of disputations on the principles of moral action, drawing on Aristotle and Grotius to present an alternative to Pufendorf's *Elements of Universal Jurisprudence* (Rachel 1664). In two of these dissertations he discussed at length the matter of natural law and the law of nations (Rachel 1916), taking the law of nations to be the true foundation of politics. The same view was upheld by Beckmann, who came at the formulation that “the law of nations is the principle of politics. The first principle, which contains all elements of political theory, is: ‘Every thing should agree with social life’” (Beckmann 1679b, 17). Indeed, the law of nations was understood by Beckmann to consist of the set of duties obliging the members of a particular group once they have decided to form a community, or a society, out of that group. It does not only

concern the institutions of a single people but also covers the rules that govern all nations when they enter into a commonwealth, and it therefore contains universal obligations deriving from the rational essence of human beings: These general principles had been described by Grotius, and politics must consequently begin with his theory of international law (Beckmann 1676; 1679a; 1679b, 15–6).

Beckmann shared his double interest in politics and natural law with Johann Nikolaus Hertius (1651–1710), who contributed to the foundation of universal public law separating it firmly from politics and founding it upon Pufendorf's principle of sociability (Hertius 1694, 1700, 1703). Both Beckmann and Hertius worked in the tradition of “architectonic politics” and represented the point where Aristotelian politics evolved into universal public law crossing paths with the history of natural law, thus laying the foundation for the legal and political philosophy of the eighteenth century (Scattola 2003a, 380–1).

The early history of modern natural law can be described by analogy to a tree. Pufendorf built its trunk, the first main tradition, in the late seventeenth century. The trunk soon grew an important branch, Grotian natural law, which offered an alternative account. The branch then grew three offshoots: first the commentators on the work of Grotius, then theological polemicists, and finally authors of Christian natural law, like Alberti and Seckendorff. The tradition they built disappeared in the early eighteenth century, dispersing into eclectic philosophy.

Meanwhile, Pufendorf's work—the trunk—gained international recognition with its translations by Jean Barbeyrac (Pufendorf 1706b, 1707), and it evolved without discontinuity into the doctrine of Christian Thomasius (1655–1728). Indeed, in 1688 Thomasius defended Pufendorf in *Institutions of Divine Jurisprudence* (1963b), thus taking Pufendorf's place, from that point on, as the target of the theologians' polemic against modern natural law. In 1705 Thomasius published his second major work on this subject, *Foundations of Natural Law* (1963a): He extended the voluntaristic definition of law, which Pufendorf before him had also upheld, but rejected Pufendorf's assumption of original human sociability and so came out in favour of the Hobbesian principle of fear (P. Schröder 2001). But otherwise, aside from this divergence, Thomasius did not forgo the fundamental assumptions he had found in Pufendorf. On the contrary, his new conclusions were the inevitable consequence of his previous position, namely, that natural law could only be derived from human rationality.

What gave continuity to the whole tradition of modern natural law—from Pufendorf to Thomasius and later—was not so much any particular “ideological” assumption about Christianity, power, property, society, or the constitution, nor was it a particular anthropology, whether pessimistic or optimistic: All that was the subject of heated debates, with participants on either side

taking a firm stand of resolute support or vehement rejection when it came to the issues involved in setting out the principle of law. The true continuity, and identity, of modern natural law was instead owed in large measure to the shared moral and legal epistemology that superseded the ancient dialectical and topological concept of practical knowledge replacing it with the idea of a conceptualized experience: human conduct could finally be described and governed with the empty procedures of formal rationality, could be reduced to a single principle, and so could be developed into a rational system. Of course, this project needed and produced a radically secularized world, in which transcendence could no longer communicate with the human (Scattola 2007b, 113–31), and which consequently became the main point of concern driving the polemics with so-called Christian natural law (Schneider 1967, 2001). This methodological and epistemological complex was the real foundation of modern natural law, and aside from some general speculative hypotheses, like the state of nature, it was common to all currents of modern natural law, despite of the difference between voluntaristic theorists, like Pufendorf and Thomasius, and intellectualistic ones, like Christian Wolff and Heinrich Köhler. Paradoxically, Thomasius's rejection of a position peculiar to Pufendorf wound up saving the very essence of Pufendorf's natural law.

In this case too, as in the interpretation of Grotius, we should refashion the traditional scheme, which divided the history of natural law in the seventeenth and eighteenth centuries along two main streams: a voluntaristic school—which began with Hobbes and continued through Pufendorf, Thomasius, and his disciples—and an intellectualistic school, which began in the late seventeenth century with Leibniz and was then continued by Wolff and his followers. As a corollary, this interpretation suggests that these two modern streams both found their models in medieval theology, especially in the discussions between Dominican intellectualism and Franciscan voluntarism, or again between Thomistic and Scotist Scholasticism (Fassò 1968, 176–81 and 257–9; Todescan 2001, 63–94). But the methodological discussions of the late seventeenth and early eighteenth centuries reveal a different picture. True, we do find divergent ways of imagining natural law, with some thinkers inclining more to a voluntaristic principle and others more to an intellectualistic one. But beyond this apparent divergence there was a perfect continuity in the basic epistemic premises, or rather in the fundamental understanding of what natural law was. In this sense, all the different positions, even when they seemed to revive the doctrine of Thomas Aquinas, conceived natural law as a rationally immanent creation, the product of a logical order, and therefore looked to exactly the same result, namely, the construction of a system of juridical rules perfectly closed in within the boundaries of human reason alone, with the paradoxical consequence that the use of theological arguments, such as the use of a divine constraint in Pufendorf or Thomasius, meant the complete exclusion of theology from natural law (Palladini 1988, 413).

There are two other respects in which Thomasius played a crucial role in the history of modern natural law. Firstly, he led a group of lawyers, philosophers, and state servants who presented themselves as a close-knit and well-defined school advancing a common intellectual programme, particularly in the teaching of law and politics. Among those in this “School of Thomasius” were the theologian Johann Franz Buddeus (1703), the philosophers Nikolaus Hieronymus Gundling (1715a, 1715b, 1734, 1744) and Friedrich Gentzke (1707, 1709), and the lawyers Gottlieb Gerhard Titius (1703), Ephraim Gerhard (1712), Justus Henning Böhmer (1726), Nikolaus Pragemann (1720), and Johann Lorenz Fleischer (1722) (Rüping 1968, 104–18; 2001). Secondly, the “School of Thomasius” was particularly successful in working the history of natural law into an independent literary genre, serving not only as an intellectual tool in the general context of learned history (*historia literaria*) (Grunert and Vollhardt 2007) but also as a formidable *polemical* tool, in which respect it made natural-law theorists highly conscious of their own role (Buddeus 1701; Ludovici 1701; Thomasius 1972; Reimmann 1713a: 1–111; Glafey 1723; Glafey 1732; Gundling 1734; Gundling 1736, 6023–4; Schmauß 1754; Hochstrasser 2000, 1–39). Under the stimulus offered by Halle, natural law established itself in the early eighteenth century as a compulsory study in formal legal education, and its literature flourished across the entire academic system. Many writers on natural law kept Halle’s stimulus alive: Among them were Johann Balthasar Wernher (1704), Johann Georg Wachter (1704), Heinrich Ernst Kestner (1705), Ephraim Gerhard (1712), Friedrich Hermann Cramer (1715), Nikolaus Hieronymus Gundling (1715a, 1715b), Georg Beyer (1716), Michael Heinrich Gribner (1717), Nikolaus Pragemann (1720), Jakob Gabriel Wolf (1720), Johann Lorenz Fleischer (1722), Adam Friedrich Glafey (1723), and Jakob Friedrich Ludovici (1724) (Anonymous 1961a, 1199–201).

There is another branch in the tree of natural law: It corresponds to the philosophy of law developed by building on the positions of Gottfried Wilhelm Leibniz (1646–1716), who in 1667 published his *New Method of Learning and Teaching Jurisprudence*, in which he reintroduced the old legal topology and dialectics but did so seeking to fashion them into the rational order of elements and propositions that had already been illustrated by Thomas Hobbes, Johannes von Felden, and Samuel Pufendorf (Leibniz 1930a, 295). In this early work, Leibniz conceived law (*ius, iustum*) as something useful for the world, or for humankind, or for a particular nation: Natural law deals with the first kind of utility, as the law of nations does with the second and civil law with the third. And since the first kind of utility (what is useful for the world) can only be established by God, it follows that God must necessarily be invoked as the author of natural law (*ibid.*, 300–1). In unpublished works written around the same time, Leibniz showed in which sense God is the necessary beginning in the philosophy of law (Leibniz 1930b, 431–2 and 437). He used the same argument in 1707 to criticize Pufendorf’s *On the Duty*



of *Man and Citizen*. In both cases he assumed, against Grotius's famous *Prolegomenon* 11, that God and the immortality of the human soul are necessary conditions of natural law, because, otherwise, a rational being would not obey any law and would search only for his own utility, even if that were to violate the rights of other human beings and threaten their preservation. If God did not exist, Hobbes would be right in his description of the state of nature (Leibniz 1722; Leibniz 1951, 158–64; Kemmerich 1714, b4r–8v). But this does not mean that God intervenes in the human world directly, performing miracles or otherwise seizing on his commandments, impressed in the human soul as innate ideas. Both hypotheses, on which Christian natural law was based, are to be rejected; for, otherwise, natural law would be the product of an external authority, not of human reason. In this way, Leibniz met fully Hobbes's secularization condition, as postulated in *Leviathan*, under which communication between God and the earth is no longer possible in any form after the death of Christ (Hobbes 1962b, 396–406; Hobbes 1962c, 250–97). In fact, what Leibniz was referring to in his argument is not *God*, but the *idea* of God attained by reason. His deduction of natural law can be summarized as follows: When human reason set out in search of a first principle, it realized that no commandment is possible without the idea of God; by a process of rational deduction, human reason thus came at the idea of God as the most perfect being; this idea was then accepted as the first premise in the deduction of natural law, which therefore stands as necessary and obligatory. But in this argument the mind moves only within the boundary of reason, and God serves only as an internal function of rational argument. In this sense, Leibniz's philosophy satisfies all the conditions of modern natural law.

The same scheme was adopted by Christian Wolff, Heinrich Köhler, and Alexander Gottlieb Baumgarten: Despite certain differences among them, they formed a distinct group with respect to their metaphysical foundation of natural law, which they rested on the intellectual evidence of God and on the existence of a continuous rational nexus (*nexus rerum*) among all beings of Creation. There are certain respects in which these scholars' view differed from those of others—thus, for example, they posited for their system a first proposition different from that used by the School of Thomasius—but otherwise they agreed with all other theorists on the formal scheme of natural law. In this sense, both Köhler and Baumgarten proposed a twofold method for the deduction of natural law. They held that general principles of morality accordant with human nature can be found and established by human reason alone, in the manner of the atheist. But this will only take us so far: It will yield no more than a vague idea of natural law and so will not suffice to achieve a true constraint. Therefore, the only way to achieve a real obligation is by postulating the existence of God as a truth of reason and then supplementing with this theological premise the remaining argument on justice and law (Köhler 2004, 67–8; Baumgarten 1763, 3–4).

In the middle of the eighteenth century, after the great expositions of Christian Wolff (Wolff 1968, 1969), natural law took different directions and attempted a variety of eclectic solutions, which in most cases subscribed to a moderate form of Wolff's theory and combined elements from all the main traditions of the late seventeenth and early eighteenth centuries. This came as a welcome development within the School of Thomasius, which took a historical view of science and the humanities and thought eclecticism to be a necessary exit, since in earlier times a better knowledge of the past had freed learned discussion from prejudice and authority (Heumann 1733, 4). Eclectic experiments had already begun in the early eighteenth century, as in the case of Heinrich Ernst Kestner (1705), but it was not until the second half of the century that the philosophical solution of eclecticism flourished. Among these thinkers—all of whom accepted Wolffianism in a moderate form, acknowledging the principle of “perfectionability”—were Adam Friedrich Glafey (1732), Johann Gottlieb Heineccius (1737; cf. Heineccius 1740b), Joachim Georg Darjes (1745), Daniel Nettelbladt (1785), and Gottfried Achenwall (1750; cf. Achenwall 1995). Heineccius wrote a textbook on the model of Jean Barbeyrac and Jean-Jacques Burlamaqui, introducing separate principles for each of the three parts of natural law (Heineccius 1740b, 71–3): The work was adopted as textbook in Italy, where it went through several editions, and its success in Catholic universities can be explained by observing that one of the principles it set forth was the rational love of God, and that this principle was religiously inspired. But the textbooks with the widest circulation among the universities of the Holy Roman Empire were those written by Darjes and Achenwall (J. Schröder and Pielemeier 1995, 255–69), probably because these authors took a moderate and eclectic approach, offering an inclusive version of natural law in the decades when this doctrine reached its widest academic diffusion and provided a common language for legal and political discussion.

The triumph of natural law in the universities of the Holy Roman Empire is attested by its hold even on Catholic scholars, who sought to establish their own version of the theory, regarded as a product of Protestantism, and who at the same time also thought it necessary to assimilate the theory's scientific underpinnings. Thus, Anselm Desing (1699–1772) undertook a radical criticism of Protestant natural law, rejecting the arguments put forward by Thomasius and his school against Catholic Scholasticism, and Ignaz Schwarz (1690–1740) likewise criticized contemporary Protestant thinkers, exposing what he understood to be their faults, and then developed on the basis this criticism a complete theory of natural law from a Catholic point of view. Both authors rejected the substantive conclusions of Protestant natural law but preserved its characteristic method, making it necessary to construct the entire system by rational deduction from a single principle (Schwarz 1741–1743; Desing 1753). This approach, based on combining Protestant forms with Catholic content, was then attempted by Franz Schmier (1722) in the area of public



law, and it continued in the following decades, attaining its best results with Karl Anton Martini (1726–1800), whose works on natural law can be compared to those of his Protestant contemporaries (Martini 1765, 1768, 1783–1784). The same project of a Catholic natural law was carried on as well in the ancient Italian states, with Pietro Antonio Ghio, for example, who around 1770 taught in Turin a Scholastic version of natural law, and he too combined this with a Protestant method, maintaining that there must be, in the mind of every human being, a single principle of justice to be used as the starting point from which to deduce the entire legal system (Ghio 1771, 112–7).

With the Catholic contribution in the second half of the eighteenth century, the tree of natural law was finally complete. Its roots were given by Hobbes's modern moral epistemology (Riley, vol. 10 of this Treatise, chap. 3). Pufendorf's theory made up its trunk (Riley, vol. 10 of this Treatise, chap. 5). On one side of the trunk there grew, by way of a temporary reaction to Pufendorf, the branch representing Christian natural law, based on Grotius, which in turn forked into three different offshoots. Pufendorf's trunk continued into the School of Thomasius and then branched out in a number of directions, yielding Leibniz's solution, also taken up by Wolff, Köhler, and Baumgarten, along with a number of eclectic varieties and the Catholic stream.

It was in the middle of the eighteenth century that natural law reached its highest academic diffusion and recognition, but it was also about the same time that the theory began to wane, in a process that would eventually lead to the foundation of the political and social sciences. This development was driven by intellectual forces originating from the University of Göttingen around 1750, which influenced the debate in two ways. In the first of these, the scholars at Göttingen carried to a logical conclusion the voluntaristic premises of Thomasius's doctrine, reaching a point where, for the first time, it became possible to question the epistemological and methodological underpinnings of natural law. The initial impulse came from two scholars in particular, Johann Christian Claproth and Johann Jakob Schmauß, the latter of whom actually came from Halle and the School of Thomasius. They made the argument that a pure intellectual principle and a mere rational system, as natural law pretended to be, could not exert any kind of influence on the actions of human beings, who are rather moved by material forces: If reason and instinct are two different spheres and never come into contact, how can the former govern the latter and decide when the natural instincts are allowed to take hold and guide action? If we are to have effective legal constraints, we should reject the intellectualistic premises of the modern tradition and assume that natural law is itself a product of natural motives, thus accepting instinct as the first principle in the system of the moral sciences (Claproth 1743, 1749a, 1749b; Schmauß 1735, 1740, 1748, 1754, 1755). But this will spell the end of natural law in any prescriptive role, since all the theory can do now is

describe the natural forces active in the human body and among human beings, in civil society. Natural law thus turns into a descriptive discipline, showing that human beings are naturally inclined to act in this way or that, a discipline very much akin to ethnology or sociology.

As mentioned, it was at the University of Göttingen that natural law was developed into a social science, or rather into a primitive form of it. This development was accomplished by scholars—like Johann Heinrich Gottlob Justi, Gottfried Achenwall, and August Ludwig Schlözer—who were also responsible for the second of the two developments that natural law underwent in the eighteenth century, in that they made an important contribution to the foundation of contemporary *political* science. In fact, this was part of a larger trend that started in midcentury, when natural law began to shed some important components of its former self, especially in its account of the prepolitical conditions of society as well as in its account of universal public law. These components were integrated into larger systems embracing all the knowledge available about the commonwealth and political society, and these collections of academic discourse came to be known as *Systeme der Staatswissenschaften*, or systems of political science: They would begin with an introduction to the general condition of society, often in the form of a history of humankind; this would be followed by a part covering universal public law, understood as the science of the modern state; next would come a part devoted to the theory of constitutions, as well as to politics (understood as the study of government), political finance and administration, and statistics; and finally there would be a part given over to political history (Scattola 1994, 41–74; Scattola 1996; Scattola 2003a, 493–521). To such “systems of political science” was devoted the work of Justi and Schlözer, in whose projects natural law underwent two changes in particular. Firstly, universal public law was conceived as a fully independent discipline more akin to philosophy than to jurisprudence, so much so that it eventually had to be set free from natural law (Schlözer 1793, IX). This evolution came to an end in the eighteenth century with the “theory of state” (*Staatslehre*), a theory dedicated to a scientifically independent subject, meaning the modern state and its internal rules. Secondly, the description of the state of nature was itself gradually transformed into an autonomic discipline, for which were coined the names “political metaphysic” and “metapolitics” (Justi 1760, \*3v; Hufeland 1785, 21; Schlözer 1793, 13; Obert 1992; Scattola 1994, 75–130). It described the condition in which mankind lived before the introduction of the commonwealth or the condition in which many contemporary populations still lived ignoring sovereignty. Metapolitics therefore assumed there to exist human societies before and outside the state as described by universal public law. It further assumed that society could simply exist without sovereignty and be independent of political government. For this kind of prepolitical society, Schlözer used the name *bürgerliche Gesellschaft*, or civil society, and gave an anticipation of the science that

would later be called *Gesellschaftswissenschaft*, or sociology. Modern natural law, with its intellectualistic program, has consequently developed into social science, into the description of natural processes within human groups. But in this way its original programme was lost.

## 1.5. The Epistemology of Modern Natural Law

Natural law theory, as the first theory of law and right in the language of modern concepts, was at the same time the first form of legal philosophy. It evolved in ways that, as we have seen, can be represented by means of a tree, with branches growing in different, sometimes opposite, directions. And it was with respect to content that these doctrines of natural law differed: They disagreed “ideologically” about specific legal and constitutional questions. But if we leave this surface—the contents—and look at the method and the basic scientific assumptions at work, we will find that the different authors, schools, and currents all shared the same epistemology, that they all conceived the “science” of natural law in the same way, and that their preference for this or that substantive solution was in this sense of secondary importance. In this theoretical core lay the real contribution of natural law to legal philosophy, and it was primarily a methodological contribution.

### 1.5.1. *The Method of Rational Calculation*

The first basic element in the construction of modern natural law is human rationality, which consists in the mechanical capability of inferring true conclusions from true premises (Hobbes 1962a, 2). In fact, natural law can be a science only if it follows the right method of rational demonstration (Achenwall and Pütter 1750, 54). This idea can be found in an anonymous article titled “Principle of Natural Law,” from Zedler’s encyclopaedia, in which the first and general principle of natural law is identified as being the capacity to reason:

Regarding the first point, or the qualities of the principle usually discussed, we should observe that all philosophical disciplines, with exclusion of logics, have two different principles, a general one and a specific one, and that former can be either theoretical or practical. In the same way, the general and theoretical principle of natural law is sound reason, whereas the practical principle is obedience to God. But there is a certain disagreement about the specific principle of natural law. Nevertheless it generates all particular rules as logical conclusions and is therefore also called “fundamental rule.” (Anonymous 1961b, 1205)

This idea of a rational faculty common to all human beings, and of its necessary connection with moral action, is a constitutive part of every modern theory of natural law. In fact, it would make no sense to even begin deducing the legal system without first demonstrating that human behaviour is driven by intellectual powers and shaped by rational means. The first part of any sys-

tem of natural law is therefore devoted to a theory of human action (Pufendorf 1999; Pufendorf 1934, 1–309; Pufendorf 1927, 3–21; Gundling 1715a, 3–29; Achenwall and Pütter 1750, 9–53).

This anthropology contributes to the foundation of a rational theory whose main point is to establish a necessary connection between free will and higher human understanding (Achenwall and Pütter 1750, 13): “From the notion of the good or of the perfection arises an effort towards the good, that is to achieve the good. From the notion of the evil arises an effort against the evil, that is to avoid the evil” (ibid., 11, 12, and 14). In this sense the true aim of a theory of action is to give rise to obligation by deducing all its elements from human rationality. In fact, in this tradition, it is by connecting the idea of a good with that of an action that someone is brought under an obligation—or is otherwise obliged or compelled to do something—because once an action is so represented (in its connection with an idea) the will is led to want that action (ibid., 23–24). This theory therefore assumes that the simple representation of an idea suffices of itself to force the will to bring about the corresponding action.

### 1.5.2. *The Principle of Natural Law*

The second basic element in the theory of natural law is its fundamental proposition, from which the rest of the system derives: “The first principle of the natural law is immutable, eternal and indispensable [...]. It is therefore clear that from it could be derived an endless number of inferior rules” (Achenwall and Pütter 1750, 31). This will be an abstract principle, such as “Every man must cherish and maintain sociability, so far as in him lies” (Pufendorf 1927, 19) or “You should not disturb the self-preservation of the others” (Achenwall and Pütter 1750, 48). Indeed, the fundamental proposition has a merely intellectual existence: It is an idea, a concept of the mind, so it does not work immediately on human action but can operate only through the logical consequences it produces.

When Pufendorf assumes sociability to be the first truth in natural law, this does not mean that human beings are naturally social and compelled by an innate impulse to behave sociably: to live peaceably together, help one another, respect individual rights, and so on. They only recognize the *idea* that human beings are social, and from this principle they deduce all the precepts necessary to order their lives. In this sense, what moves human beings is not an inborn drive toward rightness but their *conviction* that something is right, and once they agree that they are social beings, they will act in keeping with natural law even if their natural instincts and all other forces in their souls are completely asocial (Scattola 2004b, 3–10).

That natural law is only an idea, and that its existence is merely intellectual, was clearly recognized and explained by Hobbes, who in the *Elements of*

*Philosophy* (Chapter 6, Section 1: “Concerning Body”) describes a method of *regressus*, or the double way of knowledge (Papuli 1983, 221–77; Crescini 1983, 576–90; Scattola 2002a, 307–8). The first step toward gaining knowledge of natural law is to reduce all experience in practical philosophy to a single proposition and to the unity of a single concept (Hobbes 1962a, 3). Human beings in real life are faced with important decisions in moral, political, and legal situations that for the most part are obscure and intricate. Whenever a difficult situation of this sort comes up, we should first apply the analytic method and divide the problem into its constituent parts, repeating the same division until we get to the argument’s smallest parts, its atoms. Having broken the question down to its atoms, we can then apply the synthetic method and work in the opposite direction, by combining the elements previously diagrammed. If the original question was correctly framed, the result can only restate the starting point; but if it was incorrectly framed, this double method—analytic from the top down and synthetic from the bottom up—will rectify the error and avoid false conclusions (*ibid.*, 73–4). For instance, if a commonwealth is analyzed into its principles, any synthetic conclusion about the right to resist sovereign power will definitely be recognized as contradictory.

In truth, the double method promises to be even more powerful, in that the singular, atomic ideas produced by analysis can be compared and compounded to such an extent that only one of them stands valid as first and fundamental proposition. Once a discipline has found a first principle of this kind, it can give up the first part of its methodological inquiry, the analytic way, and pursue only the second part, the synthetic way, which is particularly useful when it comes to framing doctrines in jurisprudence (Pufendorf 1934, 22–5; Schrimm-Heins 1992, 154–70; Behme 1995, 31–4). In this sense the whole of modern natural law can be depicted as a triangle, its angles representing the doctrine’s principle, system, and method, and the plane surface its content. Principle and system are, in this depiction, so tightly bound up that they represent two different aggregate states of the same matter: If a system is compressed to such an extent as to take up only a single point, it will appear as a single principle; conversely, if a principle is developed to yield all the contents inherent in it, the outcome will be a complete system. A principle can thus be considered a system in its most implicit form, and a system a fully explicated principle. They are the two endpoints of the same segment, gradually working themselves into each other in seamless continuity (Scattola 2003d, 1–30; Scattola 2004b, 3–7). The only remaining component of the theory is its method, which consists of the set of rules explaining how a principle can be developed into a system or how a system can be reduced to a principle (Röd 1970, 5–9; Scattola 2002a, 273–309).

Similar accounts of the methodological triangle can be found even in authors working in the twentieth century. The clearest of these accounts—and a critical one at that—is that which Hans Kelsen gave in 1928 in the essay “The

Philosophical Foundations of Natural Law and Legal Positivism,” and then again in 1945 in *General Theory of Law and State* (Kelsen 1928, 7–12; Kelsen 1949, 391–8). But, of course, the relationship between principle and system had been a subject of much debate among natural law theorists in the seventeenth century, and a statement of this relationship had already been given by Samuel Pufendorf, who in this respect can be considered a pupil of Hobbes (Röd 1970, 97; Palladini 1990). In the *Swedish Quarrel*, Pufendorf forthrightly explained his methodological approach:

When I decided to give to natural law the rightful form of a discipline, whose parts should be consistent with one another and derive from one another in an evident way, my first concern was to establish a solid foundation or a fundamental proposition, which should comprehend and summarize in itself all its precepts, from which all further rules could be derived with an easy and evident subsumption, and in which they all could then be resolved. (Pufendorf 2002, 142)

The same doctrine is reiterated in Pufendorf’s textbook *On the Duty of Man and Citizen*, claiming that all the conclusions which could possibly be extracted under a legal system are already inherent at source in its first principle, and that the philosopher’s true task consists precisely in working from this principle and extracting from it all those conclusions by deduction, thus treating them as “mere corollaries” (Pufendorf 1927, 19; Riley, vol. 10 of this Treatise, chap. 5). So this intellectualistic point of view was not exclusive to rationalistic philosophers, such as Leibniz or Wolff, but could be found across the spectrum of natural law, since it was also taken up by “voluntaristic” philosophers, such as Hobbes and Pufendorf. It is therefore a point of view deeply embedded in all modern natural law, and indeed belongs to its very essence. In fact it distinguishes as well the work of Christian Thomasius and Nikolaus Hieronymus Gundling (1671–1729): Even as they vigorously defended the superiority of the will over reason, they agreed with their contemporaries on the intellectual nature of the first principle and on the “logical construction” of natural law (Gundling 1715a, 21–2).

Since the first principle of modern natural law is an empty idea, there is no tolerance in this theory for anything even remotely close to an innate idea. In fact, the classical natural law of the late seventeenth and early eighteenth centuries abhorred the doctrine of innate ideas, which was conceived as a theological threat to the integrity and independence of legal theory (Pufendorf 1927, 20; Pufendorf 1934, 201–5; Pufendorf 2002, 161–5; Thomasius 1972, 93–127; Palladini 1978). And the same polemical stance was taken as well by Christian Thomasius and Christian Wolff (Thomasius 1963a, 44–5; Wolff 1971, 206–7; Scattola 2001, 133–7; J. Schröder 2004, 19–23).

Gottfried Achenwall explained the innate ideas of the old tradition by pointing to those obscure movements which arise in the imaginative faculty of the soul, and which therefore belong to a different order than that of the law of nature (Achenwall and Pütter 1750, 13). Similar arguments were used as



well in the *Great and Complete Universal Dictionary* (1732–1754), published by Johann Heinrich Zedler (1706–1751): The dictionary was edited for the most by the philosopher Carl Günther Ludovici, and in legal theory it leaned toward Pufendorf and toward Thomasio and his colleagues in Halle (Zedler 1961, vol. 18: 1005–6). Accordingly, the anonymous authors of the entry “Law of Nature (Moral)” recall the old Scholastic doctrines of innate ideas and their interpretations as the products of an empty ability (*habitus*) or of the guiding power of conscience (*synderesis*) (Aquinas, *Stb*, Ia IIae q. 94 a. 6; Soto 1967, 29a–b; Weidner 1712; Scattola 2001, 104–109), but then they are judged as “useless and silly ideas” (Zedler 1961, vol. 23: 1095), in that it is evident that children do not perceive any divine commandments in their souls and so cannot be subjected to any legal obligation, as is the case with animals and with all human beings lacking the use of reason.

### 1.5.3. *The History of Natural Law as the History of Its Principles*

The fundamental proposition, or first principle, of natural law can confer on it the attribute of a “science,” but only if the principle is in its own turn rational and satisfies certain epistemological conditions, four in particular:

If natural law should include a fundamental proposition, from which all its rules can be deduced with a correct conclusion, then it should have following qualities. It must be 1. true, that is, it must not comprehend any false propositions; otherwise we could not conclude any truth from it [...]. 2. evident, because the connexion of the conclusions with the principle has to be clear and palpable [...]. 3. unique, a condition that is postulated by the nature of demonstration and system, and that suits the nature of human understanding, which cannot comprehend and understand many things at once, but can only begin with a single notion and then pass to a plurality according to the right order. 4. sufficient, because it must include all commandments of natural law and no other rules than those belonging to this discipline. (Anonymous 1961b, 1205–6; Gundling 1744, 62–3)

The first principle must in the first place be universal, so that all the rules of natural law can be derived from it alone, whether directly or indirectly: The principle therefore synthetically contains the entire doctrine. In the second place, the principle must be specific to natural law, producing only those rules which belong to it: It is not a general or generic rule of practical reason but is the one standard of judgment that makes it possible to identify and describe natural law as a particular discipline. Only what derives from the first principle can be considered a part of natural law, and it is only through the activity of this principle that natural law can conceive of itself as an independent discipline. In the third place, the first principle, as its name suggests, must be prior and primary: It is the highest source of law, and all the other rules of law therefore stand on lower levels. It follows from the principle’s prior standing and its universality combined that this is also a single principle. Indeed, if more than one first principle were to be operational at any one time, no single

principle would be universal—nor would it be the first, and hence the highest, principle—because these plural “first” principles would then all stand on the same level of universality. And in the fourth place, the principle must be appropriate, making it possible for us to derive from it the whole of natural law without recourse to any other rule (Achenwall and Pütter 1750, 55).

Each author of the seventeenth and eighteenth centuries imagined and defined the source of natural law in a different way: as sociability, fear, perfectibility, and so on. Still, the problem of the first principle remained a central concern in the academic discipline of *ius naturae et gentium*, producing a literature specific to it, a literature to which belong, among others, the works of Johann Nikolaus Hertius (1694), Samuel Cocceius (1699 and 1702), Theodor Pauli (1700), Ephraim Gerhard (1712), Michael Heinrich Gribner (1717), Daniel Friedrich Hoheisel (1731), Johann Balthasar von Wernher (1721b), Gottlieb Sturm (1730), Johann Jakob Schmauß (1740), and Johann Ulrich Röder (1783).

So prominent was the problem of the first principle in natural law that its entire history can be represented as the succession of its different principles. Indeed, this succession of first principles was precisely the historiographic model that came into use in the early eighteenth century: On it was based Thomasius’s own history of natural law (1972), where it was first used, and it thus shaped the continuing enterprise of the *historia literaria*. Important examples of this historiography of natural law are the works of Johann Franz Buddeus (1701), Jakob Friedrich Ludovici (1701), Johann Gröning (1701, 31–5), Jakob Friedrich Reimmann (1713a, 1–111; 1713b, 100–2), Dietrich Hermann Kemmerich (1714, 1577–613), Gottlieb Stolle (1724, 627–58), Andreas Adam Hochstetter (1710), Nikolaus Hieronymus Gundling (1715a, 21–5), Michael Heinrich Gribner (1717), Ephraim Gerhard (1712), Nikolaus Pragemann (1720), Adam Friedrich Glafey (1732, 1739), Johann Wilhelm Jan (1711), Immanuel Proeleus (1703), and Johann Jakob Schmauß (1748, 16; 1754, 1–370).

Here is Reimmann, for example, who attempts to reduce the entire history of natural law to a sequence of alternative first principles formulated from two separate yet interrelated viewpoints:

The history of natural law serves as a mirror and shows me and for my own a. Education [...] that authors of natural law have quite opposite opinions about the foundations of this teaching, since the one declares this as fundamental proposition, the other declares that and a third one something else [...]. For instance 1. Scholastic theologians took as first principle of natural law the conformity with the sanctity of God; 2. Grotius partly the conformity with the sanctity of God and partly the sociability; 3. Pufendorf the sociability; 4. Hobbes the self-interest; 5. Alberti the uncorrupted condition in the Eden; 6. Prasch the Christian love; 7. Bodin the conformity with the order of creatures; 8. Semler the righteous love for the own happiness; 9. Cocceius God’s will; 10. Wachter the conformity with nature; 11. Thomasius happiness and a long life; 12. Proeleus the self-preservation, and so on [...]. b. Recreation, because we can explain the different principles in natural law with different proverbs, and so we could write on the title page of each author a particular sentence according to his first proposition: 1. Pufendorf: The human being is a god for other human beings; 2. Hobbes: The human being is a devil for other human beings; 3. Alberti: What a change from that old time!; 4. Prasch: I



know and approve the better, but I chose the worse; 5. Bodin: Let all things be done decently and in order (1 Cor 14, 40); 6. Buddeus: Three is the perfection; 7. Cocceius: Thy will be done; 8. Wachter: God and the nature do nothing in vain; 9. Thomasius: Do not do unto others as you would they should not do unto you; 10. Proeleus: I am my neighbour for me. (Reimmann 1713a, 104–10)

Another such arrangement of first principles is found in Zedler's encyclopaedia, whose anonymous entry "Principle of Natural Law" lays out a grand architecture for an all-inclusive classification. At the outset we have a broad division of fundamental propositions that classifies these as either adequate or inadequate, or untrue. The class of untrue propositions in turn breaks down into two subclasses, the first of which contains all propositions that do not partake in the nature of a principle because they are not formulated as laws or as precepts. Such are the propositions of consent among nations (Cicero, *Tusculan Disputations*, I, 13, 30; *For Milo*, 4, 10; Grotius 1925, 38–40; Groot 1667; Zentgraf 1678), natural instinct (Aristotle, *Politics*, 1253a 30–31; Ulpian in D. 1.1.1.3), the rational creature's similarity to the Creator (Zentgraf 1678; Ferber 1709), the divine will (Cocceius 1699, 1702), the divine will as manifested in the final aim of all things earthly (Glafey 1714, 1732), and conformance with divine holiness (Grotius 1925, 14; Oslander 1671; Veltheim 1676). Some untrue propositions do have the form of a law, but they do not correspond to human nature, and for this reason they fall within the second subclass: They bring into account a much larger sphere than human society and by so doing contravene a basic condition for a first principle of natural law. Examples are the Seven Laws of the Noachides (Gen 2, 16), proposed by John Selden (1640); the state of innocence, proposed by Valentin Alberti (1676), David Mevius (1671), Veit Ludwig von Seckendorff (1685), and Georg Pasch (1700); Christian love, as described by Johann Ludwig Prasch (1688a, 1688b); and the Ten Commandments of medieval Scholasticism (Aquinas, *Stb*, Ia IIae, q. 100, a. 1; Soto 1967, 102a–106b), proposed by Niels Hemmingsen (1559), Georg Calixt (1634), and Johann Heinrich Boeckler (1663).

If any principle is to be counted as adequate or true, it must satisfy all of the theory's necessary formal conditions, and it is only in the second of the two main classes that these principles can be found. But the principles in this class are a numerous and diverse lot; so they, too, have to be divided into two subclasses. In one subclass are all those principles that do have a lawlike form and do conform with human nature but do not correctly identify the fundamental proposition of natural law as an intellectual fact that manifests itself only in the human mind: These authors fail to separate such a principle from its real cause, existing only in the external world, because they confuse or equate the *principium essendi* with the *principium cognoscendi* (Reimmann 1713a, 104–8). There are four solutions in this subclass. Under the first of these—proposed by Johann Georg Pritius (1690, 1701), Johann Christian Müldener (1692), and Matthias Jakob Wahl (1700)—the first proposition of

natural law should be derived from the *finis Dei*, from the aim pursued by God with the creation of the world. The second solution is by Lambert Velthuysen (1651), one of the first defenders of Hobbes, who proposed, by contrast, that we consider the final aim not of God but of the world, the *finis mundi*. The third solution, by Johann Georg Wachter (1704), consists in leaving aside the cosmic dimension and considering human singularity alone, thus making it possible to define the principle of natural law as whatever is in accord with one's own nature, in effect repeating what Cicero had already explained in his philosophical works (Cicero, *On the Laws*, 2, 8–10). The fourth solution, espoused by Samuel Rachel (1916), is that of divine providence understood as something to be achieved by bringing harmony among the final aim or reason of God, of the world, and of the world's single creatures.

None of the first principles offered under any of these four solutions are fully adequate or correct: While they satisfy some conditions, they remain imperfect by virtue of their merging the sphere of thought with that of things. So it is only in the final group (the second subclass of the second class) that formally true principles satisfying all conditions are to be found. Indeed, these principles are all based on human nature such as it was designed by God for a particular aim and such as it enables human beings to act according to their own free will. There are, then, three conditions that these principles all satisfy: Firstly, they always agree with human nature in its singularity, considering not the universal end of the world but only our human ends as individuals; secondly, they always consider God as the creator of natural law, as its *principium essendi*; and, thirdly, they clearly separate this *principium* of natural law from its *principium cognoscendi*, for in this latter case we have a process that can only exist in the human mind, which is composed of both reason and will. Some of the authors who satisfied these conditions sought the origin of natural law in the rational pursuit of happiness in this life: This group included Christian Thomasius (1963a), Ephraim Gerhard (1712), Dietrich Hermann Kemmerich (1716), and Gottlieb Samuel Treuer (1717). Immanuel Proeleus (1709a) and Karl Otto Rechenberg (1714) gave a refined version of this principle and explained natural law as a principle designed to aid the rational practice of individual conservation. But this view was also liable to a radical, and pessimistic, interpretation, reducing natural law to a mere principle of selfishness, since humans engaged in self-preservation will only seek their own advantage. This was Hobbes's (1962b, 1962c) famous, or rather infamous, principle, also espoused by Lambert Velthuysen (1651), Johann Christoph Beckmann (1676, 1679b), Nikolaus Hieronymus Gundling (1706; 1715a, 15; 1715b), Johann Friedrich Hombergk zu Vach (1722), and Gottlieb Sturm (1730).

While it is undeniable that at the origin of natural law we do find the conservation and fulfilment of human nature, it does not follow that the same idea should itself become the proper principle of natural law. Indeed, conser-

vation should be understood as the overall or *final* end, an end requiring certain necessary means for its achievement, and it is these means that should make up the true principle of natural law, for they are much more effective as a starting point from which to deduce the system. To see this, we need only consider the individual insufficiency of every human being, making it evident that if human self-sufficiency is to be achieved, it must necessarily rely on some other condition: This other condition is society, and sociability must therefore be the true principle of natural law. This was the argument put forward by Pufendorf (1927, 19; 1934, 207–10), and his view was shared by many German scholars, among whom Johann Georg von Kulpis (1682), Christian Thomasius (1963b), Jakob Friedrich Ludovici (1701), Immanuel Weber (1702, 1719), and Andreas Adam Hochstetter (1710).

But this is not the only evidence that sociability was indeed regarded as an effective, and hence proper, principle of natural law: One should also consider that many formulations of the same period seem to be simple variations of Pufendorf's doctrine. Thus, Nikolaus Hieronymus Gundling (1715a and 1715b) thought that human beings should always seek outward peace; Ephraim Gerhard (1712) stated the same definition in the negative, holding that humans should avoid all those situations which threaten their outward peace; Justus Henning Böhmer (1726) broadened the account and recalled that God obliges individuals to maintain a peaceful way of life; Georg Beyer (1716) combined the positive and the negative statements of the precept, applied both to the public sphere, and claimed that nature impels us to pursue all those actions that preserve human society and to avoid those that destroy it; Christian Gottlieb Schwarz (1722), by contrast, restricted this precept to its negative statement alone and maintained that natural law condemns all actions which endanger the conservation of human community; finally, Christian Thomasius himself formulated a golden rule of reciprocity that implies human community, as it reminds us not treat others as we would not want others to treat us (Anonymous 1961b, 1220–1). A similar conclusion about the necessity of sociability is valid as well for Richard Cumberland (1672), who simply proposed the precept of mutual love as the highest proposition in the system of natural law.

The history of natural law reveals an extraordinary continuity from the mid-eighteenth-century perspective of Zedler's anonymous encyclopaedia: This is essentially the history of the different principles advanced in the course of academic discussion at the universities of the Holy Roman Empire. So, even in this peculiar form, as a history of principles, natural law confirms the two theses presented at the outset, namely, that it was the first form of German legal philosophy, and that it originated and developed as an academic discipline. Even the history of natural law was written presenting these two characteristics as the main merits of German culture in seventeenth and eighteenth centuries:

The history of natural law serves as a mirror and shows me and for my own a. Education 1. that the republic of letters should be grateful to the German, because they have retrieved natural law from oblivion, have cleaned it from all its dirt, and have reduced it to the form of an art or in the artful shape of a coherent discipline or science [...]. 13. That only the “naturalist philosophers,” but not the ancient authors, tried with all their forces to find a general principle, from which they could derive and demonstrate all conclusions of this discipline. (Reimmann 1713a, 104–8)

The contribution that natural law was thought to have received from German philosophers and lawyers—and Grotius was counted in this group (*ibid.*, 108)—lay in their exploring a proper principle and extracting from it true conclusions. These intellectuals thus inaugurated a new era in the history of natural law: the era of the “naturalist philosophers.” A perfect coincidence was established between the history of natural law, understood as a science, and the history of its principles. And from the perspective of this historical climax, natural law does not just contain a simple, disorderly assemblage of proposals for first principles: It rather reveals an internal coherence necessarily tending toward the intellectual form of modern theory, and within this form, toward Pufendorf’s formulation of external sociability and self-preservation, which consequently stands as the only scientifically correct principle. This scheme was adopted by even the fiercest opponents of intellectualistic natural law in their effort to bring some order to the theory of natural law (Schmauß 1748, 16).

#### 1.5.4. *Rational Constraint*

The main effect of the theory of human action developed by modern natural law is that reason appears as the only constraining power in moral and legal action. Human beings act as moral subjects because they are guided by logical consistency, which they honour as the most important quality of their essence. Why do we, as individuals, obey the law of nature? Because we are rationally persuaded. Why do we respect the lives of other human beings and do not kill or hurt them? Because we understand ourselves as rational essences and acknowledge a first principle as the starting point for all other deductions. From this empty idea we form a chain of inferences and finally realize that homicide goes against the first principle, as well as against our own good, and is incongruent with our rational nature. This contradiction gives rise to a prohibition which in turn gives rise to an obligation.

The power of modern natural law to compel action must therefore lie in a truly internal constraint, a constraint flowing from the rational essence of every human being. Reason, in this sense, plays a role only with respect to the *individual*, since nowhere does the deduction natural law admit of any external authority, and no external intervention takes place, either; human beings each believe their own particular intellect only and pay obedience to no other source. There is no way to convince someone other than by appealing to the promptings of their reason:

Is natural law obligatory for all human beings? The obligation is general [...], because God gave to all human beings so much understanding as is necessary to [...] recognize and comprehend the general rules of this law. (Kemmerich 1714, 1580)

A condition for the coercive power of natural law is that natural law must necessarily build a system. Christian Wolff explained that “the connection of all rights and duties with one another is steady, so that the ones may be deduced from the others, keeping the thread of arguments unbroken, and all together build a whole of connected truths, which is called ‘system’ and which we as well call ‘system’ by its true name” (Wolff 1969, 32). Similarly, Gottfried Achenwall and Johann Stephan Pütter spoke of a “connection of consequences” in the doctrine of obligation (Achenwall and Pütter 1750, 27). And Heinrich Köhler came to the conclusion that philosophy can develop a sufficient knowledge of human nature only if it follows the internal structure of the soul, explaining all its powers and capacities. Indeed, what strengthens the soul’s internal unity is good and what weakens it is bad—from which it follows that moral goodness can only reside in rational consistency (Köhler 2004, 66). Philosophical deduction will then demonstrate that philosophy must ascend to the metaphysical idea of God, understood as the supreme principle of all knowledge and action, and thence, through “an uninterrupted connection,” it will flow back to each particular question. Hence, only the idea of God and the deductive coherence of each step in the argument will warrant the validity of natural law in all its single parts (*ibid.*, 67–8).

Similarly, for Alexander Gottlieb Baumgarten (1714–1762) all knowledge must proceed in agreement with the internal structure of the sciences. All true conclusions are interdependent, and there must be, in every science, a single principle from which all of the science’s propositions derive. But only metaphysics has a claim to a first and absolute principle, the principle of noncontradiction, which arises out of metaphysical reflection itself as soon as it starts out, with the very activity of reasoning (Baumgarten 1757, 3). Not so all the other disciplines: The only way they can demonstrate their fundamental propositions is by leaning on the earlier conclusions of other disciplines, and hence on external propositions. It follows that a subordinate science, like natural law, can have no more than a relative principle, one that will have to be justified by other sciences, such as practical philosophy or metaphysics. So, every single conclusion of natural law, no matter how insignificant it may be, requires the parallel accompaniment of an interrupted chain of arguments tracing back to the fundamental proposition of metaphysics (Baumgarten 1760, 48–9).

If internal consistency or systematic order is the condition for the validity of every moral and legal choice, there must be an assumption that no single action can be carried out unless the entire legal system has already been theoretically deduced in the agent’s mind or is otherwise being deduced while the action is in process. Indeed, it is by showing something to be in accord with

the first principle of natural law that it can be said to be right or wrong (Köhler 2004, 66). Whenever a command or a prohibition is issued, it must be supported by an argument showing that a continuous, uninterrupted chain of truths joins it to that first proposition: Nothing but this rational conformity can supply the necessary constraint (Gundling 1715a, 25–7).

#### 1.5.5. *The Enforcement of Natural Law in Political Society*

While natural law exists for all of mankind under any condition, and can be deduced even from the state of nature, it can by no means persist without external constriction and must therefore transform itself into the law of a civil society. The writers on *ius naturae et gentium* conceived this transition in different ways, and their solutions can be laid out according to the degree of disorder they imagined to be present in the state of nature. Hobbes denied that rights can ever exist in any proper sense in the original condition and admitted them only in civil society, in which law is the same as the sovereign's will (Hobbes 1962b, 252; Hobbes 1962a, 77). This makes the sovereign the source of all law, natural and civil. Most German authors tried, on the contrary, to deduce natural law straight from the state of nature, but accorded real validity to law only as it exists in civil society. This makes the sovereign the defender of natural law.

Pufendorf deduced directly from the natural condition the entire doctrine of private law, building it on the principle of human sociability: Human beings in this condition live as free and equal persons, and as such they can therefore govern their relations and pursue their happiness *outside* the sphere of political society. But then Pufendorf, having completed this deduction and set out the entire system of rights and duties, found that human beings in the state of nature are too vulnerable and disorderly to live peacefully together. They need an independent judge to settle their disputes and defend them from the injuries of the wicked. In fact, natural freedom weakens mutual love to such an extent that human beings look on one another as untrustworthy friends, if not as outright enemies. (Pufendorf 1927, 92–3). August Ludwig Schlözer could thus say: “Natural man is alone and weak against untamed nature, against animals and against brutal persons. Therefore there is no liberty in the state of nature: what is a right good for, if I cannot assert it?” (Schlözer 1793, 37). Schlözer's answer was clear: Free individuals must take refuge in civil society, which affords them the undisturbed enjoyment of all their rights. In fact, civil society does not call into being or introduce a new kind of law but accepts and sustains through political authority the rights rationally framed in the state of nature (*ibid.*, 94).

In the modern tradition, civil law is for the most part natural law as enforced by political power. Natural law, obtained through reason in the state of nature, is therefore a pure hypothesis, a mental construct: If it is to attain any



reality, it must be reinstated in political society. Some eighteenth-century authors were thus led to distinguish between two sorts of natural law: a *ius mere naturale* or *absolutum* and a *ius naturale hypotheticum* (Heumann 1711, 411; Böhmer 1726, 126; Gundling 1715a, 27; Gundling 1737, 128). Others used this distinction to describe the possible conditions of human beings, imagined once alone and once in mutual relations (Darjes 1745, 7; Madihn, 1789). In any case, these expressions meant that natural law in the state of nature is either absolute, detached from the exchange of rights and duties, or hypothetical, based on an intellectual assumption of human intercourse—but never does it exist in any historical reality.

The idea that natural law is inscribed in the state of nature, and so precedes civil society, but is not valid until the civil state has formed is reflected in the way the scientific system of the *ius naturae* is structured, meaning that the system can be made to rest on two different foundations, one for the natural condition and one for civil society. It was right in the eighteenth century that this dual foundation became a concern. Johann Gröning was aware that there was a danger of splitting the discipline into two separate theories, and he pointed out that the part concerned with the foundation of the commonwealth has no principles of its own but should be deduced from the first principle of natural law (Gröning 1703, 8–10; Böhmer 1726, 67–9). Likewise, Theodor Pauli observed that Samuel Pufendorf derives the whole of natural law from the sociability of mankind but then grounds political society in the need for self-preservation (Pauli 1700, 88), and Michael Heinrich Gribner tried to solve the same problem by suggesting precisely that there should be two different foundations: self-preservation, or fear, for political society and some another principle for natural law (Gribner 1717, 155–6).

Coherently with the dual foundation of natural law, some systems of *ius naturae* were divided in two different parts. Thus, Nikolaus Hieronymus Gundling identified two main conditions in the history of mankind—the *status naturae* and the *status civilis*—and so always deduced every rule twice: once before and once after the foundation of the state (Gundling 1715a, 30–1; Gundling 1734, 62–4). Daniel Nettelblatt distinguished “natural jurisprudence” from “civil jurisprudence” and expressly stated that any right or duty in natural law will be accepted within civil society so long as it is not removed or restricted by political authority. In other words, natural law does not carry over into civil society on its own but only survives if authorized by political power (Nettelblatt 1785, 633; Höpfner 1783, 151–2).

This division in the structure of modern natural law was meant to solve a basic dilemma. Thus, for Hobbes, it was only in political society that a right could exist in the proper sense of a right capable of bringing about a symmetric obligation (Hobbes 1962b, 115). But this solution gives rise to a serious problem, that is: It amounts to renouncing any idea of an independent law, insofar as all rights originate with the sovereign’s will and cannot exist without

it. Covenant, agreement, property, succession, and all the other institutions of private law, which seem to be prior to and independent of political power—and indeed all basic legal concepts, such as injury, guilt, responsibility, truth, action, equity, duty, law, and right—are now determined by the sovereign's will, in such a way that this will can change them without reason. This is a paradox: the state should preserve rights, but the state destroys rights by the very act of preserving them.

The dual foundation of natural law was a way of getting around this contradiction: It accepted that rights properly so called can only exist in civil society—since they are established by political power and could not otherwise be exercised—but it also imagined a weaker right, or the mere *idea* of a right, existing in the state of nature independently of any sovereign, and to this natural law it then accorded a conditional existence, thus in some measure enabling it to influence its own enforcement through political authority. Of course, the solution remains paradoxical, for it still winds up saying that a true right cannot come into being except in political society. And that explains why this was such an abiding and characteristic question, a general problem of German legal philosophy that persisted throughout the eighteenth century, resurfacing in an even clearer shape with Immanuel Kant.



## Chapter 2

# FRENCH LEGAL SCIENCE IN THE 17th AND 18th CENTURIES: TO THE LIMITS OF THE THEORY OF LAW

*by Jean-Louis Halpérin*

Before being able to discuss French legal science during the last two centuries of the Ancien Régime, it is necessary to provide a little background information. There is no doubt that a French legal order, that is to say a number of rules of law applied in the territory of the kingdom of France, existed well before the French Revolution. This legal order, like all those of the same period, came from different sources of law, and some were only administered in certain areas of the kingdom. Since the Middle Ages, the kings of France had allowed rules of law, which had to do with customary law or Roman law, to take roots while carefully developing from the thirteenth century onwards a legislation which came directly from the king. While Roman law from Italy had deeply penetrated the South of France, where it was received as a “written law”—an adaptation of Roman texts accepted for use by the kings of France—the territorial customs of a more Germanic origin had taken hold in northern and central France. This division between “countries of customs” and “countries of written law” was consolidated in the sixteenth century under the influence of two phenomena of considerable significance: a new wave of Roman law, recognised throughout the kingdom as “written reason” in certain matters such as the law of obligation, and the official drafting of customs under royal order. Between 1454 and 1590, in the North and centre of France, 48 general customs were drawn up in this way and received the royal sanction. This meant that the various sources of law came under the control of royal authority: Alongside the royal legislation, which was used mainly in matters of justice and finance, the customs were grouped together by the king, the “written law” was tolerated by the sovereign and even the canon law—applicable notably in the case of marriage—was officially received in the kingdom of France.

Alongside this legal order which, although it came from many different sources, was already unified in that it was connected to the king, there was a doctrine of French law, an expression and a notion that had been invented previously by the legal experts of the sixteenth century (Thireau 1993, 40–3). The expansion around the University of Bourges of the *mos gallicus*—this humanist movement in search of a more historical understanding of Roman law (Kelley 1970)—had, in fact, been followed by a nationalistic type reaction in favour of customary law and the purely French characteristics of the legal rules

which were being administered in the kingdom. If the efforts made since the sixteenth century to establish a common customary law came up against obstacles in the form of different customs which remained practically unchanged until the French Revolution, the idea of a French law was making headway. The beginning of the seventeenth century saw the publication of the first doctrinal works written in the vernacular language—if we exclude the previous works of the private writing of customary law in the Middle Ages. The works of Guy Coquille (1523–1603), published shortly after his death, are a good example of this linguistic revolution: *Les coutumes du pays et duché de Nivernois* (1605, commentary on the customs of the people of Nivernois) and even more so the *Institution au droit des Français* (1607) in which, after many others, he makes the customs the real civil law of France. In 1610, L'Hommeau uses in much the same way the expression “French law.” The *Institutes coutumières* (1607) of Antoine Loisel (1536–1617) was written during the previous four decades: This collection of 908 maxims classed according to a plan similar to that of Justinian's *Institutes* intended to give a certain importance to a common customary law written in French. Later than in England, but earlier than in Germany, French legal literature moves away from the use of Latin—without abandoning it completely, as the case of Pothier shows in the eighteenth century—at the same time as judicial nationalism is developing. As in other European countries, the writing of the *Institutes* of national law is the first sign of a break away from Roman tradition (Luig 1972).

French law is as much a creation of this doctrine, which can be traced back to the sixteenth century, as it is a result of the action of the monarchs. It is of no less significance that the affirmation of the modern State under Louis XIV (1643–1715) comes at the same time as the introduction into the faculties of law of an obligatory course in French law. In 1679, with the decree of Saint-Germain-en-Laye, Louis XIV orders that the teaching be done in the French language, by a royal professor to students in the third year of their degree course. This course in French law completed the teachings of Roman law and Canon law, which were carried out in Latin, and marks the triumph of this national vision of law. At the same time, references to customary law and royal legislation were introduced into the universities (Chêne 1982).

The use of the expression “science of law,” notably by Domat, is a sign of another decisive change in this French doctrine of the seventeenth and eighteenth centuries. While not abandoning the monographies and commentaries on customs, which were fashionable in the sixteenth century, over the next two centuries French jurists moved towards the form of treaty or manual inspired by the *Institutes*. They considered the positive law that was applied in France as a “system” and professors of French law became particularly fond of the description of what is today known as the French legal order. It seems, therefore, that we can look at “French legal science” during this period by grouping together all the works on French law as a whole, or parts of them.

However, when justifying the existence of this French legal science, we come across other difficulties. It seems quite adventurous to put on the same level the most ambitious works, of a general character, and the more specialised works of the specialists of commercial law (Savary and *Le Parfait Négociant* which appeared in 1675), the canonists (Héricourt and his *Lois ecclésiastiques de la France dans leur ordre naturel*, 1719), legal historians (Fleury and his *Institution au droit français* put together around 1665, Hoarau 2003) the first specialists of administrative law (Delamare and his *Traité de la police*, 1705–1719, Napoli 2003), penalists (Jousse and his *Traité de la justice criminelle*, 1771, then Muyart de Vouglans and his *Lois criminelles dans leur ordre naturel*, 1780) commentators of customs or authors included in one monography (Ricard and the *Traité des donations* in 1652, Lebrun and the *Traité des successions* in 1692). To these, we must also add the authors of reports who play an original and important role in this judicial literature of the Ancien Régime (Dauchy, Demars-Sion 2005). If one must always be careful when claiming there is a division between theory and practise, then it is worth placing works with such different objectives into groups. The collection of judicial decrees, followed by the legal dictionaries, made a significant contribution to the change, in this period, of the meaning of the word “jurisprudence” in France, from the traditional meaning of the science of law towards the much more specific application to the “jurisprudence *des arrêts*,” that is to say to judicial precedents.

As we are dealing with the philosophy of law, we should consider the authors who tried to explain the foundations of the law as a whole. This is where we can see the weaknesses in this French legal science which was so flourishing from other points of view. Only two authors achieved fame both in and outside France; Domat and Pothier. Considered the “fathers” of the Napoleonic Code—even in the iconography of the Emperor’s tomb, where at the Invalides the sculptor Simart depicted the writer of the Code sitting on a throne with volumes of Domat and Pothier at his feet—these two French jurists are also the only ones to have received some sort of recognition, even if in a slightly condescending way, from Savigny in the nineteenth century (Savigny 2006 and 1855, I, § LVI, 364). The same Savigny wrote that “France, before the Revolution, was well below Germany as far as the theory of law was concerned, well above it in terms of practice” (Savigny 1855, I, § XXXI, 194–5). If we look further into this comparison with the German and English jurists, the philosophical aura of Domat and Pothier seems much weaker than that of their contemporaries, firstly Locke and Pufendorf (both born in 1632, while Domat was born in 1625) and secondly, Wolff (born in 1679, twenty years before Pothier). Domat has the reputation of being a somewhat isolated spirit, detached from the changes being made in the School of modern natural law, while Pothier appears as merely a commentator on the rules of positive law. This makes them even more deserving than Blackstone of Bentham’s sarcasm against authors who are simply content to approve the law in force.

This weakness in the philosophical vein of the French jurists can undoubtedly be connected to the political decline of the legal experts which begins in France in the seventeenth century: Contrarily to their predecessors of the sixteenth century, the legal technicians gradually abandon political questions, before the philosophers of the eighteenth century attack the legal professionals, even though many of them had a judiciary background (Church 1967). If we do not include Montesquieu in the authors of judicial doctrine—which we are often reluctant to do for fear of lowering him—we cannot but notice a decline in the theory of public law in France. Following the works of the partisans of the absolute monarchy, in the line of Bodin, in the first half of the seventeenth century (Loyseau and his three treaties of Offices, Seigneuries and Ordres in 1607–1610, Lebret and *De la Souveraineté du roi*, 1632), political theory almost completely breaks away from legal science. This cannot be compared in any way to the doctrinal effervescence of the English revolutions of the seventeenth century, nor even with the controversy surrounding the Holy Roman Germanic Empire at the time of Pufendorf. By censoring and refusing to allow public law to be taught, royal power intended to keep its secret on the science of the State at the risk of giving the jurists no alternative but to repeat the orthodoxy of the legists or to join the group of controversial philosophers. The absolute monarchy was, from this point of view, not in favour of the development of a legal science searching for explanations in the foundations of law and the State.

The patent weakness of the French universities, particularly when compared to the constant renewal of the German universities in the seventeenth and eighteenth centuries, is probably another reason for the French jurists' lack of interest in more theoretical questions. With no real competition between the usual structures that handed out easily obtained diplomas, there was no emulation in France for the creation of fresh blood or the need to present audacious theses. Even the increase in the number of Law faculties from 18 to 22 between the end of the seventeenth century and the French Revolution, with the establishment of universities in Dijon, Pau, Douai and Nancy, was not enough to create a stimulating movement for academic life. If the introduction of the teaching of French law in 1679 inspired several generations of professors who had experience in practising law and were likely to give quality courses, the refusal to introduce any teaching of natural law—a refusal which is also based on the fear of a contestation from the royal authority—played a determining role in this relative deletion of the professors, which can be compared with the sixteenth century or with the Germanic territories in the following two centuries. Despite Pothier and his fellow professors of French law (De Launay in Paris, Prévost de la Jannès in Orléans, Davot in Dijon, Pocquet de Livonnière in Angers, Lamothe in Bordeaux, De Martres, then Duval and Boutaric in Toulouse, Serres father and son in Montpellier), there was not, at that time, a dominant teaching body

(*Professorenrecht*) in France. Quite on the contrary, the doctrine is characterised by the determining role played by the judges and lawyers, two interconnecting professions which a large number of French law professors belonged to. (Pothier had been a magistrate before becoming a professor of French law.) All these factors contributed to the isolation of the two figures of Domat and Pothier, who are hardly representative of the French jurists of their time.

Considering these various factors, this study of French legal science in the seventeenth and eighteenth centuries could be dealt with in a number of ways; it is necessary to choose which way. Historians of French law usually insist, in an obvious didactic aim, on the contribution these jurists made to the unification of French law. From the beginning of the nineteenth century, Domat and Pothier were considered the “fathers of the Napoleonic Code” and the canonic manuals of the history of law highlighted the ideas of the partisans of customary law, the partisans of royal *ordonnances* which grouped together certain subjects, the professors of French law and more generally all those whose works had been used for the writing of the Napoleonic Code. This teleological presentation has the disadvantage of giving French legal science of the seventeenth and eighteenth centuries a retrospective aim which it never actually had. In fact, neither Domat, nor Pothier, nor practically any patented jurist of the Ancien Régime spoke about the writing of a unique code of civil laws for the whole kingdom. This revolutionary programme was completely foreign to the conservative, particularist mentality of the jurists of the Ancien Régime (Halpérin 1992, 65–6). Moreover, the very idea of codification was never written about by Domat or Pothier and their reputation as “fathers of the civil Code” induces their works to be read with an inclination towards the positivist conceptions of the nineteenth, even the twentieth century, which are quite distant from their way of learning about and understanding the law (Sarzotti 1995, 3–5).

A possible second approach, which is more in keeping with the current trends of historiography, would be to envisage a cultural history of the French jurists in the last two centuries of the Ancien Régime. Several recent works have highlighted the ideologies of the different professional backgrounds which these jurists belonged to. We know the strength of what is by some called “robinocracy,” the power of the magistrates in the royal courts—particularly of the thirteen Parliaments in France—relying on the impossibility to change and the venality of charges to transform the prerogative of remonstrances against the king at the time of the recording of legislative texts into a weapon of attack against certain manifestations of absolutism. In the line of the harangues and mercurials of the sixteenth century (Renoux-Zagamé 2003), the highest magistrates in the kingdom developed a Parliamentary theory on the position of the judge, the interpretation of the law and the submission of royal power to fundamental laws (Di Donato, 1996). The Order of Parisian lawyers, which we now know was an order created at the end of the

seventeenth century (Bell 1991), formed another very homogeneous group linked by their training, the aim of professional autonomy and support of the theses of Gallicanism, even a “second Jansenism” which developed after the Bulle *Unigenitus*. The two sections of Parliamentarians and Parisian lawyers—soon to be joined by the lawyers from the province who were eager to imitate the Parisian Order (Leuwens 2006)—established close contacts and together lead, by drawing up reports, the fight against the ministers, first of Louis XV and then of Louis XVI. In order to include all the authors of the doctrine in this picture, including the more minor ones, it would be necessary to trace the background of the professors of law and specialists practising in procedure (the procurors) or commercial law.

Rather than discussing this cultural history, which has yet to be written about, we prefer to keep to a history of the doctrine, once again centred on the figures of Domat and Pothier, while trying to outline the theoretical conceptions of these two authors rather than their contribution to the movement of the unification of French law. This is why we speak of the limits of the theory of law: These two jurists were the only ones, at that time in France, to think about presenting an explanatory “map” of French law, but they never really managed to go beyond their “geography of law” to reach a truly philosophical synthesis. Moreover, it seems interesting to show the differences between these two authors despite the fact that Pothier borrowed from Domat’s work. While Domat builds a system based on carefully selected rules, Pothier gives a more systematic description of what French legal order meant to him. The following study of their theories and concepts will try to explain two paradigms which largely inspired further legal science both within and outside France.

### 2.1. Domat and the Systematic Construction of the Law

Jean Domat was born in 1625 into a middle class family in Clermont; the family already had connections with people of the law. With the help of his uncle, who was a Jesuit priest, he was able to get a good education at the Clermont college in Paris, then at the University of Bourges where he studied Roman law with Merille, Cujas’s successor. A Doctor in Law in 1645, he worked as a lawyer for ten years, putting into practise the knowledge acquired at University and in his readings. By obtaining the position of the King’s advocate in the presidial of Clermont, he has access to important functions within the public ministry; he maintains this role for three decades. Domat spends most of his life in Clermont, where a childhood friendship links him to Blaise Pascal, and he is alderman of this town from 1657 to 1683. Having started work on the *Lois civiles* at the end of the 1670s, firstly for the instruction of one of his jurist sons, Domat obtains in 1682 a king’s pension to set himself up in Paris. Towards the end of his life, he leaves his judicial functions and dedi-



cates himself completely to writing: He sees the first publication of *Lois civiles* from 1689 to 1694 (in three volumes, like the second edition of 1694–1695 while the editions of 1705, 1713, 1735, 1744 and 1777 are in a folio volume). The *Quatre livres du Droit Public* are published in 1697, after his death in Paris in 1696.

This apparently rectilinear life—which we know about thanks to a manuscript found in 1842 by Victor Cousin among the papers of Pascal’s niece, Marguerite Périer—gives little indication to Domat’s intentions. He was, firstly, a magistrate of the king—members of the public ministry had been called “people of the king” since the Middle Ages—using his speeches and actions to support the action of a state justice at the service of the king. He was among those that wanted the reunion of the Grands Jours d’Auvergne, a temporary jurisdiction aimed at putting a stop to crimes in that province in 1665, especially those committed by the lords. In his *Harangues*, presented before solemn audiences from 1657 to 1683, his aim is to point out the faults of the magistrates and correct them. This part of Domat’s work subscribes to the crisis of conscience that existed, at that time, in the French magistrature thanks to the venality of charges—allowing evidently unworthy men to obtain positions as judges—and the reduction of the powers of the Courts by Louis XIV—who, after the episode of the Fronde forbids remonstrances prior to the registration of royal legislation. To face up to this crisis, Domat uses judicial eloquence as a means of raising the morale of the magistrature just like several of his predecessors and successors did (Renoux-Zagamé 2003, 156). The constant reminder of the duties of magistrates is accompanied by the exaltation of their judicial function. Based on Psalm 81, Domat continually repeats to the judges from the Harangue to the Assises of 1660: “You are Gods.” Being lifted to this level of dignity, which can be compared to that of the kings, the judges are responsible for maintaining “order in a civil society” (Harangue in 1669) and, by setting an example, ensuring that justice triumphs. This “ministry” of judges outlines a judicial theocracy which cannot be compared with either the royal legists’ total submission to the king nor with the Parliamentarians’ claims for a share in legislative power. Domat thus manages to conciliate his respect for the king with a central role for independent judges who are also at the service of God.

Domat has a strong faith and shares with many of his contemporaries a pessimistic view of the society of his time, or rather a tragic interpretation of how corrupt the world has been since the original sin. This constant disillusionment based on the ignorance of God’s plans, linked to a strong moral rigour, is probably one of the reasons which brought him close to Pascal and the Jansenists. Up until Pascal’s death—at which Domat was present in 1662—Domat, with his friend, remains resistant to pontifical and royal pressure which wanted to get a Formula signed condemning Jansenius’s proposals. The jurist from Clermont joins the most radical Jansenists, distancing himself from

Arnauld and Nicole. The period of relative calm in the opposition between the Jansenists on one side, the Papacy and royal power on the other—which corresponds to what is called the Peace of the Church (1669–1679)—is conducive to the penetration of Jansenist feeling within the magistrature. Seen by the Jesuits as a tenacious and intransigent opponent, Domat does not seem to have conceived Jansenism as an attitude of political opposition to the king, and his admiration for Louis XIV goes as far as his writing verses in Latin in his honour. Through his connections with high magistrates of the Court, Domat obtains a pension from Louis XIV: This would have been incompatible with subversive thoughts. At the same time, it was probably Domat's isolation, similar to that of the "solitary Jansenists," that made it possible for him not to deny again his convictions (Todescan 1987, 8). Nothing in Domat's work refers to the "second Jansenism" of the lawyers and Members of Parliament of the eighteenth century around Le Paige (Maire 1998, 396). He is not at the heart of the political struggles of his time, as Grotius, Hobbes or Locke were.

Lastly, the mystery surrounding Domat's intentions comes from the absence of any reference to contemporary authors, including the manuscripts which were kept (the manuscripts of the *Lois civiles* contain few corrections, Domat left *Pensées* partially published by Victor Cousin). The problem is particularly acute for all that concerns an eventual influence of the School of Salamanca and the School of modern natural law. If the analysts agree that Domat probably had some knowledge of Suárez (Renoux-Zagamé 2003, 79), they have always questioned whether or not he had read Grotius and Hobbes (Baudelot 1938; Sarzotti 1995). The absence of any quotations, whether direct or indirect, cannot be used as an argument as to whether or not he had read these works, as Domat never quotes any of his readings and he stubbornly refuses to present his work as a response to other theorists or in a polemic form. It is difficult to conclude that he was unaware of the works of the most important authors of his time merely because of his isolation. On the contrary, the writing of *De jure belli ac pacis* in France and its dedication to Louis XIII (1625), the exile of Hobbes in Paris some ten decades later (1651–1652), the knowledge of the works of Grotius and Hobbes in several circles in Paris at the beginning of Louis XIV's reign, the fact that Pascal knew Hobbes and quoted Grotius as Suárez (Brimo 1942) make it, in our opinion, difficult to believe that Domat knew nothing about these writings that were revolutionising the science of law. The close friendship between Domat and Pascal, like the deliberate choice to use exclusively biblical references and texts of Roman law, seems to show a strong desire to distinguish himself from Grotius and Hobbes, which supposes that he was aware of their work. In the *Lois civiles* there is, we believe, an Anti-Grotius part (singling out the French jurist in relation to his German contemporaries) and an Anti-Hobbes section which places Domat in constant dialogue, although he does not admit it, with these two theorists. This does not mean, however, that Domat's work is based on



the *De jure belli ac pacis* or on *De cive*. Domat proposes some didactic intentions which cannot be ignored, even before exposing his conception of law in the *Traité des lois*, and then applying it to civil and public matters.

### 2.1.1. *Didactic Intentions*

Without limiting ourselves to the objectives which are clearly stated, it is impossible not to take into consideration Domat's proposals in the Preface of the *Lois civiles* where he outlines the "aim of this book" which is dedicated to the king, God's "greatest and most powerful prince" (Domat 1777, I, Preface). Here Domat presents the law as an enigmatic subject and describes the study of civil laws as "thorny": These civil laws are collected in the books of Roman law "which are their only deposit," but the result of the work of the Roman legal experts ("so many people at different times") was put together by Justinian in no particular order, with repetitions and superfluous texts. Even among legal professionals, there are many who do not know the essential rules that came from Roman law. To this surprising "pile of confused material" an even more surprising mystery can be added: Why should we respect laws that were made by "infidels"? Domat is led to envisage a plan of Providence, with God having used the Romans "to create a science of natural law." The superiority of the Roman jurists, to whom God gave "the light" (that of science rather than that of religious faith), meant that, within the framework of the greatest empire that ever existed, they were able to envisage all situations which occurred in the society of men and which gave way to disputes. The science of law, whose foundations are handed down to us by the secular experience of the Romans, therefore has its roots in the observation of social reality and judicial disputes. An "infinity of reflections" allowed the diffusion of the natural laws, which are based on the three principles inspired by Ulpian (D. 1, 1, 10): Do not do wrong to anyone, give back to every man what belongs to him, be sincere in all conventions and faithful to all duties. We can see that this interpretation of the three precepts of law is not very original in itself, but that it differs very little from Grotius (abstain from the rights of others, keep promises, repair any damage caused through your fault, and deliver deserved punishments among men: Grotius 1964, Prolegomena VIII) or Pufendorf (Pufendorf 1934, Book III, Chapter 1, which reduces these principles down to two duties: Do not harm others or their property, repair any loss that you have caused). Suddenly, Domat rallies to the assimilation made by the natural law theorists of his time between natural law, rational law of a universal character and the main rules of Roman law. This immediate assimilation allows him not to define, for the time being, natural law and to avoid lengthy prologues of a philosophical character.

In this Preface, Domat does not seem to have any difficulty in connecting this attachment to the Roman laws with the positive law which was being used

in France. Without even mentioning that the town of Clermont constitutes an enclave of written law in the territory ruled by the custom of Auvergne, he points out that the majority of Roman law “used by us” consists of natural laws—and not arbitrary laws—and that it is in the provinces in France where Roman law is used as a custom. It is not necessary, according to him, to stop neither at the contrary aspects between Roman law and customs, nor at the differences of judicial decisions between the Parliaments. It is here that Domat makes his only allusion to an eventual unification of the rules of French law: “It would be desirable for uniform and fixed rules to be provided.” The introduction into the French area is completed by a plea for the use of the French language in the work presented. Here, Domat participates in the movement of emancipation of a national science by explaining that universal principles, which can be translated into all languages, find French the best language, the most adaptable in terms of “brevity” and “clarity” and also the language most likely to be understood throughout Europe. There is nevertheless something “mystifying” about it (Tarello 1976b, 163): Domat made generations of readers believe that he was presenting the homogeneous description of a French law that was being formed, while he built up with all the pieces an ideal system, even if he remains closely attached to the rules that were administered in France in his time.

After highlighting these paradoxes in the science of law—a science whose subjects have already been elaborated, but which has become virtually inaccessible on the whole—Domat dedicates the rest of this first Preface to his project of giving some order to Roman law. He speaks about a “correct assembly of parts which form a whole,” “according to their position in the body which they naturally make up,” of a “clear and precise system of each subject.” In order to understand this “system and plan of universal order,” we must begin with “simple and evident truths” (how can we not see the influence of Descartes here?), as we do when teaching geometry to children. The *Traité des lois* which begins the *Lois Civiles* is similar to the exposition of cosmography as an introduction to geography. This comparison with the sciences and this first allusion to the Cartesian method shows us that beyond a didactic pretext—which would allow the “particulars” to learn the laws “for their own use”—Domat sees the law as an artefact, produced by the human mind, certainly based on observation of social reality but by means of intellectual constructions which are likely to change with the times. Here, Domat is nearer to the rationalism of Grotius than the voluntarism of Hobbes or even Pufendorf: The sovereign legislator, with its imperative commands, is absent in this Preface which places more emphasis on the “constructed” (the system) than on the “given” (society) in a science of law aimed mainly at the judges (Renoux-Zagamé 2003, 118).

### 2.1.2. *The Traité des lois and the Foundations of Natural Law*

Following the Preface, the *Traité des lois*, which is divided into fourteen chapters, makes up the most well-known part of the *Lois civiles* and is necessarily linked to what comes before and what follows. Domat refers again to the surprising role of the Romans in history: This people that made such a large number of just laws also spawned a number of “barbarous laws,” such as the right of life or death of the fathers of families over their slaves and their own children. Domat immediately adds another example of how the Romans and “their philosophers” went astray: “They imagined that men had first lived as wild beasts in the fields and without any relationship” between them until the formation of society (*Traité des lois*, Chapter 1: Domat 2002, 1). This first page, in which he talks about “such a strange contrast of light and darkness” merely repeats the concepts mentioned in his Preface. We are tempted to see an attack, only slightly hidden, against the idea of a natural law of a secular character that reason would draw from the observation of human nature. Almost all the affirmations of the Grotius’s Prolegomena are rejected by Domat here. Natural laws are not directly known by all men as they would be engraved “in the depths of our nature.” The state of nature is a chimera, as man has never lived in isolation—which reconciles Domat with Pufendorf (Pufendorf 1934, Book II, Chapter 2.4). There can only be blindness outside Revelation: Only the Christian religion really shows us “these first principles that God has established for the foundations of the society of man.” Contrary to the impious hypothesis of Grotius, Domat’s natural law cannot exist without the existence of God and without the “true religion” which is not known in all States. Far from being a natural law which is as universal as mathematics, for Domat natural laws can only exist in Catholic countries.

Nevertheless, Domat is not satisfied with the classic vision of a natural Christian law derived simply from the precepts of the Christian faith. If laws are a reality regulating “the conduct of each man in particular and the order of the society which together they form,” the science of law is a “human science,” that is to say a construction with a history that can be traced back to Ancient Rome. What is particular about this science is that it must have principles made certain by the double conviction arising from faith and reason. The truth of the science of laws must speak both to the heart and to the mind (Domat 2002, 2) and it is not so easy to discover this truth, as can be seen from the exceptions which God himself made against the most basic rules, for example when he ordered Abraham to kill his son. Although he does not claim to be the first to have found this truth, Domat justifies his method “supposing two truths which are merely simple definitions: one that the laws of man are merely the rules of his conduct; and the other, that this conduct is nothing other than man’s journey towards his end.” Based on these stipulative definitions and without cutting the line between the realities which can be observed Domat

seems to propose, with a singularly modern vocabulary, the “structure” (the term is used on the same page, Domat 2002, 3) which he intends to give to the science of law. Here Domat reveals his most intimate beliefs: It is for God himself that God made man. He paints a tragic picture of the outside world which is very close to that of Pascal. “All that the earth and skies enclose is nothing but a tool for our needs, which will perish when they cease to be.” We can expect nothing from these superficial properties: The essential truth remains hidden from us (it is surprising to note the lack of power that this amateur in physics gives to natural sciences) and the whole world is incapable of filling our hearts. Only God can fill this “infinite emptiness,” man’s end is therefore in the knowledge and love of God (Todescan 1987, 26). The first law commands us to search for common good in this love of God, and the second law obliges us to love our neighbour. Using the classic bipartition of *distinctiones*, Domat claims to reveal the two laws which allow the analysis of society’s plan. The Christian faith is therefore placed at the centre of a system of natural law which was built by the human mind using Roman materials.

Like Grotius and Pufendorf, Domat believes in sociability between men, but he bases it on a necessary division of labour rather than on a natural need. Ever since the original sin, which plays an important role in Domat’s way of thinking, man has had to work to satisfy his needs, and this creates all sorts of relationships and duties: Those that exist “naturally” through marriage within the family and those that are the result of arts, jobs and professions (*Traité des lois*, Chapter 2: Domat 2002, 8). Domat hardly says anything original when he sees in each family a “particular society” based on an indissoluble marriage: He describes the traditional legitimate family with the authority of the father and husband, the reciprocal alimentary obligation between parents and children, the transmission of successions to blood heirs. Outside the family, each member has a place in society that has been given to him by God—based on a hierarchical and functional vision—and in the course of his life comes across events, sources of voluntary (the contracts by which man’s freedom is expressed: Todescan 1987, 61) or involuntary duties (charges such as guardianship, quasi-contracts or quasi-offences). Governments were established to ensure that these duties were respected and to place limits on the freedom of the contractors (*Traité des lois*, Chapter V, 9 and 10: Domat 2002, 18). Man’s downfall, the first disobedience in the face of the law of the love of God, explains the problems which cause the “disorder” in society: crimes and offences, wars, but also trials. The war of everybody against everybody does not exist in the state of nature, but in current society (Renoux-Zagamé 2003, 92). The divine plan once again intervenes to draw good from evil: Self-love, an omnipresent venom as in Pascal, is also a remedy in that a well-calculated interest leads men to submit to their duties (Todescan 1987, 40; Sarzotti 1995, 211).

Providence, therefore, put everything together so that we could know and try to apply the rules of law. Always following a bipartite division, Domat feels

confident enough to cast aside the traditional categories of divine and human laws, natural and positive laws, religion and the police, the law of the people and civil law. He substitutes each of these pairs with a new one, that of “unchanging laws” and “arbitrary laws.” In the well-known chapter XI of the *Traité des lois* (Domat 2002, 36–59), he likens the unchanging laws to natural laws insisting on the fact that “no authority can change them, or abolish them.” Arbitrary laws, which often fix details in terms of quantity (the number of witnesses needed to make a statement valid or the duration of a limitation), can, on the contrary, change in time and space, which explains how they differ from national laws. As he says, in the Preface (and repeats in Chapter XI, 14, 15, 16: Domat 2002, 41), that the Roman laws have little to do with arbitrary laws, the unchanging laws are made up of rules which come from Roman law and are put in order in the light of the two laws of love (by abolishing certain laws that he had given to the Jews, God consecrated, alongside the precepts of the holy scriptures, the Roman rules which are no longer called upon to change; Domat 2002, 53). Not all the divine laws are unchanging and many natural laws are human (Todescan 1987, 66). These natural laws, which are the main focus of the work, especially in the first two books which deal with private law, are therefore protected from the action of the legislator; Roman law is in some way sanctuarised, but after being sorted out (to remove useless “subtleties”) and put into order. While the customs are restricted to some differences in detail, and strictly territorial application, sovereign power in each state is almost exclusively confined to public law, even in the powerful French monarchy. On a political level, the jurists—particularly the members of the magistrature on condition that they submit to Domat’s method (Renoux-Zagamé 2003, 82)—are recognised as the keepers of a judicial order which, even though it is not unmovable, is placed outside the whims of the princes. The interpretation of the unchanging laws, which can seem contradictory in certain cases (for example, in terms of succession between the obligation to pass on assets to one’s children and the freedom to dispose of them as you wish) and the necessary exceptions of even the most general laws give quite a wide scope to legal professionals, who are the only ones able to understand the extreme diversity of the unchanging laws. Without denying the specific aspects of French law and its sources (the “four sorts of books” Roman law, Canon law, royal ordinances and customs form), Domat marginalises customary or feudal law which rely on “invented matters” (Domat 2002, 40) and gives his work a general character which is likely to make it a shining piece of work. While recognising the changes which affect the meaning of the expression “law of the people” (*Traité des lois*, Chapter XI, 39, possibly inspired by the reading of Suárez), Domat does not feel the need to place much emphasis on the rules that ensure “communications” between the princes (embassies, negotiations and peace treaties).

In theory, the innovation in relation to the classic binomial natural laws/human laws makes it possible to include the majority of Roman law in the un-

changing laws—Domat goes even further than Grotius and Pufendorf when talking about the fusion between Roman law and natural law (as there are a “very large number” of natural laws, Domat 2002, 48)—on condition that a science of law leading to sure and ordered knowledge is established. If the foundation of law is “natural,” the method of exposition is “invented” and Domat revindicates logic for his plan, which is also original, based on the division between duties and successions. With this method, which can only be qualified as “Cartesian,” the jurist can attain the “real meaning” of a law which conforms to his way of thinking (*Traité des lois*, Chapter XII, 7, Domat 2002, 61, and preliminary Book, Title I, Section II, Domat 1777, I, 4–6). Rather than opening the way for the triumph of a voluntarist, positive law in the Napoleonic Code (Renoux-Zagamé 2003, 78), Domat’s system, built by a jurist on the basis of God’s plan for society, seems to us to have had Savigny as its true heir and its Roman law of today interpreted in a Christian framework of thought. If the foundation of the law largely blends with morale and religion, the innovative method tends to ensure the autonomy of legal science.

### 2.1.3. *Duties and Successions: Necessary Liaisons between Men*

Domat’s plan—a first part on “duties and their consequences” in four books, a second part on successions in five books—does not only illustrate his will to put Roman rules into order on a new basis, but also shows the priority the author gives to certain subjects and his relative neglect of others. Persons and things are quickly dealt with, in less than twenty pages, in the preliminary book which also discusses “rules of law in general.” He does not spend much time on “the type of equality which natural law puts between men” (Domat 1777, I, 10), Domat takes up again the traditional distinctions of the state of persons: based on sex (“women are incapable, simply because of their sex, of carrying out several duties and functions”), age (children are under the power of “those they are born to”), by legitimate or illegitimate birth (the incapacity in successions of “bastards” is considered to conform to humanity and good morals), or place in society (nobility, bourgeois, servants, even servile). On this subject of customs, “it is not necessary to say anymore” (Domat 1777, I, 14; Gilles 2004, 241), except for the ecclesiastic and lay communities, that “serve as persons.” Here it is not a question of placing the individual and his rights as a subject at the heart of the legal system.

The way he treats things is just as concise and seems to reveal Domat’s ideas on property. In the three pages of this preliminary book, Domat reminds us of the “destination of all things for all our different needs” and takes up the traditional classifications of the law of goods. We have to wait for more than 200 pages, Title VII of Book III (“consequences which add to duties or affirm them”) before Domat deals with “possession and limitation.” It is here that he mentions the law of property “which gives the owner the right to have



in his power what belongs to him, to use it, enjoy it and dispose of it as he wishes" (Domat 1777, I, 292). We willingly agree that this phrase, with its somewhat awkward style, finds its place in the work of the modern jurists to define by its effects a subjective law of property: Domat joins a movement that goes from Bartolus and Grotius to Pothier and to Article 544 of the Napoleonic Code (Arnaud 1969, 186; Tarello 1976b, 181). On the other hand, Domat clearly distinguishes himself from the theorists of "possessive individualism," such as Hobbes and Locke, by marginalising the law of property. For the author of Civil laws, goods are nothing but means and ends. If God created things to satisfy our needs, man can only find joy in the accumulation of wealth. Here Domat joins Pascal in his scorn for the appropriation (quarrels between children on what is "mine" and "yours," "the beginning and the image of the usurpation of all the earth") of "goods from outside," the true and only good being the love of God. As far as the sharing of goods between men is concerned, it has become impossible following the downfall because of quarrels of self-love (Domat 1777, I, 338). The jurist from Clermont even insists on classifying this idea of sharing as unjust and chimerical: No policy has put to use the universal sharing "of everything between everybody"—a phrase which could be directed against Hobbes. If Domat accepts that things can be kept by those who find them first, he has no intention of making the law of property the matrix of subjective laws.

Primacy therefore comes back to duties and, among them, the conventions which are formed voluntarily between men. The reader of Domat must be careful not to overestimate Domat's voluntarism and the space he gives to the freedom of individuals. In the divine plan, even voluntary duties arise from the necessary division of labour, they are the "natural follow on" of the liaisons which God makes between men for "the different commerce of things" (Domat 1777, I, 19). It is the order of civil society that imposes these duties and Domat devotes as much time to those which are formed without conventions as to the more well-known passages of the *Lois civiles* on contracts. Dealing with conventions in general (Part I, Book I, Chapter I), Domat sets out, with remarkable concision, the general principles of this subject: "Conventions are duties which are formed by mutual agreement between two or more people who between them make a law to carry out what they promise," "once the conventions have been made, all that has been agreed serves as a law to those who made them," conventions oblige "in all situations that equity, laws and their use are an obligation one has entered into," "the duty of one is the basis of the duty of the other" (Domat 1777, I, 19–24). Taken up again, almost word for word in the famous Articles 1134 and 1135 of the Napoleonic Code, these axioms realise an admirable style of the work of the Canonists, Romanists and Humanists as the basis of modern consensualism often casting aside Roman texts even though they are quoted in support of certain ideas. If Domat always recognised that "only our will is really ours"

(Gilles 2004, 252), it would be quite absurd to see him as the precursor of the theory of the autonomy of will. Voluntary duties are a necessity and a consequence of the original sin: Men must associate with other men in order to survive. Natural and unchanging law (whose sources can be found as much in the Bible as in Roman law) exist to oblige them to respect their promises—it is the third general truth of law, one must be sincere and faithful to one's commitments—to frame transactions with rules dictated by law and equity, and finally to remind them that “in business nothing is free.” By considering the cause of obligation an objective element, identical in all similar types of contracts (in a very brief passage, Domat 1777, I, 20), Domat places interest at the centre of the majority of contracts, uses sales as a model for voluntary commitments and limits the place of charity, making donation an exception where the motive serves as a cause.

In this context which has nothing “liberal” about it, there is nothing revolutionary about Domat's theory on the law of contracts. Borrowing from the work of Dumoulin, coming close to Grotius on many points, Domat considers that “the sale is done by agreement alone”—without nevertheless neglecting the role of tradition in the transfer of property—approves the limitation of the action seeking rescission for breach of contract *lésion d'outre-moitié* (for damages of more than half the amount) in the sale of buildings and defends conservative positions on the prohibition of the use in the name of divine law (Domat 1777, I, 79). Domat's pessimism comes across in the pages where he mentions some experience on “business” practise (for example on procurations, mandates and commissions, Domat 1777, I, 152-157): Business between men is in fact fuelled by interest and not charity.

The same care for order inspires the pages, which are also much quoted, on the “damage caused by a fault which cannot be called a crime or an offence.” There is no doubt that Domat largely passes over the exposition of Roman law on the *lex Aquilia* and offences, thus providing a very general picture. After the duties of tutors, curators and managing agents, followed by those created through a quasi-contract, Domat looks at those which result from fault. He makes a distinction between three types of faults: Those which are connected to a crime or offence, breaches of conventions and, finally, those which cause damage due to thoughtlessness or carelessness. Only after examining, still following the Roman casuistry, damage caused by anything thrown from a house, by animals and by the collapse of buildings (Sections 1, 2, and 3) does Domat come to “other types of damage caused by fault without crime or offence.” According to him, “all losses and damages done by some person, whether it be carelessness, thoughtlessness or ignorance of what one should know or other similar faults, however light they are, must be put right by that person whose carelessness or other fault lead to this happening” (Domat 1777, I, 210). Should we see in this formula a prefiguration of the general clause of Article 1382 of the Napoleonic Code or a “residual princi-



ple” to arbitrarily unite hypotheses which have not yet found their place (Descamps 2005, 427–9)? It seems to us that Domat does not give as much importance to fault as Grotius (*De jure belli ac pacis*, II, 17, 1); he seems to look mainly at the damage and tries to put together all the facts that cause the damage to form a “façade of fault” (Ibbetson 2003, 90). It is remarkable to see how severe Domat is towards the owners of animals that have escaped (like Pufendorf) or towards those who light their champ stubble without taking into consideration the direction of the wind (Gilles 2004, 281). If Domat is indeed at the origin of a broad concept of responsibility, which can be found in the Napoleonic Code, he seems above all to want to compensate any losses suffered with a principle of commutative justice. Man acts freely, but it is God who puts him into a position which, based on natural law, he has to honour. Moral imputation does not hold a preponderant place in this theory of civil responsibility—an expression that was unknown at the time. Again, Domat’s system is not centred on the subject of law, the right to act, and individual rights.

The second part of the *Lois civiles* which deals with successions has raised fewer debates and is surprisingly long: Should we see here evidence of the importance of this subject in the disputes and doctrinal discussions of the time, which would explain the contemporary appearance of Lebrun’s *Traité des successions* (1691)? For Domat also, successions are the proof that the legal system has in view the “order of the society of man” which supposes the transfer of goods over time. Finally, they constitute a challenge for science combining two postulates which seem to oppose one another: the natural transfer of goods of those who die to their children and their free disposal by will. Here, the exposition of unchanging laws is not enough: Only the jurist, relying eventually on arbitrary laws, can establish the balance between legitimate successions and successions through wills. Now, on this subject, Domat does not favour Roman law very much—not only its great freedom as far as wills are concerned, but also its numerous subtleties, notably on substitutions which take up the whole of the last book of this part, even with allusions to the jurisprudence of the different tribunals in Europe—without, however daring to rally to a determined custom (as usual, he invokes “our customs” without quoting any in particular). In this search for a transaction—already began with the introduction of legitimate Roman law into numerous reformed customs from the sixteenth century and followed up to the Napoleonic Code—Domat very clearly gives preference to legitimate successions. Far from defending any extension of the law of property beyond death, Domat gives a utilitarian type argument in favour of a share being available for the person making the will: The heirs, “especially the children who have no better reason” must be “contained in their duty, for fear of being reduced to merely a modest legitimate heir” (Domat 1777, I, 491). Domat’s pessimism suggests successorial blackmail which will be taken up again by the writers of the Na-

poleonic Code to reinforce the authority of the father over his family. The rules of objective law are always analysed to sustain order in society.

#### 2.1.4. *Public Law, an Accessory or a Necessary Complement to Civil Law?*

The *Quatre livres du Droit public*, left unfinished by Domat and published posthumously (with compliments of Héricourt, for Books III and IV, in the editions from 1735 onwards), have a reputation for being a sort of appendix, and a rather fastidious one at that, to the main work. Right from the first pages of the *Lois civiles*, then again in the Introduction which begins the *Droit public*, Domat leads us to believe that public law deprived each State of its own arbitrary laws but not of the unchanging laws based on Roman law (Tarello 1976b, 169). He immediately justifies the priority he has given in his works to civil law and to the importance of public law. At the same time, this autonomous public law, put together in four books which deal with the government, officers, penal law and legal order, seems to take second place and its content is often disappointing. Domat brings no significant new ideas to the exaltation of the monarchic sovereignty of Bodin and the legists of the first half of the seventeenth century. He refuses any scheme calling for a contract of society and government, thus placing himself outside the field of controversy aroused by Grotius, Hobbes, Pufendorf and Locke. He presents a very classical vision—it could even be said to be retrograde in its attachment to the judicial monarchy rather than to a State legislation and administration (Gilles 2004, 179, 346, 490: Domat never mentions intendents, nor police officers)—of a society organised as a body, according to God’s will and under the authority of an all powerful monarch. He does not distinguish himself from Bossuet by advocating a virtually limitless obedience to the royal power—he sees in this power a “divine ministry” as absolute as the justice of God and makes no mention of the fundamental laws of the kingdom—and by affirming that the government of the monarchy is “the oldest and most universal,” the one that conforms most to the divine law (Domat 1989, 4–6). He seems to support Louis XIV’s policy, especially the ordinance of 1667 on civil procedure, which aims to ensure magistrates strictly respect royal laws (Domat 1989, 26). In the framework of the State which knows only one religion, he also shows himself to be a partisan of a rigorous Gallicanism based on the separation and collaboration of spiritual and temporal powers.

In this very orthodox presentation of the French monarchy, Domat distinguishes himself only for a few ideas which are dear to him. He encourages the State to develop its fiscal resources and to intervene, using the “police,” in the economy of the kingdom: According to Domat, it is necessary to protect the farmers from the violence of some lords—probably a reminder of the Grands Jours d’Auvergne (Domat 1989, 138)—prevent necessities being expensive (allow landowners to cultivate their heritage, Domat 1989, 243) and again en-

courage the arts (by making a distinction between the work of the hands that make the manuscript and printed book, and the work of the mind, Domat 1989, 237, inspired Héricourt's defence of authors' rights in 1725). Rather than the traditional division of society into three orders, he suggests dividing the lay people into eight orders based on profession, thus showing his belief in the division of labour (Domat 1989, 191–208). He particularly emphasises the dignity of officers, their duty of integrity and disinterest. When he writes that “the people must find the judgement of God in the mouth of the judge” (Domat 1989, 453) he plays on the ambiguity—which can be found in Montesquieu where the judge is the “mouth of the law”—of a magistrate who both serves the higher powers and is an active organ of justice. By associating lawyers, “mediators of truth and justice,” with the judicial function, encouraging them to defend the poor free of charge, Domat contributes to the development of an ideology particular to the judicial society of his time.

Finally, we can find, in public law, Domat's pessimism which here serves to justify Louis XIV's absolutism. “We are all born on the slope of evil,” violence and injustice are multiple as are heresy; corruption at certain levels of office is quite common, the torrent of crimes is too much for the dams of a justice that arrives too late (Domat 1989, 5, 23, 287, 379, 542). More than ever force must be used along with authority to retain, correct, even eliminate criminals resorting to, in certain cases, torture and the death penalty. Should we see here a total submission to the secular power of a Domat converted to the royal religion? We think rather that the science of law—which once again Domat raises to the level of the “first of human sciences” in the long passage of the *Droit public* which discusses universities (Domat 1989, 290)—finds here its limits in political and social realities. If it is an accessory and arbitrary, then public law is also necessary to enforce the unchanging laws, as will the adjective laws of Bentham be later, or Hart's secondary rules. Domat does not seem to have reached the end of his logical theory: The systematic building constructed in the *Lois civiles*—a construction relevant solely in the mind of the jurist—cannot be completely isolated from the empiric reality if it is to reflect the order of society.

## 2.2. Pothier and the Systematic Description of Private Law

Robert-Joseph Pothier is born in Orléans in 1699: His grandfather and father had been magistrates in the presidial of this town. Pothier loses his father when he is five years old, and is educated in a Jesuit college, but he does not enter into the orders, under the influence of his mother it seems (he remained celibate all his life). After his law studies (1715–1718), in 1720 he becomes counsellor in the presidial, always in Orléans, and stays in office until his death in 1772. A magistrate in a jurisdiction of average importance—but at the same time well known for the criminalist Jousse—Pothier keeps himself

away from the conflicts between the parliaments and the King which were typical of his time. He is known to have intervened just once to disapprove of justice being suspended—in other words a strike—decided by the magistrates of Paris in 1770. If Pothier sympathised with the Jansenists and openly admired the work of Nicole, he did not take any part at all in the effervescent Jansenist movement in Parliament. His library, well stocked with theological and judicial works, contains no work of the philosophers: The author of the *Traité du contrat de société* (1764) seems to have been completely unaware of Rousseau's *Contrat social* (1762). Pothier writes quite unashamedly that one can insure the life of negroes “things which are part of commerce” (Pothier 1767, 30).

In 1740, Pothier begins work on a new annotated publication of the Custom of Orléans, with the collaboration of Jousse and the French law professor Prévost de la Jannès. He then undertakes the writing in Latin of an ordered presentation of Justinian's Pandectes (*Pandectae justinianae in novum ordinem digestae*, 1748–1752): This work is noticed by the chancellor Daguesseau, and Pothier is nominated professor of French law at the University of Orléans (1749). His following publications are quite clearly the fruit of his teaching, whether it is his *Coutumes des duché, bailliage et prévôté d'Orléans* (1760) or his monographies dedicated to matters of private law: the *Traité des obligations* (1761–1764), then the treaties of sale, of pensions (1762), of change, of the constitution of rent (1763), of rent, of lease sales, of society (1764), of cheptal sales (1765), charity contracts, of loans (1766), of pledges, of random contracts (1767), marriage contract (1768), of the community (1769), of dowries (1770), donations between husband and wife, mutual gifts (1771), right of domain of property (1772), leaving many other volumes (on successions, donations, civil and criminal procedure) finished, which allowed a rapid posthumous publication. Pothier did not really write a programmatic text, but he recognised the fact that in his treaties he confined himself to “private law” and his descriptions occasionally show that he can be placed “today.” The evident planned publication of his monographies brings to mind the connections with geography proposed by Bourjon (*Le droit commun de la France et la coutume de Paris réduite en principes*, 1747) and Blackstone: It is a question of creating a map of French private law, which supposes the identification of the sources and main subjects of this legal system.

### 2.2.1. *The Sources of the French Law System*

At first, Pothier seems to follow in Domat's footsteps, without actually quoting him: He wants to help people “learn the law” by putting the texts of the Digest into a new order. He explains, however, that this project, presented in Latin according to the old form of teaching, sets out to explain French law.

The *Pandectae justinianae in novum ordinem digestae* insists, much more than Domat's *Lois civiles*, on the way French law and Roman law complement one another. Not only is a large part of French law borrowed from Roman law, but the laws themselves "even the most foreign to Roman law" are connected to the principles and the logic brought to light by the Romans. Claiming to follow the route traced by Dumoulin, and Argentré—going against ignorant practitioners that scorn Roman law—Pothier talks of "torches that light all our difficulties" and of the "almost divine prodigy of human wisdom." There is no trace, in this passage, of Domat's anxieties over the science of the pagans: Pothier subscribes to the tradition of reverence towards Roman law which described—"with the exception of all the holy scriptures"—all that can contribute to "social happiness" and to the "guarantee of commerce." Practical imperatives replaced theological debates and the science of law attempts to form "those who are called to the perilous functions of law professors, defenders or judges" (Pothier 1818, 284–5). It is, however, significant that in the same passage Pothier finds fault with those—without mentioning any names—who want to "listen to" natural reasoning "without passion and without prejudice." Rather than an attack against the natural School of modern law—Pothier makes abundant references to Grotius and Pufendorf who did not in any way abandon Roman law—we can see an attack against the Philosophers, especially the non jurists who try to read the law in reason or in the heart "as if each one of them had received by infusion [...] the spirit and the genius of the great Papinien." For Pothier, law remains a science built up from experience over the centuries, even though it is necessary to give some sort of geometrical order to the "universal system of Roman law." The method of exposition, introduced by certain jurists at the end of the sixteenth century such as Coquille, followed by Domat, is that of a logical plan, with a succession of numbered paragraphs written as clearly as possible, avoiding an accumulation of quotations from authorities.

The general Introduction to customs, which begins the commentary of the custom of Orléans, outlines Pothier's plan in relation to French law. Taking up again the lesson of the authors of the sixteenth century on customs, "municipal right of our province" and real civil right of the customs countries in the north and centre of France, Pothier places the "customary laws" in the classical theory of statutes as a way of resolving the inevitable conflicts following the transfer of the people concerned. Finally, he considers that custom law has three general objects: persons, things and actions, according to the plan of Justinian's *Institutes*. What is new with Pothier is that, after briefly describing the qualities of persons and different types of things, he gives central place to "rights in relation to things": on the one hand, the domain of property which has already been described as "the right to dispose of a thing as you wish, without either infringing the rights of others or breaking the laws" (General introduction to customs, n. 100), on the other, the "*jus ad rem*," a right against

the person who has contracted the obligation to give us something, which belongs to the subject of obligations (“its extent requires a particular treaty” Pothier announces). The relatively short passage on actions links this distinction between real rights and personal rights to that between real actions and personal actions.

Pothier did not really propose a hierarchy of the sources of French law and did not voice his views on the quarrel which continued to oppose the tenants of customary law—like Bourjon and his plan to replace the custom of Paris with the Roman laws in the model inherited from Domat (Martinage 1971)—and the partisans of a common law which was still assimilated to Roman law—like the president of the Parliament of Bourgogne, Bouhier when he denounces that the “compilation of different and opposing laws,” is similar to a dictionary of the French language which groups together words of “Basque, lower Brittany and others which have nothing in common with our language and which are not understood outside their region” (Bouhier 1742, 178). Pothier tries to make a conciliation: between customary law (essentially Orléans-Parisian customary law, he makes little reference to other customs), and Roman law (interpreted in the light of the works by doctors, from the Middle Ages to Modern times, such as Grotius, Vinnius and Pufendorf), and even more between natural law and positive law. Here again, Pothier does not show any theoretical ambition in the form of a conception of natural law that would be his own. To many readers he appeared as a “moraliser” merging natural law, justice and equity, always balancing the developments—even as far as the title of his works such as the famous *Traité des obligations*—between the rules from within the conscience and those from outside. While maintaining his undoubtedly exaggerated reputation as a Jansenist, Pothier was criticised in the nineteenth century for his “Jesuitism” which led him to combine a demand for high morals from within and a sort of relaxation as far as positive law was concerned.

Pothier seems to share with many of his predecessors and contemporaries questions, even uncertainties, on the borderline between morale and law. A reader of Grotius and Pufendorf, he is also strongly influenced by Barbeyrac. Pothier’s *Traité du contrat de jeu*, included in the *Traité des contrats aléatoires* (1767), is very marked by the work which Barbeyrac dedicated to the study of the “main questions of natural law and morale” on the same subject (Barbeyrac 1709). Like Barbeyrac, Pothier does not criticise the disinterested game which procures the “recreation and relaxation which the mind needs” (n. 30), on condition that laziness has no effect on work and conforms to God’s order to establish “a civil society among men.” If the money game—aimed at getting rich at the expense of others and not to satisfy our needs—is morally condemnable, he makes no big deal about it (Pothier, in Paragraph 57, goes as far as taking from Barbeyrac a development on the freedom of every man to dispose of his goods) which has “nothing contrary to natural



law.” “If I can give my opinion,” writes Pothier, “I am inclined to think that those who, playing on their word in defended games, have lost considerable amounts, are obliged, by their conscience, to pay them” (Pothier 1767, 337). Natural law, which is in question here, has nothing to do with Christian morale, even less so with the rigours of Jansenism, but a purely secular law based on reason whose principles were created by the Romans. It is this natural law—which Pothier finds again notably in the law contracts of the people such as sales and mandates—which is likely to create “natural obligations” and to bind the conscience of individuals. With such a concept of natural law—so different from that of Domat and his unchanging laws deriving from the two laws of love—Pothier’s work can be read as an attempt to make the whole of French law the positive extension of the natural laws and the legal science of the Romans. Each time he is in the presence of a positive law whether it comes from royal legislation, customs or even from the practise of “French jurisprudence”—Pothier bows down to the rule in force, with the submission worthy of a positivist of the nineteenth century, or even the twentieth century. At the same time, however, he tries to show that this positive law is not contrary to natural law, that it integrates with the allowances or limitations which natural law authorises: In case of any doubt, he reminds us that subjects are obliged, by their conscience, to obey the laws of the prince. As far as use is concerned, the prohibition which results from positive law is as important, in his eyes, as the divine condemnation which he reminds us about with arguments borrowed from Domat. For the same reasons, the constitution of rent is legal if there is a perfect alienation of the sum paid by the seller and not a loan embezzled with a refund. As it is a question of a scission in the sale, which is apparently contrary to the equity which must reign in contracts, an action claiming rescission can only be used in the case where a building is sold below its correct price, as the custom of Orléans forbids any action in the case of a sale where the high price accepted by the buyer lets us presume a “price of affection.” As far as hunting is concerned, the restrictions imposed on hunters by royal orders are not contrary to natural law which allows game to be acquired as a profession. The most notable example concerns the transfer of property by simple contract: After quoting Grotius and Pufendorf, in favour of the *solo consensu* transmission, Pothier prefers to leave to the “dispute of the school” this question of “pure natural law” in favour of the rule of Roman law received into French jurisprudence which gives priority to tradition “real or false.” Feigned tradition has, moreover, the advantage of not closing the door on transfer by contract which was commonly used in France with the “*dessaisine-saisine*” clause. In Pothier’s descriptions, there is always harmony between natural law and a positive French law based on a combination of Roman rules and custom rules.

### 2.2.2. *The Subjects of a General Part of Private Law*

It does not seem to us fortuitous that Pothier begins the publication of his treaties with the one dedicated to Obligations and that he ends it with the work which deals with the right of domain of property, leaving it up to his pupils to publish the works, most of which were less elaborate, on successions, donations or procedure. For Pothier, the heart of private law can be found in these patrimonial matters where Roman law had the greatest influence on French law, and where it seems possible to make a general theory which can be applied to the whole of the kingdom. In the developments of the *Traité des obligations*, there is practically nothing new with respect to what was written before by Dumoulin (Thireau 2001, 53), Domat, Grotius or Pufendorf. It is the global presentation of a law of contract—preceding the examination of special contracts with general rules which set aside the Roman distinctions between named contracts and un-named contracts or between strict law contracts and good faith contracts—based on consent which is innovative in its concision and clarity. Pothier does not take up Domat’s formula on the conventions which make law between parties and his presentation of the cause is not very different from that of the *Lois civiles*. His exposition of the “different vices which can be found in contracts” exalts more the idea of free and enlightened agreement: by exaggerating the error in quality “which the contractors principally had in mind” (it is the famous example, in a text of Ulpian, of the brass chandeliers sold for silver), by refusing to recognise the value of any agreement extorted through violence even if it was the subject of an oath (here natural law brings him to the invocation of God following Pufendorf rather than Thomas Aquinas), by distinguishing fraud which brings only slight attacks against good faith, by discarding the majority of cases of damages between adults. If it is anachronistic to read Pothier with the image of the triumphant liberalism of the 19th century—on the guarantee of hidden vices, he is, on the contrary, the first to mention the idea of protecting the buyer (“consumer” we would say today) in relation to the worker or merchant (the “professional”) who answers for the object sold (Pothier 1772, I, n. 213, 206–8)—nevertheless, his contract law is addressed to subjects who have the “free and spontaneous choice” to take on duties in respect of the “guarantee and freedom of commerce.” In the very brief passage on offences, and quasi-offences, he synthesises in a formula the obligation to repair any damage when “a person, not maliciously, but with unforgivable carelessness, does some wrong to another.”

On the subject of property, we must no longer overestimate Pothier’s new ideas which take from Dumoulin and the writers of customs the qualification of owner for the tenant and does not question the theory of double domain, nor the existence of ways to make the property “imperfect” (Grossi 1992, 385–437). We cannot, however, overlook the importance he gives to the law



of property. In France, Pothier is the first to write a monography on this subject (the *Traité du droit de domaine de propriété*, whose clumsy title is another example of the terminological uncertainty), the first to give importance—from his general Introduction to customs—to a definition of the subjective law of property and to quote theses of the great natural law authors (Piret 1937). The theoretical passage is certainly brief and superficial—even if we compare it to Blackstone—but it is no less significant. It is when discussing occupation (n. 21 of the *Traité*) that Pothier reminds us that “God has sovereign domain over the universe,” that he has given to mankind “a domain subordinate to his own,” that “the first men at first had in common all the things that God had given to mankind,” that this community was “negative” in that “nobody could prevent another from taking in these common things what he felt like taking for his own needs,” so that “the human race, having multiplied, men shared between them the land, and the majority of things on its surface.” This idea owes more to the Salamanca School (Renoux-Zagamé 1987) and to Pufendorf (Pufendorf 1934, 4, 4, 2, 535) than to Grotius: We notice that Pothier avoids mentioning any social contract. Once again, Pothier denies the smallest rupture between natural law and positive law, as he seems to look for a balance between the absolutism of the law of property and its limitation in the name of common law: Without spending much time on agronomical questions (the landowner has the right to make “of workable land a meadow or a pond”), Pothier prefers to give the example of the owner of a book who “has the right to throw it in the fire, if it seems right to him”; without placing any particular emphasis on charity towards the poor (to whom he leaves the “pea pods and salad stumps” found on the street, n. 60), he considers the attitude of the grain merchant who stocks up during the famine in the hope of selling at the best price (n. 14) to be contrary to natural law. Lastly, there are the police laws—which reserve to the king the monopoly of the tobacco plantations or defend the export of grain outside the kingdom—which are imposed. Rather than justifying a liberal capitalism that was still to come, Pothier gives to legal science a strong belief in the goodness of positive law and in the absorption of natural law by a general theory which groups the institutions of civil law based on their essence. From this point of view, he effectively prepared the French jurists of the 19th century for the idea that the Napoleonic Code was, especially in matters of goods and obligations, the positive realisation of natural law (Halpérin 2001, 74). Going back again to Domat, he also influenced the German authors in the construction of a general part of civil law that would be subjected to the test of time.

## Chapter 3

# CONCEPTUAL ASPECTS OF LEGAL ENLIGHTENMENT IN EUROPE

by Maximiliano Hernández Marcos

The objective of this chapter is to provide a basic conceptual map of the vision of the Enlightenment concerning law and jurisprudence, especially in the tradition of civil law. Its subject is therefore confined to private or civil law in the broad sense of the 18th century, which covers the vast field of the legal relationships between citizens and of the latter with the state (civil and criminal law), together with that of the procedures for settling disputes between them (procedural law). The development of the subject will however lead to the inclusion of some conceptual reflections on political law (*ius publicum universale*), as the effort to define it in direct relation to the state or even to reduce it to a legislative consequence of it (*ius civile*) is characteristic of the enlightened conception of law in general and of *ius privatum* in particular. For its part, the approach is essentially theoretical, since the aim is to delineate the legal culture of the Enlightenment as it was thought up, exposed, and disseminated through the works and writings of its most representative jurists and philosophers. Nevertheless, the consequent exposure of the theory will lead to the relating of its events and practices, either because the theoretical discourse of the members of the Enlightenment is frequently orientated towards the critical condemnation of uses of current jurisprudence, or because it almost always encourages the transferring of ideas to the same legal praxis. This overlapping between theory and social history is also required by the methodology of conceptual history itself, from which we here approach the study of the culture of law of the Enlightenment. For this reason, the objective of this chapter is merely to provide an outline of the fundamental concepts and their corresponding doctrines that shape a special culture or world view of law, owing to which we are justified in speaking of the Enlightenment in Europe as a historical period that is also distinct as far as the historiography of jurisprudence is concerned. However, this approach obliges us to situate legal concepts and doctrines within the general historical framework of the enlightened conscience and to define them in connection with it as a specific development of the same (Section 1). Contextualised in this way, its own discursive display can therefore be included both at the negative moment of the criticism of established jurisprudence (Section 2) and at the positive moment of the systematic construction and proposal of a new socio-political order of legal relationships (Section 3). The three parts into which the chapter is divided reflect this way of thinking.

### 3.1. General Idea of the European Legal Enlightenment

#### 3.1.1. *On the Concept of the Enlightenment in Europe*

In recent decades the idea of the Enlightenment as an historical process common to Europe but which unfolded according to different rhythms and profiles, specifically national ones, has made some headway (see Jüttner and Schlobach 1992; Bödeker 1996, XI; Bödeker and Herrmann 1987b, 10). The questioning of the traditional conception, based on the French model, which reduced the Enlightenment to a uniform and unidirectional movement of bourgeois emancipation leading to a political revolution, has allowed us to attain a more differentiated and complex image in which the historiographical conviction of the European dimension of the phenomenon is complemented by precise knowledge of the particularity of its different territorial manifestations. The lexical variety of the terms used to describe this enlightened era in the 18th century in the principal European languages (*les lumières*, *Aufklärung*, *Enlightenment*, *illuminismo*, *ilustración*) precisely echoes this diversity of events, experiences and historical expectations to which the concept of the Enlightenment was related in the different countries. Forming part of this relationship between unity and plurality in the European Enlightenment(s) is its own evolving dynamics throughout the 18th century, as well as the different way it developed and became specified in the diverse contexts of culture and society (religion, science, art and literature, law and politics, etc.), in which it in turn acquired nuances and specific orientations.

In order to fully understand this general idea of the unity of the Enlightened process and all its regional and socio-cultural manifestations, we need to start from the very category of Enlightenment as a concept of historical self-comprehension that was coined by its contemporaries. We already know that the historical concepts maintain a tense relation of convergence and distance at the same time with the social reality they refer to, and we are able to identify a common process or structure thanks to this tension, without denying the effective complexity of the world that is reflected by it. R. Koselleck already formulated with precision this relation of differentiated convergence between concepts and historical facticity when he stated that the concept is the “indicator of the [social] connections,” “captured by it” and, in turn, a “factor of those very connections” (Koselleck 1989, 120). If we apply this statement in our case, this means that the concept of Enlightenment, as an indicator of the factual reality of the 18th century, does not exhaust it or shed light on it in its empirical totality. This totality is made up of the multiplicity and the heterogeneity of the socio-cultural movements (traditionalism, pre-Romanticism, irrationalism, etc.) as well as by the characteristic national variety of the Enlightened phenomenon. It merely points to the set of experiences and events which because of their effect and social relevance generated a collective con-

consciousness with its own identity. Also forming part of this consciousness were a series of expectations and a horizon of tasks that were projected from the space opened up by the new historical deeds and structures, and which became incorporated, as a factor of practical transformation, to the indeterminate semantics of the concept of Enlightenment. This consciousness of a different historical time is based on the association between all the new experiences and the future, filled with even bigger expectations. This association defines the very human spirit of the middle of the 18th century, which D'Alembert tried to capture in the first pages of his *Essai sur les Éléments de Philosophie* (1758):

If we attentively observe the half century in which we live, the events that disturb us or at least occupy us, our customs, our works, and even the conversations we have, it is difficult not to realise that in many aspects a notable change has taken place in our ideas, a change which, owing to its swiftness, seems to promise us an even greater change in the future. (D'Alembert 1967b, 121–2, my translation)

It is clear that the concept that tried to register this change, with its potential for experiences as yet so undefined and expectant, would arise charged with polysemy, and that its meaning had thus to be determined contextually, according to the specific experiences and the corresponding perspectives of transformation that in each territory and each milieu of social life actually fed the collective consciousness of living in a new historical age. In this aspect it can be affirmed that the plurality of manifestations and orientations of the Enlightenment is the consequence of the universality of a concept that when coining the awareness of the newness of an age in general terms had to be really expressed in many ways.

However, an analysis of all the previous factors reveals that the delimitation of the general semantic contour of the Enlightenment as the concept of an age common to Europe does not require, strictly speaking, the analysis of the conductive ideas and key words that make up its broad lexical field (critique, reason, culture, education, nature, thinking for oneself, clear knowledge, emancipation, etc.). It seems more suitable to elucidate the essential traits characterising that collective consciousness of living in a new historical time which tried to express itself in terms such as *les lumières*, *Aufklärung* or *illuminismo*. It must nevertheless be stressed that this social consciousness gestated slowly and progressively until it took effect and became generalised throughout Europe only during the second half of the 18th century; likewise its appearance and development varied chronologically in the different European countries (in France it began at the end of the 17th century with the *querelle des anciens et des modernes*; in Spain, on the other hand, it emerged almost a century later, towards the end of the reign of Charles III). Taking into account these nuances we must also recognise its basic homogeneity and consider it the common conceptual frame of the 18th century's self-under-

standing as Enlightenment, of which at least three aspects form part, these being: the temporalisation of history, the conceptualisation of the traditional metaphor of light and the growing politicisation of social life.

### 3.1.1.1. The Temporalisation of History

In the 18th century there emerged for the first time a new historical consciousness that according to Koselleck constituted modernity and which he characterised as the “temporalisation of history” (Koselleck 1989, 19, 58, 321–38). It is the view according to which time has turned into the qualifying instance of historical events and structures the meaning of them, in such a way that by virtue of this the immanent horizon of traditional profane history acquires its own meaning for man’s action and acquires a reputation as the only destiny of his being in the world. The new historical consciousness is thus, in the strict sense, a consciousness of the historicity of human life in a double direction: On the one hand, it is a warning of the mundane nature of existence, and on the other hand, it is a recognition of the temporal quantum as a unifying way of qualitatively ordering the diversity of historical events. This formal unification of the plurality of histories inherent to its temporalisation leads to conceiving the idea of a single and universal history of all human beings, at the same time that it presupposes the elevation of the concept of progress, formulated from the experience of scientific-technological advances, to the internal criterion of qualitative gradation and dynamisation of historical time. The philosophy of history theoretically produced this new historical consciousness in the second half of the 18th century until the extreme of its radicalisation, without which the very protagonists of the process of development of that century would not have been able to contemplate their own present as an extraordinary age, qualitatively different from all past times, nor would they have dared to interpret it using the terms *Aufklärung* or *siècle de lumières*.

Indeed, pertaining to the semantics of this concept of epoch is the presupposition of a periodisation of history according to qualitative and uniform criteria of temporal organisation, which allows us to conceive of the actual place of the present and differentiate it within the frame of a unitary understanding of the totality of the past. The conscious identification of the singularity of the age by means of the concept of Enlightenment was thus carried out through contrast with the preceding times according to simplifying parameters of qualitative opposition (darkness/light, barbarity/civilisation, ignorance/knowledge, etc.), which are the result of applying to the diverse contexts of man’s historical existence the uniform scale of temporal dynamisation that comes from the idea of progress and which in turn makes it possible to globally classify the plural process of development of history in homogeneous conceptual units (epochs or historical periods). Thus, in the 18th century the

historiographical categories of the Middle Ages and Modern times began to emerge (see Koselleck 1989, 302–28), and were what the Enlightenment needed to define itself as an age differentiated either in contrast to them or in a line of historical continuity with them.

This classifying unification of the entire past in qualitatively distinct periods was not, however, the only sign of the temporalisation of history; to the extent to which the latter constituted what was peculiar to the new collective consciousness, it also had to reach the very semantics of the concept of Enlightenment, which thus became temporalised, that is, it became a “concept of movement” (cf. *ibid.*, 339), which no longer identified so much the finished contours of the present as the infinite task that opened up from it towards the future, and whose first steps could even be traced to determined moments of the past (Greek classical culture, the Renaissance, the Reformation, etc.). Under this idea of the Enlightenment as a mission and undefined process, D’Alembert, in his *Discours préliminaire de l’Encyclopédie* (1751), thought he glimpsed as early as the Renaissance the preparation “far away, in the shadows and in silence” of “the light by which the world had to be illuminated little by little and by imperceptible degrees” (D’Alembert 1967a, 63, my translation), in the same way that Kant in 1784, when he saw the pathway for emancipation that had yet to be covered, characterized his century, not as an “enlightened age” but as an “Age of Enlightenment” (Kant 1923a, 40). What is new and distinctive about the present itself is thus the awareness of not constituting a closed time but only a moment charged with future, a “stage within the history of humanity conceived as a progressive process” (Bahner 1986, 23). By virtue of this internal time structure and the mainly projective semantics that it implies, the concept of the Enlightenment became so abstract and general that it acquired the most diverse and even contrary meanings as a function of the ideological use to which it was thus given over to in the linguistic struggle of the different social fronts for control of the direction of the historical movement (cf. Koselleck 1989, 344ff.).

### 3.1.1.2. The Conceptualisation of the Metaphor of Light

The semantic versatility of the idea of the Enlightenment was also aided by the fact that its formation as an historical category and its terminological fixation in the different European languages of the 18th century were to a great extent the result of a conceptualisation of the traditional metaphor of light (cf. Ricken 1992, 103–4; Delon 1997, 659–62; Becker 1994; Schalk 1977, 323ff.; Mortier 1969, 13ff.). The fact that the collective consciousness of living in a new age recognised itself reflexively in this line of metaphor and that it appropriated it by converting it into even a conceptual mirror of its identity, was possible, undoubtedly, thanks to the previous existence of a sufficiently widespread and effective metaphorical discourse of light, which was enough for an



attempt to be made, in order to use it to make an intelligible reality from the novelty of the experiences and expectations of the present. The self-understood connection of the new historical reality with that pre-existing metaphor brought with it such an important change in the meaning of the metaphor that it ended up by transforming it into a concept of epoch, at the same time that it charged the new concept with all the imaginative and expressive potential of its metaphorical affiliation and thus endowed it with enormous semantic elasticity. To this belong at least the three fundamental aspects of the concept of the Enlightenment linked to this metaphorical point of origin which are outlined in the following paragraphs: the so-called definitive secularisation of the metaphysical-religious sense of light, its pragmatic change in meaning and the imaginative dialectics of the light/darkness opposition.

Indeed, the 17th century was witness of the beginning of the secularisation of the mediaeval metaphorical line of the light, with metaphysical and religious contents, thanks to the Cartesian identification of the *lumen naturale rationis* with the cognitive capacity of human intelligence to gain access to the truth on its own and with the clear and distinct knowledge that followed from the new scientific method of thinking. This recognition of a natural autonomous light with its seat in man's reason and in its analytical-synthetic procedure became strengthened and broadened in the passage from the 17th to the 18th century with the subsequent demand for its total emancipation from the supernatural light of Christian revelation and with the claim of its cognitive and judicial primacy over it, which ended up replacing it (see Becker 1994, chaps. 3–4 and Conclusion, 301–6; Delon 1997, 659ff.). That would explain the frequent metaphoric association with the light or the lights with scientific knowledge all along the 18th century and, in general, with a clear and correct view of things that is a result of rationally examining the diverse fields of existence (religion, art and literature, society, politics, etc.), as well as with the destructive work of liberation and redemption from the ways of knowing and living that could not withstand the illuminating proof of reason (prejudice, superstition, custom, error, authority, fanaticism, etc.). This secularised sense of the metaphor, together with all its expressive resources, would always accompany the concept of Enlightenment and would always form part of its semantic and lexical field.

However, the secularisation of the metaphor of light does not in itself explain the formation of the concept of *siècle des lumières* or of *Aufklärung*; it merely opens up and empowers the mundane space of man's autonomous thinking and knowing which will later be the object of the conceptualisation and even the self-identification of an age. The passage from the metaphorical use of light in its secular meaning to the concept of Enlightenment occurred only when that natural light of reason acquired sufficient social repercussion and diffusion to be considered for its effects a decisive historical factor that marked the awareness of a collective identity and determined the latter's sub-

sequent claim for itself of the linguistic appropriation and the corresponding restrictive semantic usage of the term. The linguistic-conceptual transformation of the metaphor thus presupposes the historicisation of the secular light of human intelligence in a twofold sense: on the one hand, as coming from the inner being of enlightened spirits towards the open space of the public at large to gradually enter into the mentality, customs and even some institutions of society, and on the other hand, as the intrinsic temporalisation of the light of thought, that is, as the collective experience of the change and progress inherent to the autonomous deployment of human reason. It is that social irradiation of light which is surely echoed in the conceptual characterisation of the Enlightenment as “general state of knowledge” and of the “human soul” or “moral and cultural status” of the people, determined by the clarity and correctness of its knowledge and ideas (Stuke 1972, 249). The projective and practical understanding of lights corresponds to their temporal configuration as an undefined process of elucidation and elimination of obscurities as well as of the forming and improvement of human capacity and the social order (cf. *ibid.*, 249–50; Becker 1994, 170ff., 305–6). This double semantic meaning concurs in the conceptual crystallisation of a secularised metaphor that took place during the second half of the 18th century and became culturally visible above all in the long debate about the Enlightenment in Germany in the 1780s (see Schneiders 1974; cf. Stuke 1972, 250–89; Hinske 1981).

The secularisation of the metaphor also involves a change in its pragmatic meaning. The old contemplative conception of light as self-transparent plenitude that reveals itself and at the same time reveals the true nature of things, was replaced by the technical-practical view of it as “what must be shown” and “produced” by means of the methodical work of the human spirit, established by it as the exclusive source of luminosity in *lumen rationis* (Blumenberg 1957, 446). Thus, the cognitive confidence of man in the “naturalness” of a light that in itself gives access to the world disappears in the face of the suspicion that everything that is manifested, everything the natural light shows us, is mere appearance that leads to error and confusion, and the help is required of the attentive examination of human intelligence to reach the true face of objects and to reach that light that is no longer illuminating in itself, but rather the result of a process of illuminating the shadows in which it was hidden. The effort to progressively unmask the appearance of things, to critically question what is given and considered as natural, and to a continuous fight against the factors of confusion that feed on the supposed evidence of the established norm (tradition, authority, prejudice, dogma) is undoubtedly one of the main conceptual debts the Enlightenment has with the new pragmatic meaning of human self-affirmation in the world that goes hand in hand with the secularised metaphor of light, just as also forming part of that inheritance is the enlightened conviction that only a middling clarity can be obtained about things by the joint effect of unveiling that is a result of the con-



currence of multiple partial views of men in the open space of the public (cf. Blumenberg 1960, 54).

Finally, it is necessary to highlight that the conceptualisation of the secular metaphor of light did not neutralise the non-conceptual potential of this line of metaphor or its symbolic and imaginative power, which remained present in the idea of Enlightenment and were activated especially in contexts of political struggle and ideological polarisation on the different social fronts. In these polemical situations the historical identity of the Enlightenment was even valued up and reinforced semantically by the iconographic use of the metaphor (see Reichardt 1998). Among the aspects that cannot be reduced to concepts proper to that metaphorical use, outstanding for its omnipresence is the motif that evokes the light/darkness opposition, from which the Enlightenment extracted “its great symbolic force” and its capacity for social attraction, alignment and mobilisation (ibid., 85). The constant resorting to this elemental imaginative structure of human existence can be explained not only by the need of the enlightened for a conscious self-definition in contrast to the past, but above all by their need for practical affirmation in the growing struggle with it. For the same existential reason the adversaries of the Enlightenment also took advantage of the expressive potential of this opposition to shore up their historical survival. The polemical-existential significance of this imaginative dialectic within this line of metaphor and its lexical field (light/gloom, clarity/darkness, Sun/shadow, etc.) came to form an essential part of the semantics of the Enlightenment and became the seal of identity that accompanies its self-same historical concept.

### 3.1.1.3. Enlightenment as Politicisation

The forming of a new collective consciousness of a differentiated historical age was not only nourished by the new qualified experience of time as change and progress and the growing expansion and social penetration of the natural light of reason subjected precisely to that temporal dynamics. Likewise, the process of politicisation of human life that characterised the Enlightenment played a decisive role. By politicisation we do not principally mean the strict phenomenon of the progressive extension of enlightened critique to the public context of State action monopolised by absolute monarchy which, at a different pace in each country, was gradually deployed above all in the last third of the 18th century (see Koselleck 1959; Habermas 1990; Batscha and Garber 1981). This is only the final and polarised orientation around a liberal-emancipatory doctrinal line of a broader and more complex process of a secular raising of awareness, both theoretical and practical, concerning the worldly and common destiny of human existence and of the necessary social involvement and participation of everyone in it, a process that undoubtedly became clearly visible from the middle of the century, but which was beginning to grow

slowly in the previous decades. In this broad sense the Enlightenment is the age of politicisation, of recovery of the original meaning of politics as a space and business of everyone (cf. Bödeker 1996, xiii–xviii; Bödeker and Herrmann 1987a). To this is attributable the specific will of the collective propagation of new ideas and of the reform and transformation of society that led the Enlightenment to be considered as a “social philosophy” (see Schneiders 1974, 12–3), or the growing deployment of different kinds of associations and clubs (patriotic societies, literary clubs, scientific associations, secret societies, etc.) as well as a media network of public communication (magazines, periodicals, editorials, etc.), which not in vain have served to dub the whole 18th century as the “sociable century” (see Im Hof 1982; cf. Van Dülmen 1986).

However, this development of sociability and sensitivity for what humans have in common was the consequence of a change in historical consciousness and of a new view of the meaning of history that began to be forged in Europe at the end of the religious Thirty Years War (see Koselleck 1989, 17–37, 315; Koselleck 1959, chap. 1). Indeed, after the Peace of Westphalia (1648) an awareness of the worldliness of human existence began to come into existence, enabling politics to replace religion as the genuine historical destiny and as secular authority of social peace and co-existence. In parallel with these events, the conviction that the definition of the immanent sense of history, once transcendent expectations of salvation had vanished, corresponds to the common will of humankind and must be the object of a rational planning of social action began to make its way. This historical-cultural process surely permitted the development of the modern State, at the same time that it transformed it into the horizon and motor of our historical life, because the State was not only a reflection of that public will, which was contractually legitimated by all the parts, and which decides and realizes the intramundane meaning of history, but also the creditor of the bureaucratic machinery of the power, with enough technical capacity and executive means to take on the rational programming and management of the collective action, in which the determination of historical meaning was materialised *de facto*, because of its structure of projective temporality. The politicisation of human life thus turned out to be the practical mission in which the Enlightenment involved man as a consequence of the temporalisation of history.

### 3.1.2. *Structural Aspects of the Enlightened Conscience of Law. Panoramic Overview*

One of the social fields over which the enlightened conscience was projected specially and with its own profile was that of law and jurisprudence, which due to the effect of the Enlightenment suffered a profound change in its theory and its praxis (see Schröder 1979; Cappellini 1987, 307–13, 335ff.).

The three structural aspects of the self-comprehension of Enlightenment that have just been exposed (a temporalised conscience of history, a metaphoric awareness of the light, politicisation of the human life) become present in a clear and conclusive way as the essential conceptual substratum of the new view of law and justice that is put forward by the enlightened people. These people will try to impose and put such aspects into practice in a growing process of social and political mobilisation that will finally transform the old legal code. We will now offer a general and introductory outline of this new legal culture, and we shall analyse the incidence of those three essential aspects of the enlightened self-conscience on the formation of this culture. We will also present a bibliographical overview of the main works and authors in the field of jurisprudence that contributed to its emergence and spreading.

First of all, the politicisation of Enlightenment is closely related to the new political conception of law. This conception is precisely its main supporter and the field in which this politicisation can be realized in a privileged position. With regard to this, it does not come as a surprise that Kant identified the *Aufklärung* in the strict sense of the word with the sociological process of public diffusion of the rights and duties of man and of the citizen (Kant 1917, 89), because the new law had a structuring role in the configuration of the new social order of the reason that was being pursued by the people of the Enlightenment, and the formation and generalization of such legal mind was an essential part of that project. Indeed, the contribution of law was critical in the constitution and consolidation of the modern State that began with the monarchic absolutism in the 17th century (see Tarello 1974, 40ff.). The law was also used by the Enlightened people as an essential tool for the rational regulation and planning of the social life, and for the general unification of that life into a common, mundane will, that acts as a guarantor for peace and coexistence. This political function of reaffirmation and configuration of the modern State versus the concurrent powers of the *ancien régime* had, in fact, a double intention: it certainly laid the foundations for a rational, safe, calculable and tendentially uniform organization of the social action inside a specific territory. However, it also started slowly to generate a collective conscience of a political community and a sense of the public system that would unlegitimize the old order of a society divided into estates, together with any arbitrary form of authority, including the despotic exercise of sovereignty.

However, that task of rationalization of the social praxis could only be performed by means of a profound revision, both theoretical and practical, of the civil and practical law. That is, by the revision of a legal field that, in regulating the particular relations between the citizens or the social entities, was more subject to the will of the judges than to that of the sovereign princes. Precisely for that reason, the Enlightened conscience had the vast field of the civil and penal law (including also the procedural law) as the central subject of its criticism and demands in the area of jurisprudence. These demands and

criticism spread to the field of political law only in the last third of the 18th century. Nonetheless, those demands always intended mainly to submit the legal relations between the subjects to the unitary will of the State through the general legislation and the positive codification of those relations, to the detriment of the many existing legal authorities. However, at the same time, this legal regulation of the social praxis was also considered as a new form of civic and moral education of the people, because it increased their awareness of the fact that they live in a common order of clearly fixed rights and duties that were secured by the public authorities. Through the use of good laws—as Saint-Lambert pointed out in the entry *législateur* of the French Encyclopædia—the legislator can promote the “social passions” to the detriment of the unsociable ones, and instil in the citizens “the community spirit” and other “public and private virtues” (Saint-Lambert 1966, 358–9).

On the other hand, the application of this political function in which the construction of the State is produced by the unitary and safe regulation of the social part was inseparable from the new meaning of the law, that is, of an equally political concept derived from its exclusively State-related origin. The Law, indeed, is initially conceived in a restrictive way as a group of laws, and these laws are conceived mainly as the expression of the common will of the sovereign, or at least as a group of norms that he can sanction. This is perhaps the most original and drastic contribution of the Enlightened thought, the one that has historically led to the different modern codifications and to the ultimate implementation of the single domain of the positive law: the idea that the legal creation and validity are only subject to the authority of the *potestas legislativa* of the sovereign State. Therefore, the strict field of Law, like the power of the State, is determined by the legislation and by the application of the law, especially the positive law. This Enlightened politicisation of the law clearly brought the juridification of politics, that is, the legal and constitutional configuration of the State itself on the basis of a new principle of popular sovereignty. However, that was the ultimate consequence of the demands of rationality that the Enlightenment had made *ab initio* to the sovereign task of legislating for the subjects, of protecting and securing their private rights and the public well-being through the implementation of good laws. With regard to this aspect, the legalist conception of the law is as typical of the Enlightened culture as the scientific and normative comprehension and foundation of the law itself, with is mainly aimed to the reduction of the despotic danger of absolute sovereigns, by submitting their will to rational principles that everyone can assume. For this reason, the Enlightenment created, as its most genuine epistemic product, a science of legislation at the service of the sovereign princes, aimed to the establishment of the requirements for a formal rationality (clarity, brevity, intelligibility, precision, completeness) as well as of the requirements for a minimal legal and material rationality (according to the notions of justice, law, State goals, structure of the society, etc.) that any good

positive legislation had to meet (see Zapatero 2004, xxxv ff.). Due to this, Gaetano Filangieri presented in 1780 his treatise on *La scienza della legislazione* as a tool that would “help the sovereigns of” his “century with the task of a new legislation.” They had begun dealing with this task in “recent times” for the greater good of the nations and the people, replacing the art of war, in which they seemed to have pinned all their grandeur and their glory in the past (Filangieri 1780, I: 14, 1–3).

Secondly, there is one of the aspects of the Enlightened legal culture that reveals the presence of a temporalised conscience of history, which is closely related with this political understanding of the Law as a group of positive laws of the State: the reduction of the diversity of legal entities in favor of the human being as a unique and universal subject with equal rights (see Tarello 1974, 29–32). This is clearly an idea that is slowly introduced with very different rhythms and national nuances all along the 18th century. However, this idea never quite crystallized effectively into the positive legal code until the beginning of the 19th century. Nonetheless, it is evident that the idea verifies the Enlightened possibility of a single and universal history, characterized by the temporal qualification of the progress, in the terms of the unification of the inherited plurality of the legal histories of the individuals, according to the corporate entities, the jurisdictions, the legal objects and the law sources, in a common and unitary historical course of legal relations established by an abstract and universal subjectivity that can support several legal predicates and a public and exclusive jurisdictional authority that monopolizes the sanction and creation of the Law. As a result, the unique and universal legal entity and the legislative State are indissolubly united. The modern natural law, in clearly different ways, had already established that link, when the abstract idea of the man as the natural bearer of rights and duties was first formulated, prior to the social order, and when this abstract idea became the explanation and the basis of the existence of the State as the joint will of all the individuals for the protection of an originally equal legal capacity by means of a general law. This natural law construction, due to its abstract and purely rational nature, without equivalent historical experiences, also determined the purely projective semantics of these new legal concepts as well as its practical mobilisation force. This is due to the fact that they became promising horizons of a social future for humanity that was the full realization of the unique and universal subject of the law, from which the history of the past and the present could be viewed as a collective course of a possible legal progress in the liberties and equality of all men. This is how the historical conscience of the Enlightenment also created a general periodicisation of the jurisprudence, mainly based on the simplifying contrast between a past dominated by the old common and Roman Law, which was chaotic, complex and alien to the modern people of Europe; and a new age, illustrated by the Law of reason and the clear and uniform legislation of the State.

In the third place, the metaphor of the Light in the Enlightened discourse of the Law obtains the highest semantic effectiveness precisely from this contrast. The symbolic evocation of the metaphor in the dialectical usage, with the opposition light/darkness, clarity/obscurity is the main agent that operates in this context. It suggests the historical difference between the world of the Law as designed by the reason and the world of the existing jurisprudence, with a Roman-canonical origin, based on the authority of the doctors, the arbitrariness of the judges and the complexity of the legal sources. From the basis of this controversial scheme that supports the Enlightened criticism of the code of the *ius commune* and its deeply rooted praxis, the metaphoric dialectics are specifically focused on the very concept of the Law, in order to sketch its meaning by the radical comparison between the obscurantism of the *interpretatio* and the luminosity of the *lex*, between the gloomy and labyrinthine woods of the interpretations, rulings and comments of judges and jurists, who multiplied and prolonged the processes indefinitely; and the accessible clarity of the laws enacted by the incontrovertible will of the sovereign. Obviously, the luminous nature of the law did not come from a supposedly objective legal nature of the law itself, but of its rational discovery in the hearts or the nature of the individuals, in the case of the so-called “natural law,” but above all, in the case of the positive law, of its artificial production by the collective will of the sovereign, which was an act of creation and exact fixation of the rights as well as of the public disclosure of those same rights. Apart from this pragmatic meaning, the association with the symbolism of light led sometimes to the projection of all the mythical and religious potential of the metaphor over the law itself, up to the point of worshipping the law. This can be seen in the case of the *Club des Nomophiles*, founded by the French revolutionaries in the old chapel of Saint Mary in the neighbourhood of *Saint-Antoine* in Paris (see Carbonnier 1979, 203). This almost religious passion for the laws also included the mythification of ancient legislators, such as Moses, Lycurgus, Solon and even Justinian, in an effort for reducing the opinions and comments of the jurists, creating a body of laws that governed the courts (cf. Muratori 2001, chap. 4; Hommel 1975, chaps. 1 and 2; and in general Stolleis 1990, 174–6, 187–8).

The two following sections of this chapter go into more detail in these structural aspects of the Enlightened culture of the Law with the metaphoric dialectics of light/darkness as the thread and systematic axis of the exposition, defining the general and existential framework of the unconceptual understanding from which the Enlightenment outlines and creates a conceptual elaboration of a new comprehension of the Law. Our subsequent story, guided by this controversial game of the metaphor, is organized around a conceptual nucleus created by the evolution from the traditional conception of the Law as *interpretatio*, which is the main target of the Enlightened criticism, to the traditional conception of the Law as a group of laws, mobilising the



practical energies of the Enlightened people towards a State code since the middle of the 18th century. However, before dealing with the reconstruction of this conceptual story, we must perform a brief summary of the main works and authors that contributed decisively to forge a new collective conscience in the field of jurisprudence.

In the diagnosis of the ills of practical jurisprudence and, as a preview of the possible solutions, there is a prominent figure in the end of the 17th century and the beginning of the 18th century: the jurist and philosopher Christian Thomasius. He starts the Enlightened criticism of the irrationalities of the received Roman Law in academic treatises such as the *Delineatio Historiae juris civilis Romani et Germanici* (1704) or the *Cautelae circa praecognita jurisprudentiae* (1710). He strongly defends a profound review of Roman Law, based on rational criteria of simplicity and naturalness, as well as on an adaptation of its mixed legacy to the legal inheritance of Germany. This criticism extends, in the field of Criminal Law, with the denunciation of the inhumanity of torture, promoting its abolition, or with the categorization of heresy, witchcraft and the practice of magic as punishable offenses in his famous dissertations on those subjects. Finally, he clearly paves the way for the political process of the legislation of the prince, which he understood in the terms of (*iuris*-)prudentia legislatoria, as a formula of systematic and clear reorganization of the existing legal code, and even of ethical and civil education for the society (see *Lectiones de Prudentia Legislatoria* of 1702). However, his anthropological distrust of the power of reason keeps him from promoting a new encoding of the Civil Law on a natural law basis or on rational principles of liberty.

Along similar lines of scepticism with regard to an exclusively legislative solution from the sovereign, Lodovico Antonio Muratori wrote his *Dei difetti della giurisprudenza* (1742), which is perhaps the most widespread work in the legal circles of the middle of the 18th century. This treatise diagnoses the abuse of the opinions, comments and interpretations of the jurists as the great historical defect of the practical jurisprudence of the *ius commune*, and states that this is the cause of the indefinite extension of the lawsuits and the multiplication of the controversies. Muratori, however, rules out the elaboration of a new code of laws as a solution, because he is convinced that the unavoidable interpretability of the legal texts is an intrinsic defect of its forensic application, and that the authorized opinions of the doctors and the jurisprudence of the precedents represent a necessary obstacle for the arbitrariness of the judges (see Muratori 2001, chap. 10). His final proposal for a reform, which is quite ambiguous, is therefore restricted to the statement that it would be convenient to have a legislative intervention of the sovereign, supported by the study and advice of a commission of erudite jurists, in order to decide with clarity just the main questions that are disputed in the courts, which are the main sustenance of the hydra of interpretation, without altering the basis of the established legal code (see *ibid.*, chaps. 11 and 20).

The publication of *De l'esprit des lois* (1748), by Montesquieu, is the main contribution that introduces the perspective of the positive legislation of the sovereign into the European culture of the Enlightenment as the only solution to the ills of the inherited jurisprudence. Through the application of an empirical-inductive method to the study of the historical phenomena, Montesquieu showed that there is a rational logic of laws related with the physical and natural conditions (climate, land, economic productivity, etc.) as well as with the socio-cultural background of each country (political organization, customs, religion, demography, etc.). With this logic, a systematic encoding of the Private Law could be implemented according to the spirit of each country and to its historical and geographical idiosyncrasy. The scientific and factual description of that historical and national logic of the laws seemed thus to contain useful instructions for a legislative review and reestablishment of the existing legal code, that is, for a legislating art that, on the other hand, was specifically proposed by Montesquieu in the 29th book of his works, aimed to establish general rules of formal rationality in lawmaking (clarity, brevity, simplicity, etc.). In spite of the complexity and ambiguities of that work, its wide reception in Europe promoted the development of a culture of codification in the second half of the 18th century and, in connection to this culture, of a science of legislation that became the true Enlightened theory of politics as an art of governing. In this respect we should highlight the unfinished work of Gaetano Filangieri *La scienza della legislazione* (1780–1783), due to its symptomatic relevance in its time and its fast spreading across Europe and even in the new North America. This book, starting from very clear principles, presented a complete and reasoned system of legislation (political, economical, criminal, civil, educational, religious, etc.), at the service of the European sovereigns. Finally, the figure of the English jurist and philosopher Jeremy Bentham stands out at the close of the century for having taken the Enlightened science of legislation to its logical and systematic perfection, and for having exposed it, with all its methodical rigor, in his programmatic work *An Introduction to the Principles of Moral and Legislation* (1789), but mainly in the *Traité de législation civile et pénale* (1802), which were used by Étienne Dumont, who distributed them all across Europe.

The work *Dei delitti e delle pene* (1764), by Cesare Beccaria, deserves a separate mention for its special contribution to the field of Criminal Law. This work was very popular in the French encyclopaedist circles, and it was widely diffused in all Europe. In this book, Beccaria succeeded in giving coherence and articulating several Enlightened demands in favor of the humanity and rationality of the penalties (legal establishment of the penalties, abolition of torture, etc.) in the framework of a conventionalist of the State. This theory started from the separation between offense and sin, it defined the offenses according to the damage caused to society, and it proposed an utilitarian scheme for the penalties based on the need of social defence and prevention of new offenses.



### 3.2. The Obscureness of Jurisprudence

From the enlightened point of view, the obscure nature of the jurisprudence of the time was determined by the chaotic complexity of the legal system as the result of the long establishment of Roman-Canon Law and by the uncertainty of the justice that followed from it. This historical situation of “legal particularism” (see Tarello 1974, 20–2) created a forensic praxis that was far too slow, costly and unpredictable, characterised by the excessive multiplication and delay of cases and by the usual contradiction in the laws and normative sources or in their judicial applications. When confronted with the dire state of the practical jurisprudence, the Enlightened supported a reform of the justice, like the one that some sovereigns undertook in their own countries along the 18th century, in order to put an end to the three basic types of structural flaws in the modern code of the *ius commune*: those related with the political-administrative, practical-procedural and juridical-normative fields.

In the first place, there was no autonomous, centralised and unitary organizational structure of justice that would guarantee a uniform and formally equal administration of the law. Multiple competent jurisdictions linked to the different authorities (feudal, military, ecclesiastical, fiscal, state, royal, etc.) coexisted in each territory without precise demarcations, along with a barely ordered variety of judicial channels (ordinary procedure, summary procedure, canonical procedure, etc.) and not clearly ordered authorities, that generated not only unequal and even contradictory decisions but also frequent jurisdictional conflicts between overlapping courts involved in the same case. Such disparity in the administrative configuration of justice was simply the institutional reflection of the plurality of legal subjects characteristic of a class society in the absence of a systematic typification of legal objects, materials and fields (civil, criminal, public, administrative, etc.) in the science and practice of modern *ius commune*. It was thus logical that the call for a centralised unification of its institutional structure should figure among the enlightened demands for reform, and that, in consonance with this, as from the middle of the 18th century the governments of most countries (with the exception of England) began to gradually take legal measures. These were undertaken with limited success and were different in each territory, tending towards a clear demarcation and an increasing unification of the jurisdictional organs around the central authority of the prince or sovereign, as well as the transformation of justice workers, at least in Germanic countries, into the civil servant class of the State.

In the second place, the administrative situation of the concurrence of different jurisdictions and the plurality of authorities in turn contributed to exacerbate the great social ills of the procedural praxis: the proliferation and excessive duration of lawsuits. Enlightened awareness broadly promoted complaints about this type of abuse that was so costly and unjust for the citizens and attributed it to the excess of useless formalities in the common process of

Roman-Canon origin and to the sophisticated and lucrative ingenuity of solicitors and attorneys, favoured by the muddle coming from the interpretations of jurists. To remedy the situation, proposals of simplification and abbreviation were made, causing a certain impact particularly in the main Germanic countries, whose rulers made radical legislative changes in civil procedure in the second half of the 18th century that tended to unify its diverse forms and to affirm the authority of the judge in the investigation of the facts (in Austria, the *Civilgerichtsordnung* of 1782; in Prussia, the provisional *Prozess-Ordnung* of 1781, and the ultimate *Allgemeine Gerichtsordnung* of 1793–1795). In this regard the Prussian procedural reform was particularly polemical and well-known, not only for its exclusion of lawyers from the investigation stage of trials but above all for the introduction into civil procedure of the so-called maxim of investigation or inquiry, which made the judge responsible for the *ex officio* direction or inquiry into the truth of the facts (see Busch 1999; Hernández-Marcos 1995, 327–55; Bomsdorf 1971, chap. 2, 75ff.).

In third place, the pernicious state of a slow, costly, and unsafe judicial praxis, marked by prolixity of lawsuits and their increase, likewise had its origin in the absence of a unitary, consistent and sufficiently clear juridical-normative corpus. The complexity, dispersion and confusion of the normative sources of law between the 16th and 18th centuries was determined by the co-existence of the particular law of each place or region (municipal statutes, ancestral custom, provincial laws, etc.) and even of each guild or class (feudal law, commercial law, canonical law, et.) with so-called common law, generally of subsidiary validity, and which was the diverse result of the reception of the *Corpus Iuris Civilis* of Justinian, mixed, complemented and extended with traditional autochthonous uses, with territorial legislation (and in the Austro-Germanic case, imperial legislation as well) produced by princes or feudal lords, and with the interminable series of glosses and commentaries of jurists and decisions of the court in their practical activity. This normative variety and uncertainty thus had its origin in the confluence of two different complexes of legal material that were independent of each other but equally valid before the judges for resolving lawsuits: on the one hand, the complex of the *lex*, formed by the legislative interventions of the political authorities (Statutes and legislation of different sovereigns besides the Roman *Corpus Iuris*) and fixed and compiled customs, and on the other hand, the complex of the *interpretatio*, made up of the doctrinal opinions of recognised jurists and the judgements stemming from juridical praxis, which were often resorted to in the absence of *lex* applicable to the case (see Tarello 1974, 54). Although in principle the *interpretatio* was considered a subsidiary source with respect to the legal normative corpus according to the commonplace *in claris non fit interpretatio*, the practical jurisprudence of the 16th and 17th centuries nevertheless tended to “limit the applicability of the *lex*” and to extend in its stead a “field of *interpretatio*,” to a great extent as a way to affirm its normative au-

tonomy in the face of the growing political centralisation promoted by the sovereign princes (*ibid.*, 54–5).

The enlightened awareness of the 18th century located the principal origin of what was wrong with the prevailing jurisprudence in this abusive recourse to legal material that should only have had subsidiary value that, since in trials the habit of appealing to the disperse and chaotic plethora of the *auctoritates*, replete with diverse and contradictory opinions and decisions, clearly contributed to increasing controversy, had repercussions on the excessive prolongation of lawsuits and determined the legal insecurity of the citizens before the court. The stigma of legal uncertainty was, however, only one of the reproaches that enlightened thinkers hurled against the *interpretatio*; while the other consisted of the denunciation of the usurpation of the legislative power that legally corresponded only to the sovereign.

Both critical arguments made up the principal nucleus of the diagnosis of the curable historical ills in practical jurisprudence (“external defects”) which Lodovico Antonio Muratori presented in his famous piece entitled *Dei difetti della giurisprudenza* (1742), and whose origin was attributed to the predominance of the “doctoral jurisprudence” of the jurists (see Muratori 2001, chaps. 4, 6, 8 and 9). Not only had these jurists transformed the jurisprudence in a battlefield with endless disputes, with an increase in the comments, questions and the most diverse opinions about legal texts, but they also had supplanted the legislators by introducing new restrictions, extensions and exceptions to the given laws. Pietro Verri insisted again, in 1765, on presenting this argument of the supplantation of the legislative authority. “*To interpret*”—he declared sententiously—“means making the legislator say more than what he said, and this *more* is the measure of the legislating faculty that the judge takes on” (P. Verri 1962, 142, my translation).

When he addressed his reproaches for legislative misappropriation against the judges instead of the jurists, Verri brought up the subject of the change that the Enlightened conception of the interpretation suffered in the second half of the 18th century, as a consequence of the new perspective of legal comprehension that was started by the progressive imposition of the doctrine about the will of the legislator. Indeed, the *interpretatio* was no longer understood as a valid normative-juridical source that was an alternative in cases of doubt or legal vacuum, and began to be perceived in the opposite sense, as inseparable from *lex*, but with an unfavourable connotation as a spurious activity of legal creation that undermined the faculty of juridical creation recognised exclusively in the sovereign legislator (see Cattaneo 1966, 44; Salvador-Coderch 1985a, 400–3). This, in turn, revealed that the interpretation was already considered a problem exclusive to the implementation of laws, related to the activity of judges rather than the work of scholars, and for this reason the emphasis of the accusation of supplanting was now placed on the fact that the act of interpretation entails above all an illegitimate interference of the ju-

dicial function in legislative power, which menaced the freedoms and rights of the citizens, ensured by laws. Thus, the initial attack against the *interpretatio* as the supposedly main origin of the malaise in modern practical jurisprudence was transformed during the second half of the century in the struggle against the “despotism of the courts” (see Cattaneo 1966, 40), and the Enlightened discourse in favor of the emancipation from the authority of the jurists ended up being resolved in a harsh allegation against the obscurantist tyranny of judicial decisions. Below we present the essential doctrinal elements of this Enlightenment critique of judicial interpretation, but first we present an outline of the Enlightenment’s parallel critique of received Roman law, the material basis of the *ius commune*.

### 3.2.1. *The Twilight of the Justinian Myth*

The enlightened awareness of the gloomy nature of the jurisprudence of the time brought with it the cultural revision of the Justinian Roman Law, which, from the middle of the 18th century, started to glimpse the ultimate historical root of the defects in forensic juridical practice and, in particular, of the abusive recourse to the authoritarian interpretation of the jurists characteristic of the era of *usus modernus*. The new critical view was characterised, rather than by its hostility towards and radical rejection of the *Corpus Iuris Civilis* in the name of supposed ancestral rights proper to each territory or country or of a presumed universal right of reason (adverse attitudes which were present in some specific cases), mainly by the abandonment of the mythical concept that was dominant until the beginning of the 18th century, which held that Roman law was the perfect model of natural law, constituted by a “body of principles founded on reason and equity” (Boucher d’Argis 1966, 141; cf. Muratori 2001, chap. 5, 31; chap. 9, 66), in favour of a balanced evaluation of its achievements and limitations from the historical and systematic point of view, which would be at the foundation of the subsequent purified integration of the same into the first modern civil codes. This balanced judgement contained three fundamental critical objections: the lack of systematic coherence in the diverse Roman legal corpus, its configuration inclined to the cultured and aristocratic treatment of jurisprudence and law, and the historical anachronism of many of its laws and legal institutions.

For enlightened jurists, the Justinian *Corpus Iuris* seemed like a mixed up amalgam of fragmented material of a highly diverse nature, provenance and spirit, chaotically compiled without following the general principles that would have given unity and coherence to its different parts and without forming a true “system,” or even a “visible order for common human understanding” (Svarez 1960, 597–8; cf. A. Verri 1993, 181ff.). Except perhaps in *Institutiones*, with its famous classification of legal material into *res/ personae/ actiones*, the Justinian Corpus does not constitute a “methodical system of ju-

risprudence” (Boucher d’Argis 1966, 141). It included obscure and even contradictory laws, as well as norms and resolutions inspired by the “repressive spirit of a rough eastern despotism” together with admirable precepts of equity and social utility (Svarez 1960, 597–8, cf. 226). This lack of an internal systematic structure and the juridical-normative chaos that followed from it made the Justinian legacy the ideal breeding ground for the development of controversies and the most fertile material for multiple interpretations. It is thus understandable that the enlightened jurists sought after different ways to endow Justinian law with systematic coherence in the knowledge that it was still the main normative basis for the practice of law in almost all the territories, either because it was used to complement their own or ancestral law, or because it was entwined with them. For that reason, the scientific systematisation of Roman law in the 18th century which was supposed to make possible its subsequent integration within the first modern codes, consisted, on the one hand, in a material unification with common and national law (viz. Pothier in France) and, on the other hand, in its formal insertion in the conceptual schemata of the new science of natural law to credit it as *ius civile*, emanating from the will of the legislator (viz. Heineccius, S. von Cocceji and Nettelbladt in Germany) (see Tarello 1974, chap. 5, 168ff., and Canale 2000, chap. 4, 165ff., respectively). This dual systematisation certainly involved a restructuring and redefinition of the Roman law material (or institutions) from a new theoretical-conceptual framework, but also an extensive refinement of the Justinian normative contents to adapt them to the historical reality of each country.

But in the process of this systematic transformation that made it apt for the new science of legislation, received Roman law became blurred and also disappearing with it was that aristocratic view of the profession of jurisprudence linked to the traditional system of virtues (*prudentia iuris*) and the cognitive (and not only practical) treatment of law on the part of the *iuris prudentes*, which had had its historical expression in the cultured jurisprudence of the *usus modernus pandectarum* and in the interpretative work of the scholars (see Cappellini 1987). Although the value of the Justinian legal corpus was still recognised as an object of scientific study for any jurist who wished to be more than a simple “mediocre practitioner” (Boucher d’Argis 1966, 141), the enlightened scholars predominantly tended to reject the *Corpus Iuris* precisely because of its proclivity to the erudite and educated development of jurisprudence, which favoured the multiplication of the interpretations and which transformed the knowledge (and practice) of law into an exclusive monopoly of a noble and learned class, that of the experts in jurisprudence (cf. Cappellini 1987, 339–40; Cattaneo 1966, 16). For the enlightened conviction of the public and universally understandable nature of law as the expression of human reason, the aristocratic and even sacred way of understanding jurisprudence in the Roman tradition appeared to be the authoritarian exercise of a “difficult and mysterious science, unknown to the profane

common people,” which increased even further when confronted with the fact that Roman legal texts were written in a foreign language that the people did not speak or understand any more (A. Verri 1993, 188). This put more pressure into the need for a replacement of the Roman law by a legislative corpus in the vernacular language, intelligible to the common people. In this aspect, with their rejection of the Romanist science of the scholars, the enlightened intellectuals were claiming for jurisprudence the same thing that the Protestant Reformation had done with respect to Christian religion and theology: the disappearance of priestly mediation, the consequent recognition that it is not necessary to have a hermeneutic authority to mediate between the citizen and the law, the same as no priest is needed to mediate between believers and God.

This strangeness of the language went hand in hand with the strangeness of the spirit of many Roman laws, which, having originated in social and political circumstances very different from those of the 18th century world and in very different people, were now totally unsuitable for the new times, customs and constitutions of each country. The idea of the historical anachronism of a good part of the Roman legal corpus became more and more important after the publication of Montesquieu's *De l'esprit des lois* (1748), in which laws are related between themselves, but especially to the nature and principle of each government or political constitution (see Montesquieu 1950, Books 2–8). This thus strengthened the conviction that many private legal provisions linked to exclusively Roman institutions that had since disappeared (freedmen and women, slaves, colonists, etc.), or inspired by a culture as distant as Stoicism, and the bulk of the properly legal legislation of the *Corpus Iuris* (for example, the *Novellae* and other imperial constitutions, the Edicts, etc.), were not only inappropriate and superfluous because they were foreign to the spirit of modern peoples, but were also harmful to them (Boucher d'Argis 1966, 141; A. Verri 1993, 188; Svarez 1960, 597–601; 1791, xxvii–xxix). As a result of this, the enlightened attempts at codifying, which took Roman law as a received material basis, proceeded to expurgate from it all the precepts of a political nature and the normative provisions that—as Svarez wrote in 1781—did not fit the prevailing constitutions and customs or were “contrary to sane reason and natural equity” (see Stölzel 1885, 231; cf. Hernández-Marcos 2005, 291–3). Obviously, this historical-national adaptation of Roman law, which formed part of the devising of the first modern civil codes, was facilitated by the scientific systemization of the *Corpus Iuris* throughout the 18th century, as mentioned above.

### 3.2.2. *The Struggle against Obscurity in Judicial Interpretation*

Enlightenment culture did not confine itself to attributing the origin of the evils of practical jurisprudence to the modern abuse of the *interpretatio* of



scholars and jurists as a source of law; it also tried to eradicate it completely by fighting against the only form still possible within the new horizon opened up by the long-awaited exclusive dominance of *lex*: that of judicial interpretation. The struggle against this obscurantist leftover from the past, now diagnosed as the despotism of the courts entailed throughout the second half of the 18th century the proposal of two fundamental remedies: On the one hand, in opposition to the usual recourse by judges to the *interpretatio doctrinalis* of scholars and jurists, the literal single interpretation of the law was advocated, and, on the other hand, where the law was not clear or there was a legal vacuum, the *interpretatio authentica* was proposed as the only legitimate one and, with it the institution of the recourse to the legislator. The practical failure of both these attempts of radical juridical limitation of the interpretative freedom of the judges in the passage from the 18th to the 19th century, however, made clear the theoretical and historical limitations of the enlightened world view on which they were based: the naïve belief in a possible absolute juridical control of the law over the contingency and diversity of social reality, from which followed a simple view of the judicial function as mere mechanical work of automatic inclusion, as well as the predominant conviction, inherited from the 18th century, of the basic identification of state sovereignty with *potestas legislatoria*, both understood in a wilful sense that entailed a strictly subjectivist, even mentalist conception of interpretation. Not in vain did the decline of the enlightened struggle against judicial interpretation coincide, at the dawn of the 19th century, with the gradual imposition of the political doctrine of the division of powers and with the appearance at the same time of an objective understanding of the interpretation of the law, which came to definitively displace the dogma of the legislator's will which had principally informed the 18th century Enlightenment. Below we briefly present this historical process, bearing in mind the difficulties and the final decline of this struggle of the light against the interpretative discretion of the judges.

### 3.2.2.1. The Canon of Literal Interpretation

Within the generalised increase in the prohibition of legal interpretation, the canon of literal interpretation, demanded initially and more acutely so in the context of criminal law, also became fashionable for civil law, because it was considered the only practical hermeneutic in which the judicial function of enforcing the law is exerted as a merely cognitive act of *declaratio* of the legal text, with no juridical creation whatsoever. Here it is obviously presupposed that judges should confine themselves to the simple executive task of “seeing that the law is observed” (P. Verri 1962, 139), and by virtue of this strict subordination to the express norm they only “must pronounce the law (*dire droit*) but not generate it (*faire droit*)” (cf. Cattaneo 1966, 44, 53ff.). Cesare Beccaria illustrated this idea of the *interpretatio litteralis* as an automatic application of

the legal text with the logical image of a perfect syllogism in which the judge confines himself to inferring the decision based on immediately subsuming the deed under the general law (cf. Beccaria 1984, chap. 4). It is therefore not surprising that this reduction in judicial freedom in what concerns the *quaestio iuris* would be compensated, in some enlightened proposals, by a broadening of the judges' powers in what concerns the *quaestio facti*, since, the *ius* having been fixed by the legal text, the main work of the judges would now be addressed to finding the truth of the facts (see P. Verri 1962, 146; Svarez 1960, 637–8; Beccaria 1984, chaps. 3 and 17).

The ultimate reason for this requirement of strict judicial dependence on the letter of the law can be found in a not completely univocal theoretical-conceptual constellation, made up of three different doctrinal arguments, which succeed each other, and which sometimes overlap along the second half of the 18th century: the dogma of the sovereign will of the legislator, the protection of civil liberty or the private rights of citizens, and the theory of the division of powers. The most frequently heard argument, already from the first half of the century, to assert the exclusiveness of the *interpretatio litteralis*, was the doctrine of the will of the legislator, initially formulated in the 17th century within the historical framework of absolute monarchy, although it was later extended to all forms of political sovereignty (see Lukas 1908). What is characteristic about this doctrine is the identification of supreme power with its pre-eminent attribute, the *potestas legislativa*, and the conception of the law as an express juridical creation of the sovereign will, dictated by that very will with the aspiration of becoming the only valid legal norm. Since the State constitutes here an indivisible power that is fundamentally recognised in legislation, the judicial function did not have its own state power or a sovereign subject different from the legislator himself; the judges, who act by delegation or consent of the supreme authority, are mere subjects and their executive power of enforcing the law is for this reason, from a practical point of view, simply an act of obedience. Thus, all forms of interpretation that go beyond the literal pronouncement of the legal text are considered to be a judicial usurpation of the legislative power of the sovereign.

This commonplace argument of enlightenment thought was introduced, however, in the second half of the 18th century, disguised in the form of the division of powers, owing in a large degree to the fact that the not completely clear formulation of this doctrine on the part of Montesquieu and in particular his merely executive view of judicial power favoured the circumstantial overlapping of it with the old theory of indivisible sovereignty, so deeply rooted in 18th century culture. Such an odd mixture of doctrines was only possible from a conceptual point of view, because the alleged supplantation of the legislative power in the legal interpretation could be understood as an illegitimate confusion of the different functions of legislating and executing the law, which were clearly defined by Montesquieu (see Montesquieu 1950,



Book XI, chap. 6). However, the author of *De l'esprit des lois* (1748) had associated that lack of distinction between functions in the same person or political entity with the despotism and the loss of liberties of the citizens. Therefore, it is only natural that the two previous arguments were associated with a third one, that is, the threat to civil liberty and the private rights of citizens represented by judicial discretion dissociated from the laws. This doctrinal fusion can be seen, for example, in the discourse of Pietro Verri against judicial interpretation (see P. Verri 1962, 139–40), and it somewhat marks, in turn, a milestone in the fight against the forensic interpretation, after which, the objection to legislative usurpation begins to be progressively replaced during the second half of the century, under the influence of Montesquieu, due to the accusation despotism made by the courts. From this new perspective, the problem lies not really the fact that the judge illegitimately supplants the sovereign legislator, but the fact that the interpretative practice in the courts endangers the legal security of citizens, whose protection is precisely the *raison d'être* of the State (see Svarez 1960, 628). In view of the fact that only the positive legislation of the sovereign is the pattern and the stronghold of the civil rights of the subjects, these rights would only be guaranteed in the courts if the administration of justice is limited to giving voice to the laws rather than to men. However, that objective of the legal security of the citizens, which justifies the prohibition of judicial interpretation in the name of the rule of law, serves also as an argument, in the Enlightened culture of absolutism, against the authoritarian interventions of monarchs in the praxis of the courts by means of the so-called cabinet justice, based on the right of the supreme jurisdiction of the sovereign (cf. Svarez 1960, 236–8, 484–5, 616–7), and thus reveals how difficult it is to make it compatible with a political theory such as that of the will of the legislator that does not recognise the division of powers in the State.

Indeed, the protection of the civil liberty of the individual required not only clear and precise laws that would establish citizens' rights in the face of the interpretative discretion of the judges, but also an autonomous administration of justice in which the judge would not be under the direct tutelage of the legislator, and his right to enforce the law, far from being understood as a mechanical and uniform act of immediate execution of the law, would be considered as a differentiated exercise of the concrete determination of to each his own, and thus of the particularisation of the general norm, a task for which a margin of sovereign liberty was needed and with it the recognition of an independent power in the State. But this change in conviction over the function of the judge and its political significance only began to become effective, as a consequence of the French Revolution, in the passage from the 18th to the 19th century, thanks to the gradual imposition of the political doctrine of the division of powers, which precisely at that time began to be wielded as an argument also in favour of the literal or grammatical interpretation, understood now not as a form of judicial fidelity to the will of the legislator but

above all as the proper course of action to ensure the private rights of the citizen established objectively in the legal text (cf. Conrad 1971, 20–2; Ogorek 1986, 51–2, 56–7). However, if the autonomy of the judicial power were related mainly to the establishment and safeguarding of the civil rights of individuals in each case, could it then claim for itself, without contravening the legislative power, a broader interpretative power than that of the mere literal pronouncement of the legal text, especially when it does not clearly determine those rights in particular, either because it is non-existent, ambiguous, doubtful or too general. Therefore, neither could the judge continue to be a jurisprudential machine, nor in matters of civil law, where the positive legislation is always incomplete and imprecise, could the courts be denied, precisely in the name of justice, the necessary margin of interpretative freedom which the canon of the *interpretatio litteralis* was meant to deprive them of.

The prohibition of judicial interpretation through legal extension or restriction in favour of a single literal pronouncement was also a normative postulate of the legislative policy of the supposedly Enlightened governments of Prussia (see Conrad 1971, 16–7; Salvador-Coderch 1985a, 404ff.), Austria (see Conrad 1971, 12–3, 35; Salvador-Coderch 1985a, 431–5) or Naples (see Cattaneo 1966, 55), as well as the government of Bavaria (see Conrad 1971, 39) or even those of the revolutionary France (see Conrad 1971, 20–1, 39). However, these legislative efforts had little effect and were soon condemned to failure because judicial praxis in the second half of the 18th century, far from following the principle of being strictly bound to the letter of the law, still kept to the widespread procedure of so-called logical interpretation (see Salvador-Coderch 1988; 1985a, 411, 419–20), which tried to decipher the spirit or intention of the laws, also hiding behind the doctrine of the will of the legislator (see Salvador-Coderch 1988; 1985a, 411, 419–20). In that respect, this doctrine was supposed to be a part of the legal contents of this sovereign will, which was not only what the legislator had actually said (*dicta* or *verba legum*, written text, form of the law) but also what he had meant or what he had thought when he enacted the law (*sententiae* or *ratio legum*, contents of the law). The subjectivist-mentalist conception of that doctrine clearly worked, in this case, against the literalist canon of the forensic hermeneutic, however much the enlightened thinkers tended to see in logical interpretation, with its usual practice of extending or restricting the law, an act of creation of law that supplanted the actual legislator. Thus in the face of the non-observance of the courts and the resistance of many jurists, the canon of literal interpretation did not prevail in the process of codification, which ended up by admitting the rule of logical interpretation. This broadening of the “grammatical” meaning to the “logical explanation of the laws” was not, for Franz A. von Zeiller, an hermeneutical abuse or distortion of the legal text, but rather the only form in which the judge is bound to the law and the will of the legislator, since the meaning of a positive norm, when its formulation in

language—as often occurs—is imprecise or ambiguous, can only be and must be determined by following the logic of language and thought, based on its connection to other laws, which in their entirety comprise the code as “a coherent whole” (Zeiller 1949, 271). Therefore, with an appeal to the systematic character of all codes and the use of rational logic on the part of the judges, the Austrian jurists hoped to safeguard the merely cognitive nature of judicial interpretation without having to take on the literalist canon of their enlightened predecessors, convinced that the reasoning of the true meaning of a law that was vague or obscure represented, deep down, another form of obedience to the will of the legislator, to wit, that of the logical monitoring of the code in which the latter has been embodied in its entirety.

### 3.2.2.2. Authentic Interpretation and Recourse to the Legislator

If the enlightened thinkers proposed a single literal interpretation of clear and precise laws, in order to clarify doubtful or obscure laws (*casus dubius*) and even to cover gaps in the legislation Enlightenment thinking, instead of referring to the usual rules of *interpretatio* characteristic of common law (equity, analogy, juridical precedents, usage and customs, common opinions, scholarly doctrine, jurists’ opinions, etc.), tended to establish authentic interpretation as the exclusive norm (see Droste-Lehnen 1990). In this aspect, it advocated the institution of recourse to the legislator or his delegated body (*référé législatif, Anfrage bei Hof, Gesetzcommission...*), which should resolve such cases by means of a resolution with legal effects, in a new act of creating law. The single lawfulness of the *authentica interpretatio* followed from two theoretical suppositions linked to the doctrine of the will of the legislator: on the one hand, the principle according to which only the sovereign who gives the laws can interpret them, according to the Roman maxim *ejus est legem interpretari cujus est legem condere* (cf. D’Alembert 1967c, 833), widely diffused in Europe since the 17th century, (see Stolleis 1990); and, on the other hand, the subjective-mentalist view of interpretation itself, according to which the hermeneutic work consists of ascertaining the hidden intention of the legislator rather than the sense of the legal text itself, in scrutinising the mind of the enunciator rather than in establishing the objective contents of the express statement, as if the positive and public norm could only be understood from the mysterious and transcendent power of a sovereign who is always *absconditus*. Not in vain did the criticism that led to the definitive abolition of recourse to the legislator in the passage from the 18th to the 19th century insist on the paradoxical nature of a consultation that attempted to clarify what was objectively in the law and in the code by means of a subjective and inevitably private inquiry into the will of the legislator. However, the attempts to decide the results of a litigious legal case through a declaration from the sovereign, which therefore did not create the settlement of a particular case or an

interpretation of the norm, but a new law and, consequently, an alteration of the legal code itself was equally paradoxical—as was denounced, for example, in Prussia, by Ch. L. von Rebeur, L. Fenderlin or K. Grolmann. That alteration gave rise to a situation of insecurity and defencelessness on the part of the contenders, and it was basically a repetition of the reviled practice of the cabinet justice, which interrupted the ordinary course of justice in the courts, put into question the independence of justice, and introduced in its place a form of political control over the judges by the government and its state bureaucracy that was described as ministerial despotism (see Schwennicke 1993, 283–4; cf. Salvador-Coderch 1985a, 270). It is thus not surprising that the disappearance of recourse to the legislator, just like the prohibition of cabinet justice, should coincide in time with the gradual imposition of the doctrine of the division of powers in the State and with a growing self-awareness of the part of the judges of the dignity and autonomy of their profession. It also went hand in hand with the parallel decline of the dogma of the will of the legislator in favour of an identification with the parliament and an objective view of the interpretation of laws linked to a conception of the code as a rational juridical system.

Beyond the theory, the authentic interpretation and recourse to the legislator likewise had its practical expression in the European legislative policy of the second half of the 18th century, however, its success as a positive law was quite short in the different codes or encoding projects for civil and criminal law in Austria (see Conrad 1971, 12–5; Salvador-Coderch 1985a, 433–8), in Prussia (see Schwennicke 1993, 273ff.; Salvador-Coderch 1985a, 424–31) and in the revolutionary France (see Salvador-Coderch 1985b, 268–71; Conrad 1971, 20–1, 39). This legislative failure received, at the turn of the 19th century, a decisive contribution with the fact that the different treatment of the legal loopholes and of the *casus dubius* with regard to the true interpretation generated a paradox in the judicial practice, according to which the judge could always know “if there were a law applicable to the litigious case” and even decide in the absence of it, but may not know the sense of the applicable law (Salvador-Coderch 1985a, 418–9). The recourse to the legislator was, in effect, compulsory in cases of doubt or obscurity in the application of an existing law, but was not usually required during the course of the proceedings to solve cases where there was no positive law, in which the judges were supposed to make a decision based on analogy, on the general principles of the code and even on natural law and equity and established usage. The supposition of this approach was that only the express law was exposed to the interpretative danger of the judges, whereas wherever the legislator had not positively formulated his will there is not really a problem of interpretation but of integration or completion of the legal system, which the judge must resolve applying his reasoning or natural logic to the set of laws. However much the judges were thus conceded in this way in the face of a legal defect, a certain

margin for freedom of thought which they had been deprived of, with the canon of literal interpretation and the priority of authentic interpretation, it was still incomprehensible—as King Frederick William III of Prussia in 1798—that judges were not permitted to “interpret doubtful laws” in the same way that they had to “decide those cases for which a law was totally lacking” (see Schwennicke 1993, 293; Salvador-Coderch 1985a, 429). This warning about such incoherence undoubtedly points to the decline of the dogma of the will of the legislator, but with it as well to a new view of the judicial function, linked to the principle of the independence of the legal system, in which the logical rules of objective interpretation are considered essential for the application of the general law to a particular case.

### 3.3. The Natural Light of Reason in Jurisprudence

The light of reason with which 18th century culture aspired to dissipate the shadows of the practical jurisprudence of its *ius commune* could only come from the theory of morality and law provided by human reason, as it had been developed since the 17th century by the great systems of modern natural law (Grotius, Hobbes, Spinoza, Pufendorf, Locke, Thomasius, etc.). As a rational doctrine of the universal and immutable foundations of practical life, this new *ius naturae et gentium* was conceived, on the one hand, as an opposition to positive law, subject to the historical variations of the very authority that established it, and, on the other hand, it was considered as the new “science of custom” or “morality” (Jaucourt 1966a, 132), which emerged independently from Christian theology in a secularisation process that would not be really finished until well into the 18th century. In spite of the diversity of the natural law movement that constitutes the Enlightened thinking (see Hochstrasser and Schröder 2003; Tuck 1981) and of its own internal evolution and self-diluting transformation during the second half of the 18th century (see Klippel 1976, 13–30; 1987; Dann and Klippel 1995; Thieme 1936), we should point out at least two identifying aspects, which were also projected on other fields of the civil and criminal law, thus casting the light of the natural law reason on their jurisprudence, in contrast to the practical jurisprudence that was mainly governed by the tradition of the *ius commune* (see Luig 1979; cf. Schröder 1989 and 1990). These two characterizing aspects of the modern natural law are, on the one hand, the construction of that law as a theoretical system of practical propositions rationally deducible from one or several universal principles, supposedly linked to human nature or simply acceptable to the reason of any man (see Scattola 2003d, 2, 12ff.), and, on the other hand, an ethical configuration of that law as a general doctrine of the natural rights of the individual, of a subjective and universal nature (*iura connata, natural rights, droits de l'homme...*), which, either with merely logical-cognitive meaning or else with normative effect on the political order, obtained positive recognition

both in the civil and criminal codes and in the first Constitutional Declarations and Charters of the end of the 18th century (the American *Bill of Rights* of 1776 and the *Déclaration des droits de l'homme et du citoyen* of 1789).

Thanks to its systematic and rational architecture, the modern natural law doctrine certainly gave way to a radical criticism of the inconsistencies of the complex inherited legal system and its social structures, but also subjected it to a corrective scientific treatment that introduced a more precise delimitation of the legal fields, formulated a unitary and coherent system of the diversity of existing institutions, and projected a horizon of community life coordinated in a more just and rational way; this was to be done through policies of legislation and codification (cf. Link 1998, 23–4, 31ff.). Particularly relevant in this aspect was the conceptual structure *status naturalis / status civilis*, which made everyone consider the juridical and political world from the point of view of the tense relation between individuals as themselves, or between their specific social situations and the common sovereign, between the natural rights and the positive laws. On the view of this new considerations, the legal diversity of the social life was reduced to the essential relation with the sovereignty of the State and, at the same time, the rationality of the legal production of the State depended on the degree of consideration of the natural rights. From this double movement, which was defined by that natural law structure, two characteristic directions of the lights of reason in the civil jurisprudence were followed: on the one hand, from a scientific point of view, a progressive transformation and simultaneous dissolution of modern natural law into the science of legislation since the middle of the 18th century. On the other hand, from a doctrinal point of view, the trend towards the transformation of the positive legislation into a sanction, and the civil protection of the legal and natural space of the individual. In the following pages, we will present a purely scientific sequence in its consecutive historical and conceptual steps (sec. 3.3.1), complemented with a systematic balance of the concepts of law (sec. 3.3.2), and afterwards we will present, by means of an analysis of the concept of civil liberty, this legal configuration of the natural rights as a juridical and private space of the citizens (sec. 3.3.3). Finally, we will close this Enlightened panoramic view of the jurisprudence with a short account of the utilitarian, legalist and humanizing conception of the criminal law (sec. 3.3.4).

### 3.3.1. *From Natural Law to the Science of Legislation*

The historical debt of the first codifications of the private law and of the Enlightened theory of the legislation with the modern natural law of the 17th and 18th centuries, which was commonly highlighted and acknowledged, albeit with different nuances and meanings (see Wieacker 1967, 249; Dilcher 1969; Thieme 1936), can be confirmed with the three following considerations. On the first place, the fact that the Enlightened science of the legislation was con-



ceived and formally built on a systematic and even deductive way as a rational discourse with a logical elaboration from one or more fundamental principles seems to be an undisputable legacy of the great modern natural law systems. These fundamental principles are the also the source of technical rules for the legislative praxis of the governments. However, the unmistakably political approach of this new science from its very beginning explains, on the second place, that, beyond that systematic methodology, the role of the modern natural law in the specific configuration and development of that methodology since the middle of the 18th century is progressively reduced to a simple introductory episode, although theoretically essential, on the origin, nature and objectives of the civil society and State power, usually aimed to the establishment of the general principle or principles of the legislative science itself. It would also explain that this role even disappears, as happens with the theory of legislation by J. Bentham, which is structured over a utilitarian basis. The speculative and abstract nature of the natural law theory only could contribute with that to a science that, under the desire of becoming a social art, was incorporation different empirical contributions to its cognitive background. These empirical contributions were the result of the scientific colonization of the new emerging fields of the society and the State (economy and commerce, tax management, police, cameralistics, etc.), which were compatible with a legislative intervention, so much so that it became a new *de facto* global theory of politics. However, we must add, on the third place, that inside the limited theoretical basis of the natural law thinking that was assumed by the science of legislation there are two types of rational criteria. On the one hand, there is a series of formal requirements of technical rationality that, without doubt, transcended the purely scientific field of the natural law and the jurisprudence, and reached and were combined with the common Enlightened conscience: the typical demands of clarity, brevity, understandability, precision, unity and totality of legislation. On the other hand, the legislative science, albeit with important differences according to the natural law traditions, adopted the normatively rational contents of the idea of a legal and natural order that is prior to the positive legal code. Thus this legal code had to adapt to the preexisting order, either immediately or at least through progressive reforms of the laws and even of the constitution of the State.

Once we admit this limited presence of the natural law culture into the science of legislation, we should qualify it by presenting the theoretical-conceptual suppositions of natural law that in general created the cultural conditions necessary for the formation of legislative science, as well as the national or territorial variants that impressed a differentiating seal on this historical process of transmutation or replacement of one science with another. The following pages deal with these two aspects.



### 3.3.1.1. The Historical Formation of the Science of Legislation: the State as a Legislator and the Rationality of the Sovereign Will

We could describe the historical process of the formation of a science of legislation from the natural law thinking as a complex movement in which at least three basic conceptual moments are involved, either overlapping each other or succeeding each other in time: the political framework, initially absolutist, of the configuration of natural law as the particular theory of the constitution of the sovereignty of the State, with the subsequent understanding of politics as legislative work; the ethical or moral moment of understanding *ius naturae et gentium* as a general doctrine of natural rights and duties that provided the set of criteria or moral principles for the art or science of legislation; and the purely scientific and naturalist moment of belief in the rationality of the society and the law, which was the basis for the construction of a legislative science as the political art of enacting or abolishing laws, either based on the empirical diversity of the historical and geographical conditions of each people (a legacy from Montesquieu), or following the juridical-normative, universal and necessary demands of reason itself (a legacy of Locke-Rousseau-Kant). Let us treat each of these moments with more detail.

The first historical-cultural premise for the emergence of the enlightened science of legislation was undoubtedly the at least incipient formation of the State as the common political institution endowed with the monopoly of juridical creation through recognition of its supreme and unique *potestas legislatoria* within a territory. The natural law doctrine proposed by Hobbes, indeed, resulted in a theoretical dissolution of the old plural and estate-related constitution of the *imperium civile* into an act of unification of the different feudal powers and the different sources of jurisdiction and law around the single and supreme person of the sovereign. This act took place within the framework of the *pactum subjectionis* of the configuration of the absolute sovereignty of the State (see Hobbes 1966, chap. 17). One of the fundamental attributions of these sources was the legislative faculty, understood as the power to determine and protect by means of civil laws the private rights of all subjects (cf. *ibid.*, chaps. 18 and 26). The modern Natural Law was thus presented as a general theory of sovereignty that proposed the replacement of the old world of “feudal anarchy” (Filangieri 1780, I: 4) with the new world of the State, and which therefore supported the transformation of politics into a legislative task.

This double direction of the modern Natural Law is visible in the Germanic countries in an exemplary way thanks to a typical historical sequence, formed by the appearance and development, in the transition from the 17th to the 18th century, of a new scientific discipline with a natural law orientation, the *ius publicum universale*, focused on the rational explanation of the existence of a civil society and of the institution of the sovereign as well as on

the juridical relations between the latter and his subjects and other States (see Stolleis 1998, chap. 6), and by the parallel transformation of traditional Aristotelian politics into a doctrine of *prudentia legislatoria* (see Mohnhaupt 2003), with which that General Public Law would end up merged or at least overlapping in the second half of the 18th century. Thus, the scientific-cultural operation that was triggered by both intellectual events brought two consequences. On the one hand, the new discipline of the *allgemeines Staatsrecht* was progressively attracting the scientific field and the Natural law, which was reduced by Thomasio and his school to a general doctrine of the State, related to the concept of external peace (sphere of the *iustum*), until it was dissolved in this doctrine. This field of Natural law was reduced, at the end of the 18th century, to a merely preliminary part of itself, which only dealt with the rational explanation of the origin of the duties and rights of the subjects in general inside the civil society (see Hernández-Marcos 2005, 273ff., 300–1). On the other hand, the simultaneous reformulation, since the end of the 17th century, of Aristotelian politics as a doctrine in the field of the legislative wisdom of the sovereign, which already posed the enlightened criteria of rationality, with only consultative validity, for an ideal legislation (cf. Mohnhaupt 2003, 465, 478–9), provided, at the same time, the necessary scientific and practical supplement for that merely theoretical and natural law knowledge of the *ius publicum universale*, thus setting the foundations of the subsequent Enlightened science of legislation, to the extent that it already demanded subjecting the absolute will of the legislator to scientific-technical rules of prudence, as well as the integration of the natural law itself into the science of legislation.

However, the recognition of the State as the exclusive source of valid law and the new orientation of politics towards legislation were not enough requirements for the appearance of legislative science. As a second historical and cultural requirement, it was necessary to increase the awareness of the need and viability of a rational regulation of the legal and positive creation by the sovereign. The natural law basis of the power of the State in the 17th century, mainly aimed to the prevalence—and rescue—of the State as an appealing political unit over the neutralization of the potential controversies of the different feudal and religious factions, had resulted in a radical voluntarist conception of the sovereignty of princes, according to which their supreme power was manifested both in legislation and in the very exemption or in the arbitrary abolition of laws enacted by them (*potestas legibus soluta*—see Hobbes 1966, chap. 26). The first half of the 18th century, on the other hand, was witness to the beginning of the acceptance of the perception, typically Enlightened, that this unlimited power, that came close to despotism, threatened with the transformation of the so-called protection of the individual against the dangers of civil war and traditional powers into insecurity and helplessness, against any other possible arbitrariness from the monarch (cf.

Stolleis 1998, 487). The doctrine of the will of the sovereign could no longer be upheld in the old radically absolutist terms but in a slightly modified form, as the *voluntas ratione animata* (see Zapatero 2004, xxii), that is, it had to change from being a blind, unpredictable will to become a will guided by or enlightened by criteria or rules of legal rationality. This is the breeding ground in which the idea of a science of legislation could finally thrive.

Two cultural factors merged in the middle of the 18th century to give rise to this Enlightened outlook on the possibility of rationalizing the sovereign will, an outlook which sustained the nomothetic art of the State. One of these factors was the scientific-naturalist belief that the practical domain of human life, and of law in particular, is governed by reason and so can be rationally known and reconstructed, analogously to the legal systematization of the physical universe carried out by Newtonian science. The irruption of this Enlightened conscience of the rationality of the historical world and the subsequent viability of a rational codification of the society and of a scientific treatment of the legislative praxis of the State received the crucial contribution of Montesquieu's statement in *De l'esprit des lois* (1748) about the existence of a rational system of laws that is empirically verifiable, but linked to the historical and geographical conditions of each people, as well as the challenge of his final proposal, in Book 29, of the rudiments of a technical-practical science of legislation, to a great extent in line with the principles of inductive rationality described throughout the work. Thus, Montesquieu convinced the Enlightened world of the viability of transforming the legislation into a "safe and ordered science," which was at the same time theoretical and practical, at the service of the European rules (see Filangieri 1780, I: 14). This science had enough with the establishment of the principle or principles of civil society and the subsequent deduction of the "general rules" that follow from their application to different objects of social life susceptible of being subjected to laws (*ibid.*, I: 18). However, this systematic aspiration turned the science of legislation into something more than a rational theory and art of law and jurisprudence. Indeed, it would finally transform it into the global theory of politics or of the *res publica* in the age of the late Enlightenment, because not only the strictly legal territory of the possessions and freedoms of the subjects and of their sanctionable offenses was subject to the legislative intervention of the sovereign, but that was also the case of all the new emerging areas in society and the State, which were colonized by the corresponding empirical sciences (economy, pedagogy, police, cameralistics, administrative law, etc.), which would in turn be dealt with in the different theoretical treatises on legislation in the second half of the 18th century and beginning of the 19th.

The scientific and naturalist mind by itself would not have led, however, the legislative science were it not for the conviction that there is a specific order of legality for the social life and the legal word which provides the rationality criteria for the will of the sovereign. Montesquieu had certainly referred

to the specific geographical, cultural and political conditions of each people, but most of the Enlightened thinkers thought that this order lies in the ethical and natural law doctrine of the duties and rights of the individual into the *status naturalis*, which was broadly disseminated in Europe during the first half of the 18th century. This doctrine could now be postulated as a criterion of rational legitimisation of the action of the ruler and the normative source, hypothetical or categorical, of his legislative praxis, because it had already been working *de facto* since the beginning of the century, as an ideological dyke of resistance to political absolutism. That legal and natural order of the reason had also the advantage of being able to be considered an endless and eternal source of the juridical and positive norms, and thus to be recognized—according to Quesnay in his essay *Le droit naturel* (1765)—as “the sovereign rule of all human legislation and all civil, political, economic and social conduct” (Daire 1966, 53, my translation). The conversion of this natural-law normativity into a rationalizing criterion of the legislative practice was also helped by the growing spreading, since the middle of the century, of the eudemonist theory of the purpose of the State, which also began to include natural liberty and security of private rights among the essential goods of common happiness to which a good sovereign should aspire (see Diderot 1963, 54–5, 57). This particular doctrinal fusion of natural-law normative contents and utilitarian and eudemonist objectives of politics defined the framework for the conditions of rationality of the action of the State and represented the ultimate impulse for the science of legislation, which developed, in this sense, under the conviction that “good laws are the only support of national happiness” (Filangieri 1780, I: 3; cf. Schmid D’Avenstein 1776, Preface), and that the enlightening fulfillment of these scientific rules of rationality, instead of a blind obedience to the particular passions and desires, marks the difference between sovereign and despot, good government and tyranny (see Svarez 1960, 229, 467–8).

### 3.3.1.2. Criteria of Rationality and Forms of Development of the Science of Legislation

During the second half of the 18th century, the legislative science presented different forms of development according to the diverse nature of the rationality criteria of the legislator. With regard to this development, there were two main trends with a natural-law basis and a third pathway with an utilitarian nature, which did not owe its creation to the modern natural law. The difference between the two trends that inherited the natural law theory, which is clearly conditioned by the diversity of the sociopolitical situations of the European countries, came from a different way of understanding the meaning of natural legal order (*ius naturale*) and its specific structure with regard to the legal and positive order that emanated from the sovereign (*ius civile*). There-

fore, the development of a universalist and liberal trend was accompanied by another one, with a national nature, mainly based on the three estates.

The liberal or pre-liberal line of natural law, with a political profile that in the end is democratic and constitutionalist, ended up giving rise—as is well known—to the American Bill of Rights and the *Déclaration des droits de l'homme et du citoyen* of the revolutionary France, as well as the positivisation of certain private-legal principles in the *Code civil* of 1804 or in the Austrian ABGB of 1811, thanks to its merging in Germanic countries, at the beginning of the 19th century, with the new ius-rational approaches of Kant's critique (see Berding and Klippel 1997, 351). Its historical formation was quite complex, because it was the result of a process of accumulation and jumble of different doctrines and traditions in the varied course of exchange of ideas in 18th century Europe (defence of tolerance and freedom of conscience, Locke's theory of the natural and the inalienable rights of man, doctrines about the common good and public happiness, Rousseau's principle of the *volonté générale*, etc.). What is important about this liberal-democratic trend in general is that it considered the state of nature as a rational order of the natural rights of the individual with absolute legal-normative validity in the civil state, such that the basis of the existence and legitimacy of the State consisted precisely of the preservation and realisation of the same, and thus the legislative task of the sovereign is reduced to its positivisation, that is, to translate, without any restrictions, *ius naturale* into *ius civile*. For that reason, the legislative science developed in the second half of the 18th century, particularly in France, from this natural-law basis in civil rights, and it was characterised by its aspiration to provide the certain and immutable criteria of a universal legislation valid for all peoples and nations of the Earth (see Zapatero 2004, xxxviii ff.), either in the typically natural-law variant of the physiocrats, defenders of a genuine natural order of things (Quesnay, de la Rivière, Dupont de Nemours, Schmid d'Avenstein, etc.), or in the abstract rationalist variant close to Rousseau, which expected a legislation based on the eternal principles of law and justice (Condorcet, Mably, Diderot, etc.) from the *volonté générale*. For that reason, all the authors of this universalist normative trend share a radical criticism of Montesquieu's historical-anthropological approach. They reproached his abandonment of the idea of justice as a criterion for legislation or—as, for example, happened with Dupont de Nemours—the ignorance of the existence of “a natural, essential and general order that contains the constitutive and fundamental laws of all societies” (Daire 1966, 337, my translation).

The demand for this normative basis of a universal nature coming from natural law theory or abstract reasoning alone also forms part of the critique that Filangieri himself makes of the descriptive treatment of laws in *De l'esprit des lois*, a work that, in his view, confined itself to seeking “the reason for what has been done” instead of “deducing the rules for what should be done” (Filangieri 1780, I: 20; cf. 14). However, the position of this Neapolitan thinker

is nevertheless more moderate than that of the French authors of the pre-revolutionary science of legislation. This is due to the fact that the “general rules” of universal application “to all governments, all climates, all ages” etc. (ibid., I: 21), which he aimed to establish, had to be based not only on the criterion of the “absolute goodness of the laws,” that is, how well they fit in with the “immutable principles of what is just and equitable in all cases” (ibid., I: 80; cf. 18–9), but also on that of the “relative goodness” or conditioned adaptation of laws to the “state of the nation” that receives them (ibid., I: 19; cf. 101ff.). The legislative science of Filangieri thus tried to safeguard the essential unity and the differentiated plurality of the positive-legal contents at the same time by providing the empirical analysis of the anthropological-historical relativity of the laws with a supposedly universal and immutable natural-law foundation from which issued both the backbone of the entire scientific system (preservation and legal peace) and the common normative basis of inalienable rights (property and self-defence) which, except in the cases in which its use is clear, could never be restricted by the legislator (see ibid., I, chaps. 1, 2 and 4).

A second line of development, removed from the universalist normativism of the French Enlightenment thinkers and even from the rationalist moderation of Filangieri, is that of the reformist-conservative science of legislation developed mainly in Germany during the second half of the 18th century based on its own natural-law tradition (Pufendorf, Thomasius, Wolff and their respective schools), close to monarchical absolutism and at the same time respectful of the structuring in estates of the different Germanic peoples. King Frederick II of Prussia had already posed it in its basic outline in his famous academic dissertation *Sur les raisons d'établir ou d'abroger les lois* (1750) when calling for, in a kind of syncretic will of social-anthropological empiricism and natural-law considerations, a legislation that, on the one hand, is adjusted “to the form of government and the spirit of the nation,” and, on the other hand, attends to the “common good and natural equity” (Friedrich der Grosse 1913, 30). According to this approach, which led in practice to the *Allgemeines Landrecht für die Preussischen Staaten* of 1794, legislative science does not aspire to the formulation of a normative ideal of reason, but rather to setting down prudential criteria and rules that make it possible to bring rational theory into line with “the nature and disposition of things,” that is, with the historical circumstances of each territory; instead of “inventing new laws,” it should indicate how “to correct existing ones” (Svarez 1784, 111; 1791, xxiv). Therefore, the art of legislation had to take a material basis from the existing legal code, and it merely had to submit it to a logical-systematic work of refinement, ordering, and completion in accordance with both the requirements of “sane reason” and “natural equity” and those of the “constitution of the country” and the most original Germanic customs (see Stölzel 1885, 231, 159–60; cf. Svarez 1784, 108ff., 1791, xxi–xxx).



This work of rationalising the existing legal complexity had been carried out by natural law in 18th century Germany in two consecutive conceptual stages: first of all, through the systematic integration of the legal institutions of the Germanic society of the estates (*iura quaesita*) in the framework of the *ius naturae et gentium* under the figure of the Hypothetical Natural Law, which corresponds to the state of social nature (see Hernández-Marcos 2000, 44ff.), and, after that, through the deduction of that *ius naturae hypotheticum* from the legislating will of the sovereign as *ius civile privatum*, with effective legal validity (see Canale 1998, 181ff.; 2000, chap. 3). However, this process of deductive transformation could only have a meaning if that Hypothetical Natural Law was assimilated to the particular natural law of the German people (*ius naturale germanicum*), which had to be sanctioned by the sovereign into the positive legislation (see Thieme, 1937, 380ff.; cf. Hernández-Marcos 2005, 292ff.). This national and historical understanding of the natural-law order of the ancient Germanic institution was possible, however, thanks to the reception of the work *De l'esprit des lois* in Germany (see Herdmann 1990; Mohnhaupt 1991) as a treatise on the theory of legislation which endorsed the idea of the promulgation of laws adapted to the natural and socio-cultural circumstances of each country, and which could for that reason be very useful in the German case, in the sense that was already pointed out by the old demand of Thomasius and his followers, who wanted to revise the Roman-legal laws that were unsuitable until they could be adjusted to the typically German rights and idiosyncrasy (see Mohnhaupt 1991, 184–5, 186–7; Thieme 1936, 245–50). The predominant realist science of legislation in Prussia transformed, then, the hypothetical natural-law order of the Wolffian system into a criterion and a material basis for the legislator, due to the fact that, thanks to Montesquieu, it had earned the status of the true Germanic natural law.

However, if we consider the basics that the natural law supplies for the legislative science, we can observe that the legal order of the natural state, far from having an unconditioned normative validity in the civil state, only possesses the binding force of a criterion of political legitimacy for the legislation. This happens because, by virtue of the *pactum subjectionis* that sustains the legally unrestricted power of the sovereign, there is no other valid source of legal rules than that of his omnipotent will reflected in the positive Law. Both the inborn rights of the individual (*iura connata*) and the legal institutions of the German society, based on the estates of the realm (*iura quaesita*) represent a *ius imperfectum*, that has no effective or compulsory nature for the sovereign authority, whose absolute will creates by itself the only enforceable law, the *ius perfectum*. This law, however, only affects the subjects of the sovereign (see Canale 1998, 193–4; Hernández-Marcos 2005, 285–8). With the framework of an absolutist conception of the State, which was the predominant view in Germany since the middle of the 18th century, the legal order of the state of



nature is, without doubt, contractually bound to the civil society through the doctrine of the State objectives (public well-being, common good, legal security...). These objectives have to be realized through the application of the laws, and they are therefore the rational limit of the action of the sovereign (cf. Svarez 1960, 10, 467–8). However, this limitation does not affect the legal facticity of the sovereign (who is endowed with unlimited power), and it only refers to the exercise of the sovereignty. Therefore, its only normative validity is that of a principle of political legitimisation, that is, that of a norm related with the values with which a whole society identifies its communal existence, and supposedly assumed *ex pacto* by the sovereign as the receiver of those values. The German culture of that time, which was still indebted in this aspect with the Aristotelian tradition, tended to interpret that merely political normative in the terms of a pragmatic rationality, and to include for that reason the science of legislation and the *ius natural germanicum* (as well as the Natural Law in general) as a general theoretical basis for that science. This science is included into the doctrine of the *prudentia legislatoria* of the prince, because it does not refer to the legal constitution of the State, which concerns exclusively the *ius publicum universale*, but to the art and the way of governing (*Staatskunst* as *Staatsklugheit*), which is the only field of the absolute monarchy which admitted demands of Enlightened rationality, and which allowed for the formulation, in the form of advice, of scientific and technical rules to enact or abolish laws in the interests of the people (see Hernández-Marcos 2005, 287–8; cf. Cappellini 1987, 344–7).

The utilitarianist approach was a third form of development of the science of legislation, which also took this discipline to its maximum level of conceptual refinement and technical applicability. It had a precedent in the French Enlightened materialism (Helvétius and d'Holbach), and it was mainly represented by Jeremy Bentham, who openly set out its basis and elaborated it with a methodical rigor and a systematic technique between the 18th and the 19th centuries. Unlike the previous forms, the utilitarianist model does not base the art of legislation in any other natural-law system or way of thinking, but it provides it with an empirical and natural basis: the concepts of pleasure and pain as the ultimate motives for the human behaviour (see Bentham 1996, 11; 1802, I: 2–4). According to Bentham, appeals to human and natural laws, to contractualist theories or even to the mere reason or to the eternal reason are part of the false reasonings that are present in the field of legislation. They confound the language, they are the shelter of arbitrary and subjective interpretations that generate endless disputes, and they represent a speculative coverage for fanatics who, under the imaginary principle of a higher legal order, try to violate and invalidate the positive laws and to deny the State. “In this anti-legal sense”—as Bentham concludes—“this term of a [Natural] Law is the worst enemy of reason and the most fearful destroyer of the governments” (Bentham 1802, I: 136). For this reason, the *Déclaration des droits de l'homme*

*et du citoyen* of 1789, mainly casts light on the will of maintaining the “spirit of insurrection against all form of government” and the “contagious seed of anarchy,” which is spread through the arrogant strengthening of the asocial passions in the shape of nonexistent natural rights (Bentham 2002, 320ff.).

Bentham’s rejection of the universalist aspirations and the abstract normativeness of the legislative science that is inspired by the French Revolution does not imply in itself, however, his commitment to the historical and national line of the German jurists who support the theories of Montesquieu. The judgement of the English jurist over the author of *De l’esprit des lois* is, in this case, quite critical. On the one hand, he admits that, after Montesquieu, laws cannot be promulgated without a prior knowledge of “the people, the customs, their concerns, the religion, the climate and many other things” (Bentham 1802, III: 331). On the other hand, however, he considers that Montesquieu, in the last books of his life, abandons the normative intention of the art of legislation that he first endorsed, in favour of the merely descriptive method of the “historian and the antiquarian” (*ibid.*, I: 152). Bentham specially denounces Montesquieu’s lack of any normative rational approach when he reproaches the explicative and almost deterministic relevance, which he sometimes grants to the physical and natural environment, or when, with regard to the role of cultural circumstances in the diversity of laws in different countries, he reproaches that Montesquieu sometimes transforms the descriptive consideration of the cultural determining factors of a law into a criterion for its passing (*cf. ibid.*, III: 345–54). For Bentham, the legislator’s necessary understanding of the different physical and cultural factors can only be justified, as a prudent measure, according to the single and universal objective of the public well-being (the greatest happiness for the greatest number of individuals), which has to be the aim of any rational legislation (*cf. ibid.*, III: 329–30). With regard to this aspect, the utilitarianism and the liberal and democratic trend of the legislative science share the same impulse of normative rationality. This impulse took Bentham to support—like Rousseau, like Filangieri, or like Hommel himself, among others—and even to play the figure of the competent and impartial legislator, in an attempt to renovate the ancient institution of the Greek *nomothetes* or the Roman censors (see Zapatero 2004, l–liv, lxxiii–lxxvi). The difference lies in that the establishment of positive laws and rights, according to Bentham, does not depend on a natural-law order that is prior to the State, but on a comparative calculation of punishments and satisfactions, in which the different classes and properties of the pains and the pleasures are thoroughly assessed, together with the numerous circumstances that have an influence on them (see Bentham 1996, 38ff.). For this reason, the normative rationality of the utilitarianism does not require the establishment of a single and universal legislative code, regardless of the people or the time, but the ideal legislation that is derived from the application of the principle of public utility in each human society.

### 3.3.2. *The Meanings of Law*

The enlightened understanding of the law is marked by a diversity of concepts that sometimes overlap and which originate in different currents of thought. The symbolic meaning that the term law acquired in the second half of the 18th century, linked to the indeterminate expectations of a new social order of reason without feudal structures or the arbitrary control of men, is also part of the complexity of these historical semantics. Jaucourt, in the corresponding article of the French *Encyclopédie*, already included this symbolism when he pointed out that “it must be the law and not man who reigns,” and invited the people to consider laws “as a barrier against despotism and a safeguarding of just freedom” (Jaucourt 1966f, 644). The rule of law was certainly considered to be a guarantee against the traditional powers, and in particular against the arbitrary authority of judges, but also to be the end of the tyrannical wielding of absolute power. This symbolic use, which was doubtless on the increase in pre-revolutionary France, would equally reach other European countries, and with it the law became a factor of criticism and social action or of the practical legitimisation of princes.

As well as this symbolism, the enlightened semantics of law involve on the other hand the distinction usually made between natural and positive law, together with the relationship between them both, which depends to a large extent on the corresponding concept of sovereignty, which as is well known became linked to the notion of law since in the late 16th century Jean Bodin made *potestas legislatoria* the main identifying attribute of absolute sovereign power (see Bodin 1986, Book I, chap. 10; cf. Heller 1971, chap. 1; Rivera 2007, chap. 2). Taking this into account, however, at least three basic and differentiated concepts of law can be distinguished, which in the last third of the 18th century end up coexisting. These are the arbitrary concept inherited from the 17th-century theory of political absolutism (the law as a mandate), the scientific-naturalistic concept transferred from Newtonian physics to Morality and Law in the mid-18th century (the law as a necessary relation), and the liberal-democratic concept which based on the thinking of John Locke was especially developed as from *Du Contrat Social* (1762) by Jean-Jacques Rousseau and finally replaced the previous ones at the end of the century (law as the general will). A historical-systematic outline of all of these now follows.

#### 3.3.2.1. The Law as a Mandate

The arbitrary concept identifies the law with a mandate of the will of the sovereign. Jaucourt expresses it in this way in his article for the *Encyclopédie*, at which point he follows Barbeyrac almost literally:

The law can be defined as a rule prescribed by the sovereign to his subjects, either to impose on them by means of the threat of a punishment the obligation of doing or not doing certain things,

or to give them the freedom of acting or not acting in other matters as they think fit, ensuring in this respect the full enjoyment of their rights. (Jaucourt 1966f, 643–4, my translation)

According to the absolutist tradition, the law is here understood as a punishable precept expressly declared by the sovereign (see Bodin 1986, I, chap. 8; Hobbes 1966, chap. 26, par. 8; Pufendorf 1986, I, chap. 2, par. 2; Thomasius 1963a, chap. 5, par. 3; cf. Jaucourt 1966a, 133), in which the duties and rights of subjects within the state (civil laws) are established, and within which the status of *lex* is granted in principle to whatever pleases the prince (*quod principi placuit, legis habet vigorem*). The positivist reduction that followed from this conception was not however accepted by most enlightened thinkers tending towards political absolutism, who in contrast also generally accepted a natural law, despite the fact that within this absolutist theoretical framework the strictly coercive sense of its legal obligatory nature could scarcely be determined, not even when it was associated with a possible interior sanction of divine will or of an indeterminate Supreme being of the universe. The advantage of maintaining it, however, lay in the fact that it allowed the introduction of a counterweight of rationality to the absolute will of the prince, which would avoid the degeneration of positivist legislation into despotic arbitrariness, as it was assumed from the natural law thought predominating since the 17th century that the sovereign was subject to it. This alleged rational subjection means to be precise that positive law should ensure a continuity with natural law by granting the latter simply the punishing efficiency of a civil law; if its content had to be modified, this should only be done in the name of the common aims of the state linked to the *pactum subjectionis* (public happiness and order, legal security, etc.), introducing in this case only the legal restrictions and variations that the sovereign considered absolutely necessary in this respect.

However, the wide margin of discretionality that the absolute prince still held in this way could only be led through rational channels if in natural law unsurpassable limits to his power were recognised; from the late 17th century these limits were identified with the so-called innate rights or with natural liberty (life and freedom of conscience), supposedly not transferred in the *pactum subjectionis*. Taking everything into account, the positions of the defenders of the Enlightenment related to political absolutism do not coincide on this point depending on the type and the evaluation of the regulations or on practical obligatory nature granted to natural law. Two basic directions can be distinguished in this respect. On the one hand, the tendency of the affirmation of the civil primacy of positive law by virtue of its external coactivity, which predominates in Germanic countries, tended to reduce the regulatory extent of natural laws to the single internal obligatory nature of a council (see Thomasius 1963a, chap. 5, par. 34) or to the legal-commuting one of an *ius imperfectum*, with no legal validity, and therefore granted that natural-law

limit only the ideological effect of the legitimisation or political delegitimation of the praxis of the sovereign, without the transgression of the same justifying in itself a social conduct of disobedience or revolt (see Svarez 1960, 582ff.; cf. Scattola 2003d, 19–21). In contrast, the tendency in favour of the regulatory priority of the law of nature precisely because it was not punishable, in contrast to positive legislation which was merely external and arbitrary and developed above all in France (Barbeyrac, Voltaire, D’Alembert, etc.), considered that space of non transferable natural laws to be an intangible autonomous sphere for the sovereign, the violating of which, in the form of a tyrannical act of the prince, could be thought to represent the breaking of the social contract and therefore justify the people’s right to resistance (see Glafey 1965, Book II, 51; Achenwall 1763, II, 203). The legal protection of this legal-private aspect of natural freedom, which cannot be legislated in itself, was therefore for the defenders of the Enlightenment close to political absolutism, together with the carrying out of the state purposes defined in the social pact, the main requirement of natural-law rationality with which it was hoped to counteract the threat of arbitrariness that hung over positive legislation conceived in arbitrary terms. Only under these conditions, as the quote from Jaucourt’s text shows, can the enlightened conscience include within itself the absolute monarchy.

Together with the problem of arbitrariness and of the reduction of the law to external sanctionability, the arbitrary conception also brought with it the cognitive and practical difficulty of distinguishing legal regulations from any other precept, decision, or express resolution of the sovereign. Bodin had already indicated in this respect that the mandates addressed to “everyone in general and each person in particular” are equally laws of the absolute prince, and for this reason had included the sovereign power of “granting privileges, exemptions, and immunities, together with the granting of edicts and ordinances” within legislature (Bodin 1986, I, chap. 10). The enlightened culture faithful to political absolutism, even when in the last third of the 18th century it tried to include in its theoretical way of thinking conceptual elements of Rousseau’s new democratic approach, was incapable of overcoming this concept of law that was so wide and indistinct, as it was part of a doctrinal horizon within which it was impossible to resolve in an appropriate manner the two principal matters implied in a precise delimitation of the law compared with any other regulation, precept, or legal proceeding of the state: the question of the extent and temporality of the rule, on the one hand, and the problem of the distinction between legislative proceedings and executive action, on the other.

The resolution of these two matters within the theoretical framework of the liberal-democratic tradition as from the French Revolution, led to as is well known the differentiation between the general nature of the law and the private nature of the remaining legal proceedings of the state that develop, ex-

ecute, or apply it. In the enlightened vision of absolutism this distinction is clearly not reached; what is achieved is merely a nominally close but conceptually different one which simplifies the legal and terminological plurality of the various *leges* proceeding from various political authorities of the *ancien régime* (the emperor and the imperial classes, territorial lords or princes, municipal authorities, etc.): the distinction between universal laws and private laws, following to a large extent the differentiation already established in this respect in 1596 by Charondas le Caron (see Grawert 1975, 889–90). This division of the positive laws is still found, for example, in the *Grundsätze der natürlichen Rechtswissenschaft* (1797) of Ernst Ferdinand Klein, and with it this is a case of realising the difference between the laws that “are binding for all members of the state,” and those that “only refer to certain classes of subjects and certain matters and objects,” under which all kinds of privileges are included (Klein 1797, 502, my translation; cf. 503). For Klein and the enlightened culture of political absolutism, the general nature of the law is compatible with the unequal civil distribution of the rights and duties of the subjects depending on their different degree of contribution to state purposes (see *ibid.*, 505; cf. Klein 1977b, 70–2, 79–80), because it refers only to the territorial unity of the legislating subject and the common space of civil subordination, of public equality for all as subjects in compliance with laws generated by that sovereign will (see Canale 2000, chap. 5, 226–7). It therefore in no way refers to the universal (territorial and personal) nature of the right included in the legal regulations or to the corresponding legal-private capacity of any subject in relation to the latter which characterises the general nature of the law within the liberal-democratic tradition and lays the foundations for legal-formal equality before it. That it is a case of the mere general abstractness of having rights and civil obligations because of living under a common leader is proven by the fact that the law is not the same for all citizens, and that they are not all as subjects affected by the same laws, as on setting these within a historical society the sovereign may introduce “special determinations” (Klein 1797, 504) that break the abstract equality of all on legal dependency. This is because they create an effective legal inequality depending on the real diversity of subjects (privileges) and objects (police, administrative, tax matters,...) that must be taken into account, according to rules of political prudence in order to carry out the collective purposes of the social agreement.

However, if the extent of the law was defined not by the general nature of the subject of law but rather by that of its unitary legal source, it is then understandable that in the same way as it is difficult to distinguish it from any prescription of special or personal law, it will also be difficult to distinguish it from a private act of the application of law, as in all these cases the agent and legitimate author was always the single persona of the absolute sovereign. Such lack of semantic determination became at bottom legally insuperable; however many conceptual nuances and recommendations of caution that en-



lightened theory may add in this respect regarding the exercising of power, while political sovereignty is identified by virtue of the *pactum subjectionis* with the natural person of the prince or considered the latter to be its exclusive depositary, and all duties and actions of the state are considered as *iura maiestatis* of its supreme leader (legislation, execution, jurisdiction, inspection, etc.). There where the division of state powers was not admitted because the unity of the sovereign power could not be distinguished from the indivisible persona of the monarch, neither can there be established in a formal manner a clear legal delimitation between the promotion and development of a general or special ruling, the execution of the same, or its administrative application in relation to a specific situation, and the legal resolution on its legal suitability and effect in a given situation. Again the symptomatic example of the jurist of E.F. Klein with his vacillations on the doctrine of the division of powers reveals the conceptual difficulty of the enlightened thought of absolutism so as to reconcile political dogma from the monarchical unit of sovereign power with the diversification and separation of its essential duties: legislating, applying the laws, and establishing justice according to them. In this way, after linking with precision the “legislature and executive power” (which includes the judiciary) with the differentiated duties of devising laws and applying them by means of “decisions and mandates” (Klein 1797, 411, 500), the Prussian jurist defends the “separation” of them both only in their “exercising” but not in the person of the “single subject” that holds them unlawfully (ibid., 411; cf. Klein 1796, 327).

### 3.3.2.2. The Law as a Necessary Relation

In the arbitrary conception of absolute sovereignty (see supra sec. 3.3.2.1.), the arbitrary nature of political power, as far as the legislation of the private rights of the subjects is concerned, scarcely has an effective counterweight, as the correction of civil law rests formally on the single supreme authority of the prince, with no more restrictive conditions than that of guaranteeing the common good sealed in the social agreement or that of safeguarding the reduced sphere of natural liberty by refraining from legislating on it. In this respect the new scientific-naturalistic concept of law originating in Newtonian physics that extended to the theory of society and history in the mid-18th century, which was hailed by most of the defenders of the Enlightenment, especially in France, as the eternal model of rationality within which any positive legislation from the prince had to be included, was of invaluable regulatory assistance in rationalising the legislative decision of sovereign will. The new legal concept of natural law, by then fully mundane, contributed in effect towards the conferring on the weakened natural law of the regulatory force that the culture of political absolutism had been eroding in favour of positive law, to the point of recovering the primacy on the latter in the new enlightened vari-



ant of specifically French absolutist thought generated in this respect, more explosive than the properly Germanic one.

Although the first formulation of this new concept goes back to the treaty by Richard Cumberland *De legibus naturae* (1672), which was disseminated throughout Europe thanks to the French translation of Jean Barbeyrac published in 1744 (see Grawert 1975, 895), it was mainly through the systematic elaboration of Montesquieu how it came to be known and developed in the second half of the 18th century and how it came into operation especially for the science of legislation. In effect, the first book of *De l'esprit des lois* (1748) rewrote (and with this partly cancelled out) modern natural law so as to adapt it to the requirements of universal legality discovered by Newtonian science, and in this way offered the possibility of justifying a legal concept of natural law that the arbitrary conception of absolutism could scarcely establish without recourse to divine will. "Laws, in their widest sense," wrote Montesquieu, "are the necessary relations deriving from the nature of things, and in this sense all beings have their laws," including God (Montesquieu 1950, I, chap. 1, my translation). With this very general definition Montesquieu faced theological and political arbitrariness, maintaining that neither was the creation of the world an "arbitrary act" because it was based on the same "unchanging laws" of knowledge that currently govern the universe, nor can positive laws be considered an entirely capricious product of princes, because "possible relations of justice" precede and predetermine them (*ibid.*). With clearly stoical echoes, Montesquieu thus emphasised that there is an objective order of universal rationality, a *raison primitive*, that is certainly specified in a relative manner depending on the different beings, namely as *natura rerum*, as a structure necessary in its own right, but in no way modifiable by human will. This rational order was however interpreted in accordance with the scientific-naturalist model of the Newtonian universe as an almost mechanical course of action of cause and effect that generated relations of regularity, in other words "invariable laws" by means of which "uniformity" is given to what is diverse and "constancy" to change (*ibid.*). Hence the new general concept of law as a necessary relation, i.e. as a form of regularity in which is expressed *ex necessitate* the rational structure of a type of beings and also "the relationships of the various beings among themselves" (*ibid.*). This last nuance also made it necessary to think of the causal complexity or "multi-causal" concurrence of entities or factors (see Starobinski 1982, 81ff.; cf. Zapatero 2004, xxv–xxix), both strictly physical (climate, soil, ...) and cultural (form of government, customs, religion, ...), that predetermines or conditions positive laws and that constitutes what Montesquieu refers to as the "spirit" of the same, namely "the various relations that laws may have with the various things" (*ibid.*, I, chap. 3, my translation).

The new scientific-objective notion of "relationship law," an alternative to the political-arbitrary concept of "mandate law" (see Althusser 1959), thus al-

lows the insertion of legal laws within the unchanging order of universal rationality and their explanation based on it as a type of law characteristic of the “intelligent world,” in which an invariable regularity also prevails, although men may not always comply with it (cf. Montesquieu 1950, I, chap. 1). Montesquieu thus accepted a series of natural universal laws deriving from the psychophysical “constitution” of the human being and of needs linked to its elemental powers (the law of peace, of storing or searching for food, and of both natural and cultural sociability) (see *ibid.*, chap. 2; cf. Book 26, chaps. 3–5). These however served it only as a brief introduction so as to present the civil state and not as an ideal legal situation of laws common to all men, but rather as an order of positive laws appropriate for and/or adaptable to the specific rationality of each country. The natural, invariable, and common legality of the physical universe ended up within the social world of man as a diversity of historical and national legalities, each of which were adapted to the corresponding *nature du peuple*. From this follows the final, political, or civil formulation of the concept of the law as “human reason insofar as it governs all peoples on earth” and is applied to them in a differentiated manner (see *ibid.*, chap. 3); this definition was later repeated in *encyclopédiste* circles (cf. Jaucourt 1966e, 643). Montesquieu thus ruled out the modern idea of a universal natural law of human acts based on the whole legal-positive set of rules. Therefore, the legislator no longer had to look to human nature in general, but rather to the specific nature of each society and territory (see Saint-Lambert 1966).

This geographical-national resolution of legislation, which was quite well received in Europe, was not however followed by the majority of the defenders of the French Enlightenment of the second half of 18th century, who appealed instead to the general scientific-naturalistic concept of law as a necessary relation for travelling the reverse route, which led to the restoration of the natural-law doctrine of the universal reason of man. On this route the French Enlightenment overloaded and complicated with new conceptual elements (materialist-utilitarian, liberal, utopian-equalitarian, etc.) both the idea of nature and that of natural law, but always invoked both as a radical means of the assessment of contemporary institutions and a rationality reference for the legislator. The critical potential contained in the scientific-naturalistic notion of law was used in both a positive and a negative sense. On the one hand, it served as a controversial argument for denouncing the contemporary legal system thanks to the contrast that it was able to establish between unchangeable natural laws and arbitrary, changeable, and merely conventional positive laws (see Grawert 1975, 895–6; cf. Jaucourt 1966a, 131–2; 1966f, 644). From Voltaire, in for example his article *Lois* (see Voltaire, 1972), to the movement of the *idéologues* a controversial appeal was made to natural laws in order to attack the irrationality of established human laws and to vindicate, against Montesquieu, as the real “spirit” of the latter the conformity with “those most

primitive and powerful laws” (Destutt de Tracy 1992a, 6). On the other hand however, the new concept of natural law as a necessary relation was used in its most fruitful development within the legal-political field in order to build a “complete model of social organisation,” a “static model, more or less complex, to work directly as an example and criterion of civil society” (Tarello 1976b, 342, my translation). This approach is present in some authors in favour of radical utopian equalitarianism (Mably or Morelly), but above all in the physiocratic movement, within which we can clearly see the application of that concept of law-relation to the systematic study of all the fixed and eternal regular aspects that are followed as “physical and invariable effects of the nature of beings in general,” of that “of man” in particular, and of his relationships with “the beings that surround him” (Schmid d’Avenstein, 1776, Préface, my translation), and of which knowledge is essential for a complete legislation of all fields of society. Schmid d’Avenstein, for example, in his private controversy with Montesquieu, questioned the fact that “all [positive] laws were equally good” because they had been adapted to the contingent circumstances of each people if they did not constitute a mere civil enactment of invariable natural laws (*ibid.*, Book 11, chap. 2; cf. chap. 1). In their place he defended, in a kind of normative-abstract inversion of historical-national legality, the existence of an eternal and cognitively available storehouse of natural laws of all kinds, from which each legislator had to select and establish, as if ordering food à la carte, as positive laws those that seemed useful and convenient for public happiness depending on the particular situation of each country (see *ibid.*, chap. 2; cf. Book 6, chap. 2).

As far as the extent and temporality of the law are concerned, the occasional regulatory reflections of Montesquieu do not contain a sufficiently clear solution (cf. Grawert 1975, 899). In contrast with the tradition of political absolutism, there is no doubt that the distinction between general actions and private actions of the state was already perceptible, as for example between the laws and “rescripts” (cf. Montesquieu 1950, Book 29, chap. 17), provided by the doctrine of the division of powers. Despite this, Montesquieu appears to oppose the uniformity and general nature of the law (cf. *ibid.*, chap. 18), although he recognises it as having a permanent effect and nature (cf. *ibid.*, chap. 16), and even goes as far as saying precisely, on the subject of moderate governments, that it is the fruit of the “political will of the state” (*ibid.*, Book 11, chap. 6). His aristocratic conviction that legislature must be separated into two different bodies, one for the nobility and one for the representatives of the people (cf. *ibid.*), was however an insuperable obstacle to a democratic vision of the law and to clearly maintaining the general and uniform extent of the same. Without this democratic basis, the legal correction of positive law comes to rest on the double criterion of the adaptability to the peculiar nature of things, which has a scientific basis, and on the regulatory separation of powers as a guarantee of citizens’ freedom from state despotism (cf. *ibid.*).

The liberal-democratic tradition of enlightened thought would however manage to provide in this respect a precise solution to the question of the regulatory extent of the law, but would also propose a new procedural manner of accrediting its legal correction, which has been retained to the present day.

### 3.3.2.3. The Law as a General Will

At least two distinct currents of thought came together in the formation of the liberal-democratic concept of law during the second half of the 18th century. On the one hand, the liberal natural-law line of John Locke in which natural law continued to be an essential regulatory criterion of the correction of positive law was very influential in 18th-century Europe, and on the other the democratic-conventionalist theory of Jean-Jacques Rousseau reduced the natural-law regulations to the sole contractual procedure of general will, by means of which the exclusivity of positive law was finally established in modern legal culture. To this double source can be added the varied profile of the syncretic reception of these doctrines in connection with ideas from other distinct traditions, the fruit of the eclectic spirit so characteristic of the time, for example of the French *encylopédiste* circles as is shown by the case of Louis de Jaucourt. His articles combine without nuances the liberal-democratic reflections of Locke himself with ideas from the Pufendorf-Barbeyrac line of thought and with the new theoretical proposals of Montesquieu (see Jaucourt 1966b and 1966c; cf. Tarello 1976b, 333–6). Such a doctrinal amalgam explains the semantic complexity of the concept in many authors and texts, and also the degree of tension that the relationship between natural law and positive law still maintained in its meaning, until it gradually gave way during the transition towards the 19th century in favour of an exclusively positivist vision in accordance with the Rousseauist approach, which converged at this point with the arbitrary conception of political absolutism that was still current in many European countries.

The special contribution of John Locke, elaborated in the second of his *Two Treatises on Civil Government* (1690), consisted of offering a rational concept of law as a universal form of regularising actions related to human freedom, which included the admission of a natural legality that is unwritten but obvious to any rational being (see Locke 1992, chap. 2, 6), from which originated the validity of the natural rights of man (life, liberty, and property) and which was established as an “eternal rule” of all positive legislation (*ibid.*, chap. 11, 135; cf. chap. 2, 12). The continuity between the natural state and the civil state then implied that positive laws should go no further than sanctioning without modifying the content the natural rights of the individual, the protection and defence of whom was the sole *raison d'être* of the state. The liberal moment of Locke therefore lay in that the law of nature and its corresponding individual rights became at the same time the legal-normative

source and limit of the legislator (cf. *ibid.*, chap. 11, 135–42), in such a way that on the one hand positive law, in *continuum* with natural law, should be only the public enactment of the natural rights of the individual, and on the other hand, any alteration or violation of the latter by the supreme authority could be understood to represent the break-up of the social agreement that legitimised the people's right to resist the tyrant (cf. *ibid.*, chap. 18, 202ff.). Both aspects mean that the influence of Locke on North American and French pre-revolutionary thought is understandable (see Berding and Klippel 1997, 351; Kleinheyser 1975, 1066–9), as is also in part the continued presence of language and a natural-law world view in the democratic concept of law, which was however more and more marked at the time by the positivist-conventional vision of Rousseau. Locke however, apart from this natural-law foundation, also favoured the democratic basis of positive law to the extent of raising it to the criterion of the distinction of the same as a general and lasting rule, with regard to any other precept or private and temporal proceedings of the state (proceedings of the executive branch, according to him), as only the laws, on being proceedings of the legislature (the supreme power of the government), emanated directly from the entire "consensus of society" and derived their authority from this consent of the sovereign people (Locke 1992, chap. 11, 134; cf. chap. 10, 131; see Grawert 1975, 899). The legal correction of positive legislation therefore rested not only on the material-regulatory criterion that imposed on it the liberal demand that it should be the public sanction of the natural rights of the individual, but also in the procedural criterion consisting of being the result of the common agreement of a united people. In Locke it therefore seems clear that the universality of natural law can only be channelled politically as positive law by means of a formal and entirely democratic procedure. It is evident that Rousseau only had to draw the radical conclusions to this idea, for the conceptual elaboration of which it was no longer necessary to maintain the natural-law assumptions on which the Englishman had based himself.

In effect, in *Du Contrat social* (1762) Rousseau, starting from a conventionalist vision of human rights and liberties similar to that of Hobbes (nature does not establish genuine rights or liberties), resolved the democratic sovereignty in the contractual procedure of the constitution of the general will (see Rousseau 1996, Book 1, chap. 6), from which all rights and liberties within the state are generated. Legislation, as an active "declaration" of this general will (*ibid.*, Book 2, chap. 6; cf. Book 3, chap. 15), could now only be positive. The law was thus clearly differentiated from any decree or private proceedings of the state because of its general and abstract nature, as it was not only the direct expression of the general will, but also precisely for this reason it had no material object other than social totality, "never men as individuals or actions as private ones" (*ibid.*, Book 2, chap. 6; cf. chap. 4). In its turn, its legal correction was likewise guaranteed by this general nature of the will that enacted it,

which was set up in this respect in the true regulatory criterion of any legislator. “The general will,” declared Rousseau in this respect, “is always upright and tends towards public use”; it is the rational will that is the result of separating individual interests from the “*volonté de tous*” (ibid., Book 2, chap. 3, my translation; cf. Grawert 1975, 900). The regulatory problem of good legislation lay then in finding the appropriate institutional formula in order to build that general legislating will from the “blind will” of the people that is self-interested and ignorant (cf. Rousseau 1996, Book 2, chap. 6). This problem of the rational, competent, and impartial legislator, to which the Swiss, perhaps conditioned by his idea of direct democracy, was unable to find an appropriate solution, would be resolved by the immediately subsequent liberal-democratic enlightened culture by introducing the mechanism of the representation of popular sovereignty, firstly by means of legislative assemblies, and finally by means of the Parliament (see Zapatero 2004, lii ff.). In this way the law continued to be the manifestation of the general will of the nation, but now in an indirect manner through its representatives (as it already was for example within the framework of the French Revolution), thanks to the act of delegation generated by the sovereign will itself (see Grawert 1975, 901–2), following to a certain extent the Lockian vision of legislature as a power delegated by the people, or assuming the republican idea of the representative system already proposed by Kant in *Zum ewigen Frieden* (1795).

The rapid dissemination of the concept of law as an expression of the general will in the legal-political culture of Europe in the last third of the 18th century was not only restricted to the enlightened circles of liberal and/or democratic orientation, in some of which (in the physiocratic movement, for example) this even merged with the scientific-naturalistic concept of an eternal and necessary relationship. It also reached the enlightened thought of political absolutism, without going as far as questioning it and without moving for this reason to the arbitrary concept of mandate, with which it began to co-exist as if it were one and the same thing.

### 3.3.3. *The Space of Private Rights: Natural Liberty and Civil Liberty*

The legislative spirit of the enlightened was based on the belief that the law in general is the only source of rights for the citizens, and that the positive law, especially, is also the best way to fix them with precision, and to clearly announce them and secure them effectively. The law and the legislation of the sovereign take meaning then as tools for the identification or constitution of the civil rights as well as for the protection of those same rights. Therefore, a minimal conceptual comprehension of the Enlightened legalism requires further inquiries into the way in which the lights of reason founded and demarcated the theoretical basis of that object of the laws, that sanctionable sphere of the social relations that could be labelled as the field of private rights. In a



simplified way, we could say that the Enlightened culture of the second half of the 18th century tried to demarcate and conceive this new field as a social aspect of the civil liberty. This expression, however, had two very different meanings, as it included different arrays of rights according to the discursive contexts that were creating the concepts in each case. A panoramic approach to this complex and polysemic idea, which was still only taken into consideration in a broad sense into the sphere of those private laws that were recognized by the law, needs to deal with the demarcation of the different concepts of the idea itself from those theoretical perspectives that were involved in its elaboration. With regard to these perspectives, we will take into consideration three essential ones: the anthropological perspective of the liberty of decision as the basis of the subjective rights; the natural-law perspective of the relationship between the civil rights and the natural liberty, and the merely political perspective of the relationship between the human liberty and the positive law.

The unitary and systematic conception of the different private laws of the citizen as a space for civil liberty did not completely reach the European Enlightened conscience until the last third of the 18th century. This only happened as the result of a long historical process of reflection, especially in the framework of the modern natural law theory, in which the idea of liberty progressively attained more and more legal relevance, until it became, with Kant, the only original right from which all the other rights of the man and the citizen emerge (see Kant 1914, 237). This theoretical structuring of the private legal field was also possible due to the fact that the doctrine of the free will or the liberty of decision in the configuration of a new practical subjectivity, together with a specifically human ability of action and decision, based on the game of the reason with the different desires and pleasures, was central in the anthropology of the modern thinking since the 17th century. Based on this subjectivity of liberty, which is now understood as a capacity of acting with freedom which is inherent in the rational condition of the human being, the natural-law conception of the man as an individual subject to rights and duties was developed. However, although this conception was created in the Germanic tradition from Pufendorf to Wolff according to the modern Romanist concept of the legal entity, in which the rights depend objectively on the social *status* (see Coing 1962, 62–5; Nass 1964, 33ff.), it finally led to the liberal and democratic idea of a single and universal legal subjectivity, that is, to the recognition of an capacity, inherent in all men, of being the bearers of subjective rights. The Enlightened culture of that time tended to consider these rights as natural and inalienable rights. In that respect, the natural-law generalization of that Romanist concept of *status*, and especially its dissolution into the fundamental structure *status naturalis* / *status civilis*, paved the way for the recognition of the universal legal individual—which was later theoretically founded by Kant from a new concept of individual (see Hernández-Marcos 2004)—because the theory of the *status naturalis* con-



sisted, in fact, in an explicative and general anthropological praxis of the rights of the individual into the *status civilis*.

This basic structure of comprehension of the law and the political society that was imposed by the modern natural law theory takes us, then, to the second approach for the treatment of the civil liberty that we mentioned before, in which we can demarcate different concepts from a semantic field which is defined by its relation of tension with the corresponding notions of natural liberty. This last expression fulfilled a systematic function in the natural-law culture of the Enlightenment, by demarcating the anthropological space in which the different natural rights of the individual are born and reside. For this reason, the decline of natural law theory brought the disappearance of that expression, as well as the correlative term of civil liberty, in favor of the general mention of the liberty of men, as happens, for example, in the Articles 2 and 4 of the Declaration of Rights of 1789 (see Rials 1988, 22). Except for the particular nuances of the different traditions, all of them coincide in characterizing the natural liberty with the idea of a practical independence from external influences. This idea is also related, since the middle of the 18th century, with the eudemonist objective of searching for individual happiness with self-produced criteria. For this reason, the entry for *liberté naturelle* in the French Encyclopedia defines this term as the capacity of all individuals of “treating their possessions and their selves as they consider fit for their welfare” or as the natural power of “doing what they deem proper and acting as they prefer with their actions and their possessions” (D’Alembert and Diderot 1966, 471). This is, in principle, the liberty of action and decision of the individual when faced with another, and it is understood according to the Roman-republican idea of the individual as its own master (*sui iuris*), but before any legal action (see Pufendorf 1986, Book 2, chap. 1, 8; Locke 1992, chap. 4, 21; Achenwall 1763, I, 77ff.; Kant 1914, 237–8). This liberty is supported by the equality of natural rights in order to propose and pursue any objective. However, the true meaning of this natural liberty, as well as the scope of the rights that are related to it, vary according to the different cultural traditions. In a liberal-democratic-oriented tradition, the natural liberty is a normative concept that is opposed to the idea of servitude (see D’Alembert and Diderot 1966, 471), and it therefore creates around it different inalienable rights (life and individual, freedom of conscience and expression, and even property), which guarantee that individual independence. However, the natural-law Germanic tradition only consider this natural liberty as a logical and methodical concept that explains the possibility of contractually acquiring rights in a general sense and, therefore, of structuring relations in the private field (natural societies) or the political field (civil society), in which the single inborn capacity of the free will is totally or partially transferred, thus being compatible with slavery as well as with the unlimited subjugation to the absolute sovereign (see Klippel 1976, chap. 1, 35ff.). In the second half of the 18th century,

in the framework of the Germanic natural law theory, the normative character of the *libertas naturalis* is clearly established. However, this is done as a mere demand for political caution that only includes a partial restriction (cf. *ibid.*, chap. 2, 57ff.), because that liberty also includes, with a supposedly untransferable character, the main *iura connata* (conservation of life and personal integrity, freedom of conscience and thought, faculty of use or appropriation of possessions, etc.).

On the other hand, the common identification of natural liberty with the state of nature shows that this concept is, in fact, an anthropological principle that clarifies and justifies the legal situation (the one that is or the one that must be) of the individual into the civil society and, therefore, the space of liberty that corresponds to the State. However, this civil space can be understood in two different ways: either as the replacement of the political reflection of the natural and total personal independence of action and decision, in which case the civil liberty, in this broad sense, would include all the private laws together with the political freedom or the capacity of democratic (self-) legislation (see Rousseau 1996, Book 1, chap. 8; cf. Klein 1977a, 117–8; 1797, 539); or, in the strict sense of the term, as a mere legal private representative of the natural liberty, recognized in the framework of the social relations between the citizens and with the State, in which case we could be talking about a civil liberty which exists apart from any form of sovereignty. In this strict sense—the one that matters here—the Enlightened culture tended in general to characterize it in the same terms than the natural liberty, that is, as the “freedom of the individual for promoting his own welfare according to his own opinion,” provided that, inside the limits of legality, he does not cause harm to others (Klein 1977a, 118; cf. Kant 1923b, 290); or, in a more radical formulation of Article 4 of the Declaration of Rights, as the power of the man to “do everything that does not harm others,” limited only by the law, in order to secure the same liberty for everyone, as well as the enjoyment of all the rights related to it (Rials 1988, 22–3; cf. Jaucourt 1966d, 472).

However, the real extent of this civil and private liberty, as well as its degree of legal guarantee by the laws of the State varies according to the way in which the so-called contractual rejection or transfer of the natural powers to the sovereign with the transition to the civil state is understood in the different natural-law trends of the Enlightenment. In the liberal and democratic tradition, where the social contract only implies a restriction of the natural liberty in those cases in which it is essential for its guaranteeing by the institutions (see Locke 1992, chap. 9, 128–30); the civil liberty represents the true realization of the natural liberty. It is a guarantee in a civilized form through the legal safeguard of the corresponding natural rights (life, personal freedom and property). In that respect, the independence of action and decision according to the own will lies in the State as an space that has been created by the common dependence of the law, understood as a fixed and safe norm for

all, thus allowing for the orientation of the individual life according to individual criteria, without being at the mercy of the fickle and unknown will of other men (cf. *ibid.*, chap. 4, 21).

On the other hand, in the Enlightened culture of the political absolutism, the pact of submission implies surrendering the natural liberty, either all of it or the most part, to the figure of the sovereign for the execution of the objectives of the State (public safety and well-being). In this culture, the civil liberty is mainly understood as the rest of the natural independence that the individual still maintains in the State, which is made up of “indifferent actions for the civil society” (Achenwall 1763, II, 107; cf. Wolff 1968, Book 8, 47; Klein 1797, 538), that is, they are included into the individual space of action and decision which has been removed from the political field due to their alleged neutrality in relation with the objectives of the State, and to their subsequent exclusion from the social sphere of the sanctionable actions, even if they have to be secured by the laws (see Klippel 1976, chap. 2, 59ff.). Therefore, this is not a space created by the legal norms in the strict sense, but a space excluded from it. It is not the civil guarantee of the natural liberty, but it mainly represents a restricted prolongation of that liberty, a private preserve of the state of nature in the civil order of the political community. For this reason, this residual space only includes, in principle, the strictly inborn rights (life, freedom of conscience and thought, choice of the way of life, etc.; see Svarez 1960, 455, 581ff.), and it excludes those that are acquired in the social state of nature (properties or *dominium privatum*), which are subject to the civil legislation of the State, because their fixation and securing are part of the political objectives of the State itself (see Hernández-Marcos 2004, 279ff.). For that reason, that natural-law space of civil liberty, far from being legally inviolable, is unprotected against the intervention of the power of the state, and it can be restricted or altered by it, as long as its specific demarcation depends on what the sovereign deems necessary or indifferent for the State objectives of public well-being and security in each case. However, at the end of the 18th century, the Enlightened thinking of the absolutism already shows a trend that wants to increase the sphere of civil liberties outside the reduced space of the strictly innate liberties, and to identify that sphere with the order of structured and private legality, under the assumption that only positive laws are a true guarantee for the liberty of the citizens (Klein 1977a, 117ff.; cf. Klippel 1976, 149, 171–2). Under this new perspective it looks like the property, which is now considered (after Locke’s influence) a consequence of the personal freedom (Klein 1977a, 116), is now part of the orbit of the civil liberty, which is thus configured as the legal space of the private rights. That is what the character Kriton confirms in the dialogues of *Freyheit und Eigenthum* (1790), when he declares that “the main duty of the government is the protection of the civil liberty”, and when he concludes that “the State must consecrate the property of its citizens” (Klein 1977a, 153, my translation; cf. Klippel 1976, 145ff.).

In order to complete the panoramic view of the Enlightened idea of civil liberty as a legal and private subject, we must of course make reference to the political perspective of the relation between freedom and law, between independence and legal subjection. From this point of view, we can observe two essential doctrinal lines, that could be provisionally classified as the anarcho-liberal line and the politico-republican line, respectively. Both trends are present, as a form of complementary semantic stratum, in some conceptions of civil society (and natural liberty), both in the Enlightened absolutism and in the liberal-democratic thinking. The anarcho-liberal approach presents a radical conception of liberty as a concept that is incompatible with the law, either natural or positive, and for that reason it always tries to place it outside the law, in the space of human action and decision which is removed from the mandatory imposition of the norms or which is not protected by them. In the modern natural-law tradition, the liberty was identified with the practical sphere of what was omitted by the law (either natural or civil) (see Hobbes 1966, chap. 21). This sphere is not subject to mandates or prohibitions, so it can be included under the permission of the law, so that the individual has got the liberty to act according to his own criteria (see Pufendorf 1986, Book 1, chap. 2, 11). The consideration of these unspoken licenses of the laws as a field of the freedom of decision (see Pufendorf 1986, Book 1, chap. 2, 2, note), which is also a generator of particular rights (contracts and properties) in relation to the others (see Tarello 1976b, 128–9), created an association between this faculty of free action, without the help of the laws, and the natural liberty, and lead to an equal understanding of the civil law, in the absolutist conception of the residual field of the natural liberty in the State, as the representation of what is allowed by the positive laws (see Svarez 1960, 217, 582–3). Some semantic echoes of this anarcho-liberal view remain clearly in the general concept of civil liberty as the individual capacity of searching for happiness with self-made criteria, and mainly in the more empirical and utilitarianist trend of the liberal thinking represented, for example, by Bentham. He considered that liberty means doing everything one wants, even when it harms others (see Bentham, 1802, II: 4–5).

The politico-republican line, which was, by the way, predominant in the Enlightened culture, considers, however, that liberty cannot be separated from the law, either natural or positive, and for that reason it tends to conceive it as the space of open independence which is guaranteed by the common coactive norm. This proposal can be found in the natural-law tradition with a liberal-democratic view, started by Locke, as well as in the Germanic natural-law tradition related with the political absolutism (Pufendorf-Wolff), in which even the natural liberty is always subject to the laws of nature. Apart from natural law theory, the strictly political conception of Montesquieu, which had an influence on most of Europe during the second half of the 18th century, deserves a special recognition. Montesquieu left explicitly the anarcho-liberal

conception, and defined liberty, in accordance with the republican tradition, as “the right to do whatever is allowed by the laws” (Montesquieu 1950, Book 11, chap. 3; cf. Jaucourt 1966d, 47, my translation). This strict relation with the positive law (no wonder he uses the term *political liberty* instead of *civil liberty*), however, makes him consider the aspect of legal security that is guaranteed by all positive laws, instead of the space of individual action and decision and its corresponding rights which is created by the civil law. For that reason, he reduces the liberty of the citizen to the knowledge of the security of his rights and the “spiritual peace” that emerges from it (Montesquieu 1950, Book 11, chap. 6; Book 12, chaps. 1–2; cf. Jaucourt 1966d, 472; P. Verri 1962, 141) whenever the citizen lives in a State structured on the division of powers and in a society which is regulated by soft criminal laws, proportional to the offenses. This connection between the civil liberty and the legal security could be, without doubt, by the partisans of an Enlightened absolutism that wanted to encode the freedom of the subjects into the legality imposed by the sovereign, without the need of completely removing the *iura quaesita* from the society of estates of the previous era.

### 3.3.4. *The Lights of Reason of Criminal Law*

In the world vision of the Enlightenment criminal law is considered to be part of civil law *sensu lato* (positive law), because it specifically concerns common peace and the legal security of the citizens that *ex pacto sociale* must be provided by the state. In effect it is thought that this legal security depends not only on the precise delimiting of private rights by positive law, but also and above all of public sanctionability which distinguishes the latter from natural law and divine law. In this sense criminal law is understood to be the development of the type of sanction that is an integral part of all civil law, insofar as it stems from the express will of the sovereign (see Diderot 1963, 57; Bentham 1802, II: vi-vii). However, as the sanctionability of positive law only reaches legal-private relations between the subjects and at the most the relation of obedience of these with the state, not the sovereign itself, it is assumed at the same time that the limits of what is punishable mainly extend to the field of civil law in its strict sense, and only include of public law the space relating to the conservation of the political community. It was only in the late 18th century that progress was made by the idea that criminal law is part of public law, not civil law, which is due to a large extent to the change of perspective that occurred with the post-Rousseauist conviction that the constitutional space of the sovereign itself admitted positive legislation in the same way as the legal-private sphere of his subjects, in such a way that the field of criminal laws, insofar as they refer to the sanction of all laws whether political or civil ones (cf. Rousseau 1996, Book 2, chap. 12), can no longer be scientifically defined according to the recipient of the sanction (the subject) but rather to the sanctioning body (the state), and

must therefore represent an independent part of general science that concerns the rights of the state. Although the defenders of the Enlightenment always considered the power of the state to be the exclusive subject of the *ius puniendi*, the historical shadow of political absolutism, which conceived laws and sanctions as acts aimed only at the shaping of a legal order among the subjects, marked decisively this enlightened filiation of criminal law with civil law, at least before constitutionalist and democratic thought began to make its presence felt.

The criminalist culture of the Enlightenment, compared with civil culture in its strict sense, was however late to form but fast to develop. It had barely started before the appearance of the book by Cesare Beccaria entitled *Dei delitti e delle pene* (1764), but from this moment on criminal themes, under the influence of this work and the simultaneous public repercussions of the alarming legal cases of the knight De la Barre or of the families Calas and Sirven denounced by Voltaire, monopolised the main legal debates of the period over most of Europe and gave rise to political initiatives of reform and codification in Austria, Italy (Tuscany and Lombardy) and revolutionary France. The following pages first provide a historical balance of the enlightened culture of criminal law, followed by a systematic reconstruction of the main contributions to the concepts of crime and punishment.

#### 3.3.4.1. Basic Doctrinal Lines of Criminalist Culture: A Historical Balance

The historical situation of criminal law in the 18th century is characterised by a particular deterioration of the obscure features of the civil jurisprudence of the *ius commune* (see sec. 3.2.1), determined by the specific weight of canon law and by the customary practices of cruelty and arbitrariness in criminal procedure (see Conrad 1966, 412–4, 429–33; Planitz and Eckhardt 1961, 305–7). From the enlightened perspective, the obscurantism of the contemporary criminal system was the result to a large extent of a religious conception of crime and punishment, and of an absolutely tyrannical forensic practice that was characterised by an inquisitorial procedure designed to make the accused confess by means of the habitual use of torture, together with the harshness and disproportion of the punishments applied, which in each case were at the discretion of the court. Because of this, both the criticism and the new conception of the defenders of the Enlightenment would tend to shed the light of reason in these three main directions: the secularisation of criminal law by means of the exclusive attribution of the *ius puniendi* to the state and the consequent utilitarian vision of punishment, the legalisation or precise establishing of crimes and punishment by means of positive law, and the requirement of proportionality between the punishment and the crime, and at the same time humaneness and leniency in the establishing of the sentences. Although some of these demands originated from very different and even incompatible lines of ideological thought, the criminalist culture of the Enlight-



enment up until the time of the French Revolution is however characterised by the hotchpotch doctrinal composition of the same (see Tarello 1976b, 389-90), which is certainly not free from ambiguities and contradictions at certain points, but this combination of doctrines allowed it to establish a common and effective theoretical front, with even political-practical implications, against inherited legislation; from this front a new theoretical problem emerged, the "criminal problem," and a repertoire of new concepts to answer to it (Tarello 1976b, 383).

The most basic and perhaps most relevant contribution of the enlightened criminalist culture is its secularised conception of criminal law as part of the legal-positive system of the state, disassociated from religious morals and their purposes of spiritual redemption. This strictly mundane vision was doubtless part of the historical process of the political affirmation of the power of the state against the traditional powers of the nobility and the clergy, as it involved the recognition of the exclusive monopoly of the *ius puniendi* on the part of the sovereign authority to the detriment of ecclesiastical and feudal jurisdiction, but also implied a clearer and more precise delimitation of the field of what is punishable, with the consequent redefinition of crime, which is clearly separated from sin, and an understanding of punishment not as the expiation of moral guilt but rather as a means of social usefulness. The technical elaboration of these two aspects of secularisation had an identifiable historical sequence, and in effect led to a progressive reduction of both the extent of what is criminal and of the legitimate capacity for criminalisation.

In effect, the attribution to the state of punitive jurisdiction brought with it a restriction of the field of what is punishable to external conduct that is indeed detrimental regarding relevant legal rights that are recognised by law, to the exclusion of all kinds of actions, intentions, ideas, or personal features only subject to moral or religious evaluation. The technical effort to delimit the scope of offences was therefore historically inseparable from the vindicating process of decriminalisation, firstly from the alleged crimes of conscience (ethics, religion) and subsequently from the alleged crimes of opinion (intellectual, moral, and political). This process was already initiated in the transition period from the 17th to the 18th centuries within the framework of the natural law systems of Pufendorf and above all of Thomasius and Locke, who linked the exclusivity of the punitive competence of the sovereign to the restriction of his field of action to the legal objectives of external security and peace and to his corresponding abstention in matters of internal jurisdiction (religious ideas and beliefs) and even of social morals (*decorum* and public opinion), human environments removed from civil legislation in the name of tolerance and prudence. The questioning of crimes of witchcraft, heresy, and magic by Thomasius therefore represents the preliminary chapter of the criticism of the Enlightenment of legal errors and abuses and of the cruelty and arbitrariness of the inquisitional process conducted half a century later by Voltaire. The main



contribution of the latter in this respect consisted of pointing out the connection between contemporary criminal legislation and religious fanaticism, superstition, and intolerance, and of calling for as a result the decriminalisation of all crimes that were either fanciful or hard to prove, related to the prejudice and dogmas of faith, or disassociated from the legal system of life and property, which are the only assets liable to state sanction. The will of the precise delimitation of what is punishable, reducing crimes in general to external actions detrimental to individual rights (life, freedom, and property) and to collective security, together with the call for the decriminalisation of the old crimes of an ethical, religious, or superstitious nature (magic, heresy, impiety, sorcery, enchantment, etc.) thus became a constant of the criminalist thought of the Enlightenment from the work of Beccaria to the revolutionary debates prior to the French *Code penal* of 25th September 1791, via Condorcet, Filangieri, or Bentham himself (see Prieto-Sanchís 2003, 25–31).

However, the delimitation of the new field of punishable offences could only be sustained in theory and would only be socially acceptable if it were accompanied by the establishment of a coherent right to punish with the progressive political affirmation of the state regarding the feudal and ecclesiastical authorities and with the new mundane idea of the common good that this generated. The critical denial of the moral and religious shaping of criminal offences by Voltaire needed to be complemented and guaranteed by a new systematic theory of criminal law that the French *philosophe* lacked, as did Montesquieu himself, who in *De l'esprit des lois* had gone no further than completing his political-relativist reflections on criminal laws (see Montesquieu 1950, Book 6) with some relevant and unoriginal observations on them in relation to citizens' freedom under moderate governments (Monarchy and Republic) (see *ibid.*, Book 12; cf. Tarello 1976b, 415–58). Modern natural-law thought from the second half of the 17th century (especially that of Pufendorf-Thomasius and Locke) had already based the exclusive *ius puniendi* of the sovereign on social agreement, presenting it as the result of the transfer or common renunciation as from natural power and freedom, and had restricted it to the field of external actions related to civil rights. This approach was still to be seen in *encyclopédiste* circles (see Jaucourt 1966f; D'Alembert 1966), and indeed natural law theory, in the enlightened version of French abstract rationalism of the second half of the 18th century, was to be decisive in the development of the single criminalist theory of the Enlightenment in favour of the decriminalisation of the so-called crimes against property, that of Morelly, Brissot de Warville, and Marat (see Prieto-Sanchís 2003, 111–27). Even for these thinkers, however, the influence of *Dei delitti e delle pene* (1764) by Cesare Beccaria, the work that provided the first systematic basis for criminal law of the Enlightenment, is noticeable in many respects.

The great merit of the Milanese author (and hence his great success) consisted of his having integrated the varied new criminalist ideas within a com-

pletely secular unitary theory based on a conventionalist vision of the state that set the *ius puniendi* as part of social usefulness. Beccaria in effect made use of Rousseau's contractualism in order to present the existence of the state as a specifically human convention (neither divine nor natural), which had only arisen (as in Locke) for the security and defence of the greatest possible individual liberty for all. From this starting point it based the right to punish on the need to defend the political society thus constructed by means of the establishment of punishment, conceived as sensitive stimuli to dissuade any form of aggression (see Beccaria 1984, chap. 1). This utilitarian-public sense of criminal law, far from the old ideas of the retribution of evil or the expiation of guilt, would however be redefined according to the conditions of justice deriving from the civil contract, which legitimised only the use of punitive power restricted as far as possible for social defence, in harmony with the precarious amount of minimal portions of freedom supposedly deposited by individuals with the sovereign nation for their security (cf. *ibid.*, chap. 2). The criminal system is therefore based on this merging of usefulness and justice, which is possible and explainable only from a basis of empiric-individualistic and pessimistic anthropology (individual interest as a spur to action) that Beccaria assumed from Hume and Helvétius, and of the need for the ideas it adopted, as a rational counterweight to the thoughts of Montesquieu. Utilitarianism, with this conviction of the minimum criminal law necessary to preserve the state and collective security, would thus become the predominant criminal theory of the Enlightenment and would reach its highest expression during the transition to the 19th century with the criminalist thinker J. Bentham.

Starting from this systematic basis of Beccaria, the other criminalist demands scattered throughout the literature of the Enlightenment of the middle of the century could be articulated in a coherent theoretical manner, and others could be more precisely defined. As Beccaria himself pointed out, the exclusive monopoly of the *ius puniendi* by the state also meant, in the first place, the demand for the legality of crimes and punishments (see Prieto-Sanchís 2003, 41–7), as it was incumbent only on the legislating sovereign to establish both with clarity and accuracy by means of general laws to the detriment of judges, who were limited at this point to investigating the “truth of the matter” (Beccaria 1984, chap. 3) and to mechanically applying criminal law by perfect syllogism (cf. *ibid.*, chap. 4). Based on the doctrine of the division of powers, the principle of criminal legality also set a limit of rationality that could not be crossed both for the judgement of the legislator, who could neither try nor judge criminal offences (or set punishments as he pleased), and for the judgment of the judges, who were forbidden to make any interpretations in relation to criminal laws. The demand for legality was likewise followed by two other requirements of the culture of the Enlightenment: that of the lack of retroactive effect of criminal laws unfavourable to the accused,

sanctioned by Article 8 of the Declaration of Rights of 1789 (see Rials 1988, 24), and that of equality to the effects of criminal law, which was already accepted by Beccaria (cf. Beccaria 1984, chap. 21), and later contemplated in Article 6 of the aforementioned French Declaration (see Rials 1988, 23). All these demands of the Enlightenment related to the principle of equality could only be put into effect by means of a clear and precise criminal code issued by a single legal entity to replace the existing legal system and thus provide the longed-for citizen conviction and security of not only individual rights, but also of criminal behaviour and its corresponding punishments.

In its turn and secondly, the guiding principle of the minimum criminal laws necessary to defend society made room for the principle of the proportionality between crimes and punishments that had already been called for by Montesquieu in the name of citizens' freedom (cf. Montesquieu 1950, Book 12, chap. 4). The proportionalist argument doubtless aimed to introduce a criterion of rationality to put an end to the arbitrary and unequal determination of punishments, with the application of a measurement scale to weigh up the punishment depending on the corresponding seriousness of the crime. Montesquieu had interpreted this proportionality according to his naturalistic rationalism in terms of the suitability of the punishment to the "special nature of the crime," and in this respect he had gone no further than basically using this criterion to differentiate the state sphere of what is punishable from the moral and religious spheres of sin and social disapproval (see Montesquieu 1950, Book 12, chaps. 4ff.; cf. Tarello 1976b, 450–6). Beccaria goes more deeply into this scientific-naturalistic interpretation of proportionality and expands it in a dual mathematical and utilitarian direction. On the one hand, he understands that proportionalist rationality makes possible the mathematization of criminal law, the introduction of an albeit only probabilistic "political arithmetic" into the repressive state system, as assuming the mechanical-phenomenist nature of social events and criminal acts (as Beccaria does following Newton), the relationship between crimes and punishments can be understood in analogy with the physical law of action and reaction, and the degree of the punishment can then be calculated depending on the appreciable force necessary to counteract the perverse effect of the crime (see Beccaria 1984, chap. 6). This programme of criminal mathematics would not however be developed by Beccaria but by Bentham. But its possible nature, the theoretical budgeting of this calculation of the criminal *ratio* as a proportion of empiric forces, was the scientific-naturalistic conviction of a legality or necessary and unchangeable relationship governing the nature of things, and which Beccaria for his part interprets in anthropological terms as a natural mechanism of the indelible interests and feelings of man (see *ibid.*, chap. 23; cf. chaps. 21 and 22). The stoical-scientist idea of nature as a need thus inspires the proportional rationality between crimes and punishments, except that on the other hand the natural need for things in criminal affairs, and therefore

the very nature of the punishable act, is measured for Beccaria by the seriousness of the damage done to society. This is the utilitarian base to the principle of proportionality. The punishment meted out for the crime is at the same time a socially useful punishment, as it is that using precisely the minimum necessary force in order to preserve social coexistence against future assaults.

Thirdly, this same idea of the minimum necessary sentence in order to preserve public health and peace allowed not only the combining of utilitarianism with proportionalist rationalism but also the linking of both with the humanitarian requirements of the tempering of the sentences and the excessive cruelty of the punitive system (cf. Beccaria 1984, chap. 3), which was perceived in this respect as an extension of barbarity and tyranny that was unworthy of an enlightened time of progress and civilisation regarding ideas and society. The harshness and the disproportion of punishments was certainly considered inhuman, but also unjust and irrational and at the same time pointless, as far from dissuading the most serious crimes, it contributed towards them, encouraging the hardening of social sensitivity and its apathy in the face of cruelty, and at the same time favoured impunity from crime (see Montesquieu 1950, Book 6, chaps. 12–7; Beccaria 1984, chaps. 6 and 27). However, where humanitarian ideology found perhaps its strongest social and political echo was in its denouncing of torture as a habitual practice in contemporary inquisitorial practice. This in effect, on being solely designed to establish the culpability of the accused and not to ascertain the truth of the matter, denied the presumption of his innocence and used torture to force a confession to the crime, which was considered to represent conclusive proof within the established system of legal or appraised evidence. The defenders of the Enlightenment certainly attacked this, putting forward in its place the system of the free legal appreciation of the evidence and a contradictory and public form of trial with a defence and an accusation in which the judge should act as an impartial investigator of the facts (see Prieto-Sanchís 2003, 47–58; cf. Beccaria 1984, chap. 17). In this new form of proceedings the confession is of secondary importance and therefore the use of torture makes no sense. The enlightened criticism of torture, as well as indicating the legal aspect of the violation of the presumption of innocence, had however stressed its inefficiency and probative illegitimacy, its aggravating nature, and its pointless and inhuman cruelty (see Beccaria 1984, chap. 16; Voltaire 1784, 236–7; Filangieri 1780, III: 147ff.). In this respect political legislation and enlightened culture were almost simultaneous. Torture was officially abolished in Sweden (restrictively in 1734 and in general in 1772), in Prussia (in 1740, and in general in 1754 and 1756), and in Austria (in 1776, and in general in 1784) to coincide with the demands of the Enlightenment, which were also channelled by other monographs such as *Über die Abschaffung der Tortur* (1775) by the Austrian Joseph von Sonnenfels, the later *Osservazioni sulla tortura* (1806) by Pietro Verri, already written by 1777, and *Discurso sobre la tortura*

by the Spaniard Juan Pablo Forner, which was not published at the time but which had been written in 1792.

Finally, the minimalist vision of punishment included the characteristic conviction of the Enlightenment of its secondary importance within society. If any punishment, even the necessary minimum, is an “evil with which the sovereign threatens his subjects” (Jaucourt 1967a, 246; cf. Bentham 1802, I: 79), and in consequence the last resort, the *ultima ratio* in order to save social co-existence, the best punitive system will then be not so much one that merely punishes the most serious attacks on society and fundamental legal rights (cf. Beccaria 1984, chap. 6; Condorcet 1975, 431 and 443), but rather one that is completely superfluous. “True jurisprudence is that of preventing crime,” Voltaire had written (Voltaire 1784, 213), and this was pointed out by the new enlightened conception of the criminal system. However, it was precisely for this reason that punishment, no matter how lenient and rational, did not seem to be the most efficient way of eliminating or at least reducing the incidence of criminality. In this respect the defenders of the Enlightenment showed their preference for the non criminal prevention of crime as they considered this to be more efficient: the education of the people, culture and art, good civil legislation, and a fairer share-out of assets so as to prevent poverty and begging, as for most of them the breeding ground for crime was ignorance and defective social organisation. “Do you want to prevent crime?”—asked Diderot in 1774—“Make your subjects happy” (Diderot 1921, 70, 32).

### 3.3.4.2. Concerning New Concepts of Crime and Punishment

The enlightened vision of criminal law brought with it a radical change in the fundamental concepts of crime and punishment, which had to be brought about systematically in accordance with the preceding expounding of the new criminalist culture.

With the exclusive secular attribution of the *ius puniendi* to the state and the consequent restrictive delimitation of the extent of what is punishable to the external actions of social relationships among men, crime lost its religious meaning as sin or as a symptom of moral illness, and was neither a matter of the internal conscience of the individual (ideas, beliefs, intentions) nor of his psychic character, interests, or strictly private acts. On the contrary, it was defined as effective social harm, as an injury to or assault on the political community and its empirically verifiable system of legal security (cf. Beccaria 1984, chap. 6 and 7; Condorcet 1975, 443; Bentham 1802, I: 98ff.). Crime is therefore determined in accordance with property belonging to others or public property that is objectively damaged, and not by the subjective intention of the agent or its personality, not even in relation to alleged internal evil linked to the idea of the moral dignity of man (Kant 1914, 333). The formalist or strictly legal nature of its objective establishment also corresponds to this

empirical-objectivist and social-utilitarian concept. There are no criminal acts before these are determined as such by law, since as Bentham affirms in his most positivist definition, “crime is any act forbidden by the legislator” (Bentham 1802, I: 89; II: 240).

The social-utilitarian criterion also serves as a basis for the new typology or rational classification of crimes, which obviously excludes the so-called crimes of conscience, of private morals, and of strictly private negligence. Therefore, depending on the degree of damage caused to public property, Beccaria establishes a “scale of disorders” that ranges from the most serious, that of the immediate destruction of society, to the “smallest injustice to private members of it” (Beccaria 1984, chap. 6). This takes the form of a tripartite division that is quite common in the subsequent culture of the Enlightenment: crimes against political society (or of lese-majesty), crimes against the legal security of private persons (life, property, honour), and crimes against law and order (disturbances of the peace and the police) (see *ibid.*, chap. 8). With the basic criminal types of this classification having been assumed with minimal modifications, in the late 18th century however a new alternative bipartite division began to prevail, which distinguished between public offences (against the state, law and order, the security forces..., or social customs and religion) and private offences (against people, property, and against the reputation of private persons), depending on whether the damage affected general interests or only individual interests (see Brissot de Warville 1781, 128–31; Bentham 1802, II: 240–6). Special attention should be paid to the questioning of crimes against private property or at least the demand for the decriminalisation of robbery out of natural necessity as proposed by the French equalitarian pre-revolutionary natural-law tendency, based on that *ex pacto sociale* the state must guarantee all natural rights in the form of civil rights, including the natural right to possess the minimum necessary proportional share of property in order to ensure the right to live, which is the most basic and fundamental of all (see Marat 1790, Part I, chap. 3; Brissot de Warville 1966, sec. 5, 108–9).

The exclusive state competence of the *ius puniendi* also meant that the concept of punishment became secularised and defined itself depending on public property and general use. On the one hand, in principle the retributive idea of punishment, whether as penitence out of guilt or as redress for the damage caused, was abandoned because it was considered that punishment has to seek “some future good” instead of cruelly inflicting suffering on someone without any benefit, only because of his past wrongdoing that cannot be remedied (Jaucourt 1967a, 247). On the one hand, this utilitarian expectation is included in the future defence and conservation of this new common secular property that is the state itself, as an institution established for the social peace and legal security of its citizens (*ibid.*; Beccaria 1984, chap. 2). Punishment therefore, although it certainly represents harm done to the wrongdoer, a “political sanction” as established by law (Bentham 1802, I: 46, 87–9), is



however conceived only as a means of defending the future of society, counteracting by intimidation the force of attraction of crime with an appreciable negative force or a stronger repulsion. For this reason Beccaria refers to punishments as “political obstacles” set against criminal acts to avoid their repetition in the future (Beccaria 1984, chap. 6). The key to the new social-utilitarian concept thus lies in the aim pursued by the punishment: the prevention of crime within society (general prevention) and of a second offence by the criminal (particular prevention). Beccaria declares that “the aim is no other than preventing the criminal from causing more damage to his fellow citizens and discouraging others from committing similar offences” (Beccaria 1984, chap. 12, my translation; cf. Bentham 1802, II: 292). In order to achieve this objective, the punishment has to intimidate men as efficiently as possible and must be at the same time as painless as possible for the criminal, in accordance with the contractual-minimalist assumption according to which individuals, on forming part of civil society, have only wished to submit each other to as little harm as possible (see Beccaria 1984, chap. 19; cf. chap. 12). However, punitive efficiency depends on the satisfaction of various demands in the establishing of punishment: on the one hand, of the principles of proportionality and legality, which jointly make it possible to prevent the most serious and harmful crimes to the state, applying to them the harshest punishments with the unavoidable certainty of the law; and on the other hand, of the constancy of the association between crime and punishment in the human mind, which is only guaranteed for the duration and frequency of the intimidating impression. At this point the requirement for efficiency appears to come together with that of humanity to recommend punitive moderation, as the cruelty and harshness of the punishments, as well as being inhuman, only causes momentary intimidation; it is an example of barbarity within society and eventually generates apathy, impunity, and further social violence (see Beccaria 1984, chap. 27).

The graded type of punishment according to the seriousness of the crimes that is allegedly the result of the combination of these demands is not however totally coherent with the sole preventive aim that should inspire them. In effect, although prevention is the primary objective, it was not the only one contemplated by the culture of the Enlightenment. Together with the moral purpose of the correction of the criminal, which had still not been discarded, the retributive aspect of the compensation of the damage to the private person (a fine or compensation) is brought to the fore, as it is in particular in the case of society as a whole (public works) (see Prieto-Sanchís 2003, 35). The insistence on forced labour as a punishment (both temporarily and for life) at the service of the state even for crimes against property and frequently as a substitute for capital punishment (see Beccaria 1984; chap. 22; cf. Voltaire 1784, 232ff.), seems to indicate that the principle of proportionality did not serve in this case a minimum criminal utilitarianism, which would be preven-



tive, but rather a maximum criminal utilitarianism that considered the public profitability of the punishments (see Foucault 1975, 95ff.). The main argument wielded by the defenders of the Enlightenment in their preference for sentences to works of public easement instead of capital punishment was certainly that of the greater preventive efficiency of the permanently terrifying image of “a man converted into a beast of burden and deprived of his liberty,” in contrast to the inhuman but perishable spectacle of the death of the criminal (Beccaria 1984, chap. 28; cf. Marat 1790, Part I, chap. 6; Brissot de Warville 1781, 140ff.). This argument however contradicts the minimalist and philanthropic requirement for the least possible physical suffering of the wrongdoer, but is compatible with the retributive principle of compensating the offences caused to society with physical hardship (Beccaria 1984, chap. 28), a maximum utilitarian reason also used by those in favour of abolishing the death penalty or of restricting it to strictly political crimes (see Prieto-Sanchís 2003, chap. 6). The extolling of the sentence of forced labour thus revealed that when the defenders of the Enlightenment proposed the rationalisation of punishment for utilitarian reasons they did not necessarily think of greater leniency.

## Chapter 4

# THE MANY FACES OF THE CODIFICATION OF LAW IN MODERN CONTINENTAL EUROPE

*by Damiano Canale*

### 4.1. Codes and Codifications: An Overview

The legal codes of the modern age served two main functions in civil-law countries.

On the one hand, they were the fundamental tool of the trade for legal professionals: Judges, lawyers, public servants, and citizens regarded them as the main source for the cognition of law and as the basic framework of the legal system. This has sometimes led legal scholars to assume, incautiously, that “civil law stands for codification” (Caenegem 1987, 39), even though codes have now lost their central position in contemporary legal systems and no longer characterize the civil-law world (Merryman and Perez-Perdomo 2007, 152ff.; Irti 1979; see vol. 1, 161).

On the other hand, codes embodied a definite conception of the nature of law and the social function of regulation by law. This is a threefold conception whereby (a) the law consists of a set of general prescriptive sentences forming part of a legal system; (b) a prescriptive sentence is law not by virtue of its content but by virtue of its source, in that the authority of law is identified with the authority of the state’s legislative power; and (c) the aim of the law is to guarantee liberty and equality, considered to be necessary conditions of any genuine individual good and of any social justice and welfare.

Once the first modern codifications were completed in the second half of the 18th century this conception began to spread across Europe, and it deeply modified legal methodology and legal knowledge, as well as the way in which officials conceived their own function within the state. This change did not take place all at once, however. It was the result of a long process that had started at the same time as had the modern natural-law tradition (see chap. 2 of this volume). Moreover, legal scholarship is divided on the course of this change. What conceptual shifts made it possible to understand the law as a codified system of legal provisions, how this assumption modified the general understanding of law, and what its consequences were for the European path to the constitutional state and democracy—all these are still controversial questions.

The ambiguity of the term “code of law” in the “age of codification”—understood here as the period running from the enactment of the Bavarian Civil Code (1756) to the enactment of the Austrian General Civil Code (1811), a period that will be the focus of this chapter—is a first clue to the historical

reasons that make modern codification an open question in legal history and legal philosophy. As Diderot and D'Alambert observed in their *Encyclopédie*, the word *code* "means a general presentation of laws; but this name is given to many sorts of presentations that are very different from one another" (Diderot and D'Alambert 1779, III, 570). According to the *Encyclopédie*, this term may refer to (1) collections of Roman law (the Gregorian Code, the Theodosian Code, the Justinianian Code); (2) collections and anthologies of Roman ecclesiastical jurisprudence (the *canons*) and other Church rules and principles (the *Codex canonicum*, the *Codex Gratianis*, etc.); (3) collections of old and new laws, regulations, writs, edicts, constitutions, ordinances, etc., collected either in a single volume or in a single collection of volumes (the *Code Néron*, the *Corpus Constitutionum Marchicarum*, etc.); (4) collections of statutory provisions that govern an area of the law of the land (the Criminal Code, the Merchant Code, the Civil Code, etc.); (5) treaties of law that include jurisprudential maxims, precedents, regulations, general provisions, principles and other sorts of rules that are relevant to the corresponding legal subject (the *Code de cures*, the *Code des chasses*, etc.).

The boundless variety of codes that were still in effect at the end of the 18th century have often stymied legal scholars looking for a definition of the term *code* in the modern age. Legal scholars traditionally draw in this regard a distinction between *consolidation* and *codification*. Consolidations group existing legal material so as to make it more accessible to professionals; codes strictly understood are bodies of legal rules enforced by authority of the state to replace any preexisting law (Viora 1969; Tallon 1979; Cavanna 1982; Wesenberg and Wesener 1985). At the same time, codes may have either *primary* or *subsidiary* force of law: They include either the law of the land or the law that legal professionals have to apply in only those cases where the law of the land gives no clear answer, under the principle that *ius specialis* prevails on *ius generalis*. Both these classifications, however, are surrounded by controversy and show that no definition per *genus et differentiam* can be assigned to our subject. Codes in a strict sense, such as the French Civil Code of 1804, would typically include preexisting legal material but would do so within a new framework; and subsidiary codes, such as the Prussian General Code of 1794, were in fact promulgated so that they could play a primary role in their respective legal systems, despite their subsidiary status.

It may therefore serve our purposes better if we establish a functional classification of codes of law. From the 18th century to the present day, codes have been designed to present different legal texts and simplify their use, or they have been designed to systematize legal materials so that all legal prescriptions are rationally interconnected, or again they have been designed to set up a new legal system on the basis of a fundamental political decision, so as to support the system's normative authority and the state's cohesion. Modern civil-law codes typically serve *all* of these purposes. On the contrary,

premodern codes serve only the first one, and common-law codes merely aim at simplifying legal information or at rationalizing an area of law so as to reduce judicial uncertainty (Vogel 2004; Atiyah and Summers 1987).

## 4.2. Three Discursive Levels

Apart from these definitional problems, it is useful to look at the different discursive levels on which legal codification has traditionally been discussed by legal scholars, since this will help us better clarify the concept of a code in modern legal history.

In particular, legal codification can be considered from the point of view of (1) legislative technique, (2) legal theory, and (3) legal philosophy. It is worth examining these discursive levels separately, even though each of them is closely connected with the others. In fact, if we consider them as a whole, they give us the *traditional* view of the codification of law in European legal culture, that will come under criticism in this chapter. It is a view still popular among legal scholars as well as among legal practitioners. In particular, legal scholars use this view to emphasize the contrast supposed to exist between common-law systems and civil-law systems, as well as between alternative models on which to base legal training and the administration of justice. Legal practitioners, for their part, typically use it not to describe the structure of statutory legal systems but to justify a solution to a case and to legitimize legal adjudication.

### 4.2.1. Legislative Technique

As far as discourse on the level of legislative technique is concerned, the age of codification was inspired by three main principles that in the second half of the 18th century were widely upheld by philosophers, legal experts, publicists, civil servants, and “enlightened” sovereigns. Firstly, in keeping with an ancient *topos* invoked in the Renaissance by T. More, F. Bacon, and T. Campanella, the law ought to be *simple*: It needs to consist of only a few rules—clear, public, and written—that can be known and understood not only by legal experts but also by its final addressees. Secondly, the law ought to be *coherent*: It must not admit of alternative solutions to a case and must therefore exclude any legal contradiction. Thirdly, the law ought to be *complete*: It must regulate *all* of the cases the courts may be asked to solve and must therefore do away with the need to seek out further sources of law.

The code was supposed to be the best means by which to achieve these principles, and so it was supposed to greatly simplify the legal system, guarantee better protection of individual rights, make the outcome of a trial predictable, and subject every person to ordinary law in force within a jurisdiction. The main argument in favour of codification revolved, in particular, around

the problem of the sources of law, a problem that, under the ancien régime, affected both regulation by law and the activity of legal professionals. As concerns the first aspect, the law consisted of a progressive and stratified accumulation of different types of rules drawn from local customs, medieval constitutions, Roman law, canon law, imperial law, royal edicts and ordinances, precedents, expert legal advice, and so on. This variety of sources made it problematic to determine their content and mutual relations, and hence their applicability to the case, which depended on tradition, authority, and territory, and not on deductive reasoning or on any hierarchical relations between legal rules. The criteria for finding the law applicable to the case were not generally fixed: They depended on the subject of the case, the personal status of the parties, the judicial authority that had been asked to decide, and the territory where the case occurred or where the court was located (cf. chap. 3 of this volume). As concerns the second aspect, the selection and interpretation of the rules regulating the present case, particularly under Roman law, required forms of nondeductive reasoning that strictly depended on the kind of court, on judicial and doctrinal trends, and on the education of the judges. If one considers, in addition, the lack of unified procedural rules and the central organization of the judiciary (Mohnhaupt 2000; Picardi and Giuliani 1985; Nörr 1976), it follows that the judicial solution of the case “is often felt by its addressees as an arbitrary one” (Svarež 1960, 599). Franz von Zeiller, the drafter of the Austrian Civil Code of 1811, paradigmatically argued that

If one allows the state’s national law to coexist with a foreign law, an old one that in many cases can no longer be applied to current legal matters; if one allows huge amounts of laws to endlessly accumulate, in such a way that even legal experts cannot fully know the law; if judges refer to their own philosophical views in lieu of legal provisions, because they do not know all such provisions or because none of these provisions apply any longer to the case at hand; if a single court and the legal experts confer authority on contradictory statutes, customs, adjudications, doctrinal opinions, and prescriptions [...], then conflict among different laws, doctrinal opinions, and adjudications will enormously increase. (Zeiller 1801, 61; my translation)

A codified legal system was supposed to overcome all these problems by introducing a new way of drafting and organizing legislative provisions, which represented a turning point in the method of regulation by law.

#### 4.2.2. *Legal Theory*

Where discourse on the level of legal theory is concerned—that is, where the effort is to single out the distinctive features of legal rules, of legal systems, and of legal interpretation—the modern idea of a code is no less revolutionary. According to this idea, the coming into force of a code entails the abrogation of all preexisting law: Codified legal prescriptions become the only source of valid law within the state’s territory. In this way, the terms *lex*,

*Gesetz*, *loi*, and *legge* (a law or statute) began to merely denote a written legal provision formulated and enforced through the state's legislative authority, in contrast to natural law, Roman law, customary law, precedent, the opinions of legal experts, and so on, which were no longer formally considered autonomous sources of law. They could still be indirectly considered sources of legal obligation within the State, but only if a statute provided that, under particular circumstances, they should be recognized as rules having binding force, or only if the legislator enacted legislative provisions having the same content as a corresponding nonlegislative provision.

This explains why, in codified legal systems, *all* law is originally considered a system of commands enacted by the sovereign. This gives the sovereign strict control of all legal content and form: Existing legal materials continue as law only if the sovereign *wills* that they still be law. But even where existing materials are so recognized—and hence even when the law's normative *content* seems not to change—such a recognition is not neutral. Existing legal materials assume the *form* of statutory imperatives, and so the various kinds of guidance by law that characterized the *ancien régime* were drastically reformed. Analogical reasoning, equity (understood as justice or fair dealing), authoritative judicial principles, precedents, jurisprudential maxims, doctrinal opinions, and the like, came to be used as *exceptions* in solving a case. The law was understood to consist only of homogeneous normative entities, i.e., only of prescriptive sentences, and this enables it to be structured as a *legal system*.

This new conception of law and the legal system had important consequences for legal interpretation, too. Legal interpretation was still considered a source of law in 18th-century continental Europe. On the one hand, precedents were assumed by the judiciary to have the force of law (Mohnhaupt 1980, 168). In particular, the courts' constant flow of decisions could acquire a *direct* binding force as customary law, or it would acquire an *indirect* binding force through legal reasoning, in cases where the judge applied the argument from judicial authority in finding the legal source pertinent to the case. On the other hand, the plurality and indeterminacy of legal sources opened the door to a high degree of discretion in judicial activity, giving rise to the *topos* of "judicial despotism" which characterized Europe's philosophical and political literature in the late 18th century (see chap. 3 of this volume).

The codification of law was considered the means to best suited to overcome these issues. According to the modern codes of the 18th and 19th centuries, precedent has no binding force and so cannot be considered a source of law. Moreover, modern codes would include a detailed regulation of legal interpretation: They established the way in which to determine their own normative contents. In this way, judicial discretion in legal interpretation was banned by codes. The codes required the judge to interpret codified legal provisions according to their wording understood as the plain expression of the legislator's intent: The judge must *declare* the law, i.e., he is simply re-

quired to ascertain its content. In cases of legal indeterminacy, the codes allowed no one other than the legislator to clarify the legislator's own will, even though courts were still allowed to use analogical reasoning to fill legal gaps. Therefore, the codes seemed to bring into practice two further theoretical *topoi* of the Legal Enlightenment (see chap. 3 of this volume): In the manner of Montesquieu, they reduced the judge to the *bouche de la loi*, that is, to a public official who was strictly obligated to declare the law without interpreting it; and in the manner of Beccaria, they conceived adjudication as the result of a “perfect syllogism” governed by the rules of deductive reasoning. It should be noted, however, that the European science of legislation in the 18th century was perfectly aware that adjudication could not be reduced to deductive reasoning and that modern codification could not eradicate judicial discretion (Albrecht 2005; Théry 2004; Mohnhaupt 1980). In fact, the codification of all areas of law led to an *increased* discretionary power of the judiciary, since general provisions of code law would often replace more detailed forms of regulation. The regulation of legal interpretation introduced by the modern codes simply was aimed at increasing political control on the judiciary by incorporating it in the government of the State.

#### 4.2.3. *Legal Philosophy*

Where discourse on the level of legal philosophy is concerned—that is, where the problem is to investigate the nature of law and of legal authority—the age of codification is seen as determining the transition from theory to practice in modern natural law. This thesis can be reduced to three main claims as follows.

(1) The three major codes of this era—the Prussian General Code (ALR, 1794), the French Civil Code (or Code Civil, 1804), and the Austrian Civil Code (ABGB, 1811)—positivized the principles of liberty and equality, forming the basis of modern natural law, and drew from them both the rules governing the social and economic activities of citizens.

(2) In this sense, the codification of the natural-law principles at the beginning of the 19th century marked the first step toward the liberal state and toward modern constitutionalism in Europe. Once transformed into a set of positive legal prescriptions, the principles of liberty and equality would govern not only the behaviour of citizens but also the activity of officials and public administrators in general, who would themselves be subject to the law. The next step in this process was to make law subject to legislative power: Once the positive law is understood to bind not only its final addressees but also the judiciary and the public administration, the principles of natural law assume the status of *fundamental rights*, ones that citizens can claim against the state, too. This would set the political system on the road to democracy. On the one hand, in order for citizens to be free and equal, there must be general rules that guide them, and these must be clear, coherent, and public. On the other



hand, these rules can ensure freedom and equality only if their content is determined by the citizens themselves, that is, only if they form part of a democratic political system. The codification of law, then, can be considered a fundamental phase in the historical process that led Europe to constitutionalism, democracy, and the rule of law.

(3) The codification phase was a process in its own turn, involving successive evolutionary stages embodied in the three codes previously considered. Thus, on this view, the ALR, the Code Civil, and the ABGB mark the three main stages in the evolution of the European legal systems from the sources pluralism of the ancien régime to the legislative monism of the 19th century (Conrad 1961). The first stage is represented, on this view, by the Prussian General Code, which wrought the sources pluralism of the Brandenburg-Prussian territories into a unified legal system wholly dependent on the sovereign's will. But this code did not introduce, as the basis of regulation by law, the concept of a "unified legal personality," understood as the basis on which each individual in the state is equally capable of exercising rights and being bound by duties. Instead, the code remained anchored to the personal differences characterizing the rank society of the ancien régime. The second stage would then be represented by the French Civil Code, which introduced for the first time the legal device of a unified legal personality. In this way, the French codification radically simplified the structure of the legal system, thereby making possible the development of a modern civil society based on individual autonomy. This code, however, established the primacy of codified legal directives not only over all other legal sources but also over individual rights, which would be legally binding only insofar as they were acknowledged by the legislator through the code. The third and final stage is represented by the Austrian General Civil Code (1811), which recognized in principle the primacy of individual rights over codified legal prescriptions, thus recognizing the existence of a private legal sphere that cannot be violated by the state or by any other person.

### 4.3. Natural Law and Codification

This interpretation of the age of codification has been very influential and is worth examining here in greater detail. To begin with, one needs to consider in what sense the code was regarded, in late 18th-century Europe, as a way to positivize natural law and turn its principles into directives by which to guide behaviour in society. In fact, the relation between natural law and legislation was the subject of much controversy in the age of codification and can be broken down into three main models, corresponding to alternative conceptions of code law in general.

According to the first model, which one might call the *methodological* model, the legal code was a specification of natural law: By deductive reason-

ing, it drew from natural law the prescriptive sentences guiding or regulating the behaviour of individuals within the state. From this point of view, codified prescriptions are accordingly *necessary* and *eternal*: Their normative content does not depend on territory, nation, culture, or human will but only on the principles of natural law and the rules of deductive inference. But this kind of code is not created to guide human conduct in a strict sense: As Franz von Zeiller pointed out, its nature is “rational” or “philosophical” in the sense that it contains rules of rationality applied to legislation (Zeiller 1810–1811, 3). To put it otherwise, it shows how human conduct ought to be guided by law from a *methodological* point of view, by stating (a) how legal provisions must be ordered within a legal system, (b) which legal provisions are incompatible with one another, and (c) which legal provisions are no longer applicable (in that they no longer apply to any present case). The methodological code therefore serves to make *more effective* the existing legal order: It is compatible with any normative content and any articulation of political power and does not require any political reform. In this sense, it is not surprising that its principles are necessary and eternal: Just like Leibniz’s principles of natural law, “they merely are conditionals, and thus do not tell us what [should be] the case but what necessarily follows from the fact that something [should be] the case” (Leibniz 1971, 460).

The second model, which one might call the *revolutionary* model, serves not a methodological purpose but a political one. It considers the legal code as a means to return to the purity of the natural order—which has since been corrupted by human practices, conventions, and institutions—or as a means to “correct” nature itself, so as to make up for human weakness and improve natural dispositions by way of positive law. The code is seen here as a means to effect a palingenesis of law and society, or a new foundation of the existing legal and social order so as to achieve liberty and equality for all citizens. If this is so, then code law can bring radical *change* to the social and institutional order: It entails a political revolution and requires a specific articulation of political powers. Its prescriptions are still eternal, though, because they are equally deduced by sound reasoning from the axioms of natural law.

The third model, which one might call the *reform* model, assumes that the legal code is justified by natural law, which authorizes the sovereign to enact legal provisions and to consider them the only source of law within the state. To put it another way, natural law specifies what reasons underlie legal codification but does not establish the content of positive law, which depends on contingent factors such as the sovereign’s will and the needs of government. These factors are not a subject of natural law, which is the science of universal and eternal laws, but of political prudence, which is the science of particular and contingent government through the law. This means that a codified legal provision can occasionally diverge from a prescription of natural law, or can even be in conflict with it, if this prescription is seen as a necessary condition

of peace, security, and welfare. But even in the case of conflict between positive law and natural law, positive law nevertheless accomplishes the aim of natural law since it consolidates the State and its legal order, which are necessary conditions of peace, security, and welfare.

It follows from these remarks that the codification of law in the modern age can serve different purposes and can produce different consequences for law and society. The code can be viewed as a model of legislation in which legal provisions are the conclusions of chains of deductive inferences, carried out according to a logical design determined by the principles of natural law. But codes can also be used to achieve a new political and social order by removing all constraints on the legislator's will and regulating the behaviour of both officials and citizens through positive law. Moreover, codes can be used to reform society and institutions so as to avoid any political change that implies democracy, fundamental rights, or the limitation of political power. In brief, codes play quite different roles in the modern age and therefore cannot be reduced to a single abstract model or be considered as expressions of a single historical trend.

The standard view of the age of codification presented in Section 4.2 disregards the many faces of the modern codification of law, meaning the many functions that codes can serve within society and the state, as well as the different ways the codes were set up and used in the civil-law countries. This view really originates in German historicism and finds its most important source in Max Weber's sociology of law. According to Weber, the legal codification that took place between the 18th and 19th centuries marked the passage from ancient to modern law in continental Europe. It was precisely in this period that the need to *unify*, *generalize*, and *systematize* the law emerged in society, and the supremacy attributed to codified legal prescriptions assured a progress otherwise unattainable in the direction of the calculability and predictability of the legal consequences of individual conduct (Weber 1999). From this point of view, modern legal codifications made a perfect fit with Weber's ideal types of *formal* and *material rationalization* of law, occupying a specific position in the evolution of law and society from the ancien régime to the rule of law. It must be noticed, however, that Weber's concepts of rationality, generality, and system do not refer here to any historical evidence: They are abstract "points of view" that social scientists frame on the basis of their interests and conceptual schemes. In fact, it is only way of such cognitive "typifications" that historical evidence can be reduced to a sequence of causal connections, and can thereby make historical *sense*. As Weber points out, "history need only provide a causal explanation of those 'elements' and 'aspects' of an event that, from a certain point of view, have a 'universal meaning' and hence a historical interest" (Weber 1982, 154; my translation). A phenomenon of the past, such as the modern codification of law, will accordingly take on historical sense only if it has "universal meaning," that is, if it can be

conceived as the “adequate cause” of our present beliefs, desires, values, and conceptual schemes. But on this conception of historical knowledge, we wind up ascribing to the age of codification the very sense that justifies our present idea of law and legal order, while any source or document from the past that fails to reflect our present view of what law is and what it ought to be will lose all “historical interest” and be consigned to oblivion. In short, on this methodological approach to the history of law, history itself runs the risk of becoming a means by which to justify the present and misconceive or otherwise be ignorant of the past.

#### 4.4. An Alternative Framework

##### 4.4.1. *Three Theses*

In the pages that follow, we will examine an alternative account of the age of codification that questions the view just outlined. This alternative account is aimed at showing that the traditional view is flawed because it fails to take adequately into consideration some peculiar features of the three main codes of the age of codification, especially as concerns the formal structure and normative contents of these codes.

The alternative account presented here is based on three main theses:

(1) Modern natural-law theory provided the conceptual basis of the modern state and a set of powerful arguments by which to legitimize it. The thought of philosophers such as Thomas Hobbes, John Locke, Jean-Jacques Rousseau, and Immanuel Kant developed some basic conceptual elements—natural freedom, the state of nature, natural rights, the social contract, civil society—offering a theoretical framework for social reality: These philosophers designed a new social and political order based on the nature of individual human beings. If one disregards the different ways in which the different theories of natural law frame the form, prerogatives, and ends of political power, it is easy to show that each such theories conceive the state as a uniform and homogeneous space in which each person is formally equal to the others and is allowed to pursue her or his aims and interests freely, under the protection of the law of the state. In this sense, natural-law theory provided a theoretical *justification* for the historical process under which territories were unified, governments centralized, law systematized, and all individuals within the state made subject to the sovereign’s political power. This process was regarded by natural-law theory as a necessary condition of peace, security, and freedom, and hence as the only way by which to fully realize human nature within the space of social community. Historically, where continental Europe is concerned, this process came to an end in the 18th century with the rise of the nation-states, and its completion coincided with the eclipse of natural law, which lost its historical functions in the wake of legal codifications. On the

discursive level of legal science and legal philosophy, natural-law theory faded into the background and did not regain any relevant place in philosophical debate until a century later (see Riley, Volume 10 of this Treatise). Their place was occupied by the philosophy of positive law, which focused exclusively on the law enacted by the state, along with the structure, function, and scope of such law, and took this to be a subject of scientific investigation (see chap. 5 of this volume). Therefore, the passage from natural-law theory to the rule of law and constitutionalism in Europe cannot be described as a linear process, converting theory directly into practice. Moreover, the codification of law cannot be described as a merely casual step within this process.

(2) The state's smooth and homogeneous space designed by natural-law theories was merely *virtual*. It contrasted with the juridical and political pluralism of the ancien régime by presenting itself as capable of eradicating insecurity, oppression, and injustice. But the institution of the state brought about the formal dismantlement of the complex network of social organizations, legal sources, levels of government, and mutual political obligations that characterized the ancient political community and its participants. As Robert von Mohl pointed out, the principle of the state designed by natural-law theory

isolates each member of the state, places this person before the state's law and power without any organic connection with those who have the same rights and interests, eliminates every corporative political institution, and promotes only the egoistic behaviour of individuals together with the omnipotent functioning of the state's machine. (Mohl 1840, 26; my translation)

In other words, once reduced to a complex of free individuals who can pursue their own interest and good, the state's artificial space turns out to be "empty" as to the legal regulation of individual conduct. The members of the state are simply *private individuals*, that is, subjects *deprived* of their natural prerogatives, mutual relations, and corporative rights so as to enable them to fully develop their capacities and attitudes within the free space of the state. Therefore, the forms of familial relations, inheritance, property, contract, civil wrongs, and so on, have to be *built*, step by step, from top to bottom. In short, once the state has been established, it has to build society, and codified positive law is the best means by which to accomplish this task.

(3) The Prussian General Code, the French Civil Code, and the Austrian General Civil Code can be viewed as three *alternative* projects of civil society within the political and institutional frame of the modern state. They embody, in legal form, three different *logics of socialization* through which the state law aims to regulate those aspects of individual life that are relevant for the cohesion, government, and welfare of the political community. Modern codes *require* individuals to organize their private sphere according to what is considered to be the common interest, since this is a necessary condition of individual well-being.

The result is that the three codes in question cannot be framed as three progressive steps in a unitary historical process toward legal rationalization, a process that explains, or rather justifies, the formation of contemporary constitutional legal systems. Instead, the three codes outline three alternative models of *material constitution* in a broad sense, that is, three models on which to frame a state's concrete social and institutional order—and they stood “in competition” with each other in the European context. The result of this competition was that these models were not all received in legal theory and legal philosophy in the same way, and their influence on law and society was likewise markedly different. The Prussian General Code was considered by its commentators to be obsolete from its birth: It found a very limited field of application and was soon radically revised. The Austrian General Civil Code drew more interest from European legal culture and remained in force for more than a century in the Austrian territories, even though it was still considered too bound up with the past. The French Civil Code, by contrast, was widespread throughout Europe: It was considered the most perfect product of the age of codification, became the model of all codified legal systems and remains so up to the present day.

These alternative models of material constitution will be the subject of analysis in the following sections. The purpose of this analysis will be to compare and contrast the three main products of the age of codification by looking at their philosophical backgrounds, conceptual frameworks, and normative contents and bringing out both similarities and differences. But before proceeding with such a comparative analysis, it will be good to devote a few words to the relation between the codification of law and the birth of civil society as a distinct sphere from the state, which is the groundwork being laid this chapter.

#### 4.4.2. *State, Civil Society, and Codification*

The theses presented earlier might be objected to by pointing out that in the legal and political literature of the 18th centuries, no distinction had yet been drawn between state and society. In fact, until the end of the 18th century, the words *civitas*, *res publica*, *society*, *civil society*, and *state* were typically used as synonyms, referring to the political community in general, in the wake of a tradition that can be traced back to the Aristotelian *politike koinonia*. According to this tradition, the forms of human aggregation, such as marriage, family, and civil society, differ in extension and not in nature, on the basis of an indissoluble continuity among the ethical, economical, legal, and political aspects of social life, that is, among individual duties, material production, mutual obligation, and government (Brunner 1968; Conze 1962; Riedel 1975). Rules that applied to morality would also apply to economics and politics, precisely because these domains differed in extension and not in substance. By the



same token, legal obligation was not identified with an external constraint on action but was instead considered an internal feature of human life, providing guidance according to goodness and to the virtue of justice. It follows from this that the many areas of social behaviour were both hierarchically organized, according to their extension, and mutually connected, because each was seen as the natural development of the antecedent, or as its “final cause,” in Aristotelian terms.

The first distinction—in philosophy—between civil society and the state on the stage is usually considered to be Hegel’s *Philosophy of Right*, even though civil society is presented by Hegel not as an independent entity set in contrast to the state, but as a process through which individuals recognize their common belonging to the totality of the ethical spirit, which becomes effective *through* the state (Hegel 1991, §§ 182–256; Hegel 1990a, §§ 523–34). This distinction establishes itself in the 19th century with the idea of a sphere of private autonomy that is free from any interference of the state, an idea that characterizes modern constitutionalism and the dualism of private and public law as well as between “Sciences of society” and “Sciences of the State” (Chignola 2004, 191ff.).

To be sure, a distinction between civil society and the state can already be found in the political and legal literature of the 18th century, but it differs in content from its subsequent liberal version. August Ludwig Schlözer, for instance, distinguished civil society from the state by tying this distinction to Samuel Pufendorf’s theory of the social contract, which attempts to mitigate Hobbesian contractarianism by subjecting the sovereign to a contractual obligation to pursue the social welfare (Pufendorf 1991, II, VI, § 7; Pufendorf 1934, VII, II, 7–8). It must be noticed, however, that this limitation was only meant to model the sovereign’s moral and political duties: It did not derive from any “perfect” obligation—from any strict, or *legal*, obligation, an obligation that carries *binding* force (*ius perfectum*)—nor did it imply any right of resistance, because such a right would be inconsistent with sovereignty (Duso 2006a). Schlözer used Pufendorf’s contractual scheme for the same purpose, that is, to justify an imperfect legal limitation on political power, but he introduced two innovations. The first innovation consists in setting up a lexical ordering: At a first contractual stage, individuals group together to form the *civil society* (*societas civilis oder civitas; pactum unionis virium*), and only at a second contractual stage do they form the *state* (*Imperium; societas civilis cum imperium*) (Schlözer 1970; Scattola 1994). The second innovation consists in a way of conceptualizing these stages. Which is to say that Schlözer *historicizes* Pufendorf’s contractual stages, considering them as successive phases in human history, along the lines of Voltaire’s and Montesquieu’s historical-anthropological approach to natural law, an approach that was widespread in legal and political literature throughout the second half of the 18th century (Achenwald and Putter 1995, § 669; Schmauss 1755; Darjes 1748, § 659).



However, civil society and the state are not yet regarded here as independent entities: Once the people decide to submit to a sovereign, civil society disappears, and only the state remains.

Carl Gottlieb Svarez, one of the drafters of the Prussian General Code of 1794, draws on this conceptual framework and points out that

a union between human beings living together can be of many sorts [...]. If these human beings group together in order to defend their inner and external security, then the name of such a people is *civil society*. If this society transfers to a superior or regent the use of its unified forces in order to accomplish its common ends, then it is called *State*. Not all peoples build up a State, and there are people that do not live in a civil society and do not have any chief. (Svarez 1960, 141)

Svarez's position is characterized by the fact that civil society does not disappear once the state is founded: It remains in place and constitutes the form of individuals' organization *within* the state. In Svarez's description, the relation between the state and civil society is still strongly underdetermined, in that nothing is said about this relation. And while the two elements on either end of it (the state on the one hand, society on the other) are closely integrated by way of the function and organization they each have, the latter element (society) is now taken to have a conceptual autonomy from the former (the state). The expression *civil society* refers to a space of free integration and organization *within* the state, and yet the way in such integration and organization ought to be guided *by* the state remains an open question. In other words, the disjunction between civil society and the state reveals the tension between the two faces of the modern concept of liberty elaborated by natural-law theory. On the one hand, individuals are free to pursue their interests within the state and to organize themselves with others to accomplish common tasks; on the other hand, the state has to guarantee and support individual freedom in order to make social organizations durable and steady. But where to draw the line between protection of the principle of self-determination and unwarranted interference of the state in the private sphere of individuals?

According to the theoretical framework outlined above, positive law and codification are the best means by which to answer this question and hence to allay the tension between the two faces of the modern idea of liberty. Jean-Etienne-Marie Portalis, who was one of the drafters of the French Civil Code, pointed out that "legal rules determine the condition of civil society (*société civile*): They define all clauses of the contract under which human beings are grouped together to form a nation" (Portalis 1992, xi). In this way, codes can be conceived as a means by which "to rebuild the social edifice from the beginning" (*ibid.*) once the modern state has been founded and become effective.

The first great modern codes lay out three different blueprints for this edifice, that is, three different ways of building and organizing society through the law, and so of solving the conceptual tension at the heart of the modern idea of liberty.

#### 4.5. The French Model (Code Civil, 1804)

The French Civil Code of 1804 is unanimously considered the best achievement of the science of legislation in the modern age. This judgment is justified by the fact that this code has known an extraordinary success throughout the world over the last two centuries: It has been adopted in many European countries and been taken as a model of civil codification in America, Asia, Middle East, Africa, among other places (Laquette and Leveneur 2004, 789ff.)

The reasons for this success are usually explained by reference to the code's *formal* and *material* features alike. As far as the formal features are concerned, the language of the Code Civil is plain, concise, and clear, and it retains a proper degree of generality. This avoids a pointless multiplication of legal provisions and makes legislation flexible by enabling the law to regulate cases that could not be foreseen by the legislator. As Portalis pointed out, "the role of legislation is to set [...] the general prescriptions of the law, to establish principles which will be fertile in application, and not specify the details of questions which may arise in particular instances" (Portalis 1992, xxxv). As far as the material features are concerned, the French Civil Code outlined a plan for law and society that answered the social needs and tendencies of 19th-century Europe by abolishing the remains of the feudal system, by supporting freedom of contract and individual ownership, by limiting the role of the church within the state, by achieving legal and territorial unification. In brief, the French Civil code helped society to "develop from its traditional to its modern form" (Maillet 1970, 692).

The reasons for the worldwide success of the French Civil Code—and also the code's philosophical background, normative contents, and political significance—are actually more complex and traditionally disputed by legal scholars. This debate can be summarized here by pointing out three interpretations of the French code that traditionally stand in competition to one another.

(1) The French Civil Code was the final product of the French Revolution (Halperin 2004, 50): It brought into civil law the principle of freedom and equality affirmed by the *Declaration of the Rights of Man and Citizen* of 1789, and it put individual freedom at the core of the legal regulation of property, contracts, and liability.

(2) The French Civil Code was the legal tool serving to carry out Napoleon's authoritarian project in society: It unified the civil law used it (so unified) to construct a disciplinary centralized state; it enforced a reactionary regulation of marriage, parental authority, and property, and it subjected individual property to the principle of social interest. All this on the basis of the pessimistic anthropology that characterized French philosophical culture after the "Terror period" (Martin 2003 and 2002).

(3) The French Civil Code amounted, in all respects, to a "law of compromises" (Carbonnier 2004a, 26; Bergel 1988, 1078): A *technical* compromise be-

tween the legal regulation of northern and southern France, the former based on custom and the latter on Roman law; a *political* compromise between the principles of the revolution and the legacy of the ancien régime; and a *philosophical* compromise between the idea of law as a guarantee of individual freedom and the idea of law as a means by which to educate individuals in freedom.

It will be useful, in evaluating the several different understandings of this code, to take a look at its philosophical background. We will thus focus on the constitutional plan articulated by French legislators, as well as on the structure of the Code Civil.

#### 4.5.1. *Theoretical Background*

None of the three interpretations just outlined really take a global look at the Code Civil; instead, they each lay emphasis on different aspects of its many-sided historical significance. It will accordingly be argued in the following pages that these interpretations do not necessarily stand in conflict, and that they can in fact be considered as parts of a more comprehensive explanation. This kind of approach seems better suited to the multifaceted nature of the Code Civil, which reflects not only the numerous sources of codified legal material it drew on but also the different philosophical conceptions that converged in it during the tormented period of its gestation. The emphasis here will fall on the *philosophical* background, of which the following aspects will be considered: (1) French jurisprudence; (2) the relation between the natural law tradition and the French Revolution; (3) the philosophical ideas of the “Ideologues”; (4) the influence of Montesquieu’s science of government on French legislators; and (5) the influence of Jeremy Bentham on them.

##### 4.5.1.1. The Heritage of French Legal Science

An overview on the theoretical sources of the Code Civil must take into account the systematic approach to law and jurisprudence introduced by Domat and Pothier, who are traditionally considered the “fathers” of the Code Civil. To be sure, neither Domat nor Pothier set out a theory of legislation, nor did they advocate the codification of French law (see chap. 2 of this volume). Still, they strongly influenced the French legal culture of the 18th century by defining the standard methodological approach for legal scholars and the legal profession until Napoleon’s reform of university education in 1806 (Ferrante 2002; Arnaud 1969). Pothier’s works on positive customary and civil law were particularly widespread both in the universities and among legal practitioners, in this way contributing to the technical and cultural training of the drafters of the Code Civil. It bears pointing out, for our purposes, Domat’s and Pothier’s attempt to demonstrate the compatibility and coherence among the different legal materials that make up French law. Although they were each

working from different premises, they both considered natural law, French customary law, Roman law, and royal ordinances as different parts of a common body of laws that have to work together in order to set the machinery of the state in motion. This can be achieved if legal materials are sorted out and worked into a legal system by deductively establishing the functions they serve within the entire body of law:

All laws have their source in some first principles, which are at the foundation of human society [*société des homes*]; and one will understand the nature and use of these different kinds of law only by considering their anchorage to those principles. (Domat 1767, I, 13)

Natural law represents the head of the body of law. It contains the first principle of the legal system, which Domat describes as consisting of “elementary truths that even children know, but that are necessary for discovering further less evident truths” (ibid., 12). But Domat upholds an *intuitive* natural-law theory based on God’s cosmological plan, and so he rejects the modern natural-law tradition of Grotius, Hobbes, Pufendorf, and Locke (see chap. 2 of this volume). In the result, Domat’s first principles of natural law do not lead him to deduce the concepts of equality and freedom that traditionally justify sovereignty and the establishment of civil order. In this sense, Domat’s idea of the legal system is essentially pre-modern, although inspired by Descartes’ geometrical method. Pothier, by contrast, integrated the modern natural-law tradition into the body of civil law by emphasizing the continuity between French positive law, Roman law, and the principle of secular natural law set forth by Grotius and Pufendorf. This conceptual inclusion attests to an important change in the scientific understanding of civil law, and it finds an analogue in Germany in the second half of the 18th century (see chap. 1 of this volume). This is to say that the modern principles of liberty and equality do not just concern the science of government and the problem of the foundation of the state: They are now considered to be the normative basis of civil law and so of the social organizations *within* the political community (cf. Pothier 1767; cf. chap. 2 of this volume). According to Pothier, however, liberty and equality do not legitimize the construction of a new social order among individuals: They simply coexist with Roman law and other sources of legal obligation, even though this may give rise to conceptual inconsistencies, making it necessary to rely on rhetorical devices to carry on with the scientific laying out or arrangement of the legal system. From a conceptual point of view, the inclusion of these principles in the legal system makes it possible to think about society and its legal order in a different way. As Portalis puts it a few years later, private relationships, agreements, obligations—“everything becomes public law” (Portalis 1992, 16). The principle of sovereignty and the art of government invade the territory of civil law, which had maintained a relative autonomy from politics during the *ancien régime*. From a conceptual point of view, “civil law” thereby properly becomes “private law” as opposed

to “public law,” and political power is finally enabled to reform society *through* the law.

#### 4.5.1.2. Natural Law and Revolution

Natural-law principles are a further basis of the Code Civil, which strongly influenced the codification process especially after the French Revolution. In fact, the revolutionary movement was decisive not only in giving impetus to legislative reform but also in popularizing the natural-law lexicon. In 1789, Abbé Sieyès observed that a set of ideas and principles that had hitherto been of no interest, for they had been enmeshed in “metaphysics,” were now becoming familiar to everyone. So it was with the idea that legislative power belongs to the nation and not to the king, that citizens are equal and have equal rights, and that the nation needs a written constitution in which the rights of citizens are enshrined, and through which they are protected from encroachment by external powers (Sieyès 1789). The French Revolution, Sieyès goes on to observe, made it possible for these principles to permeate social life: Privileges were largely done away with; the differences between social classes diminished; the nation was self-governed. As Hegel would underscore some years later, the abstract concepts of liberty and equality theorized by modern natural law had thereby become effective: “I am apprehended as a *universal* person, in which [respect] *all* are identical. [...] A *human being counts as such because he is a human being.*” (Hegel 1991, § 209).

The enactment of the French constitution of 1791 was aimed at stabilizing the political situation and at consolidating the effects of revolution within society by means of “a code of civil law common to the entire kingdom.” In sympathy with this idea, Jean Delaire de Cambacérès—who headed the legislative commission which drew up the civil-code projects of 1793, 1794, and 1796—pointed out that “everything has changed in political order, then the same has to happen in civil order” (Fenet 1968, I, 3). Cambacérès’s projects accordingly acknowledged the relevance of liberty and equality in regulating civil society: They introduced important innovations in the areas of marriage, divorce, parental authority, succession, property, contracts, and torts. But these innovations were only partially included in the *Civil code* of 1804. In fact, the revolutionary events after 1793 concretely exposed the worrisome underbelly of the modern idea of liberty as outlined a moment ago.

The problem we are referring to clearly emerges from the philosophical reflection in the modern natural law tradition. Once individuals have been recognized as identical and free, as “the absolute whole which only relates to himself” (Rousseau 1969, 499), a question then arises: Who will interpret and express the “general will,” which for Rousseau is the only source of law within the state? Immanuel Kant cogently argued that “any form of government which is not *representative* is, strictly speaking, *without form*, because the legislator can-

not be in one and the same person also executor of its will” (Kant 1999b, 324; Duso 2006b). But Rousseau rejected all representative institutions, arguing that they would usurp a nation’s sovereignty. At the same time, the legislator, whose role is to give the law according to the common will, is described as a mysterious figure independent of state and sovereignty, and steeped in a sacred aura: The legislator is “an authority of a different sort, which obliges citizens without violence and persuades them without their firm belief” (Rousseau 1964a, 383). This explains why the representative monarchy championed by Sieyès and enforced with the Constitution of 1791, as well as the codification project it gave rise to, was considered by the Jacobins a usurpation of the political power originally attributed to the nation. According to Saint-Just, Marat, and Robespierre, the general will—entrusted with laying down the law and regulating society—was actually not present in the political activity of the National Assembly and the legislative commissions. The general will reveals itself not through legislation but through the virtuous attitudes of the “friends of the nation,” who encapsulate the best human virtues by keeping alive the spirit of the revolution (Robespierre 2007). The distinction between virtuous and unvirtuous attitudes to freedom conceptually explains the French drift toward the “Terror period,” at the same time as it underscores the educative function attributed to legislation: As much as individuals are by nature free and equal, they have not been *educated* to enjoy equality and freedom. As will be argued in the next section, it is this educative task that legislation is first and foremost assigned as a direct expression of the general will.

The paradoxical aspect of this idea was discussed by Alexis de Tocqueville a few decades later. Citizens’ freedom and equality, which the French revolution first aimed at realizing in society, had already become effective at the end of the 18th century (Tocqueville 1952–1953, III). The evolution of the economy and society had already removed most of the personal distinctions and privileges that characterized the ancien régime: nobles, bourgeois, and farmers behaved similarly and enjoyed roughly the same rights; their status (as noble, bourgeois, farmer, and so on) was merely personal and *private*, designating as it did a profession, and all professions were equal in the eyes of the state (Gordley 1994, 492ff.). According to Tocqueville, freedom and equality, regarded by philosophers as natural human attitudes that had been lost, were actually a product of recent history. But the French Revolution transformed this social reality into a set of abstract ends to be achieved by any means (Biral 1999, 304ff.). The consequences of this drive were pointed out by Hegel as follows:

When these abstractions were invested with power, they afforded the tremendous spectacle, for the first time we know of in human history, of the overthrow of all existing and given conditions within an actual major state and the revision of its constitution from first principles [...]. On the other hand, since these were only abstractions divorced from the Idea, they turned the attempt into the most terrible and drastic event. (Hegel 1991, § 258)



The social and political consequences of the French Revolution obviously do not diminish the symbolic force of the *Declaration* of 1789 and the constitutional process it gave rise to, especially as concerns the cultural dissemination of the principles of liberty and equality Europe. This symbolic force was captured in the *Civil code* and is one of the main reasons that explain the success it continues to enjoy today across the world (Carbonnier 2004b).

#### 4.5.1.3. Legislation as Education to Social Morality

This argument introduces a further conceptual element at the basis of the Code Civil, this being the moral function of legislation. In the philosophical context we are considering, legislation took on a moral function, not in the sense that positive law is aimed at enforcing moral rules but in the sense that legislation fulfils a moral role, or rather, it is entrusted with the task of raising and training all citizens to enjoy their freedom and wealth. Rousseau had previously argued that humans often cannot identify their true interests, which in the state lies in the content of general will. Civil laws are designed to guide citizens to an understanding of what they really need and what their real interests are. Which is to say that the civil laws are there “to compel them to be free” (Rousseau 1964a, 376). The laws, in other words, must “change human beings into what they ought to be,” in accordance with their physical nature, which is the only legitimate source of morality (Rousseau 1964b, 260). The moral function attributed to legislation, whose origins lie in the sensistic and mechanistic anthropology of French Enlightenment, imparted a new direction to the process of civil codification after Thermidor, especially through the philosophy of the “Ideologues.” In his *Observations on Human Physics and Morality* (1802), the physician, moralist, and philosopher Pierre J. G. Cabanis argued that human morality coincides with human physiology as observed from a particular point of view (Cabanis 2006). In the manner of La Mettrie, d’Holbach, and Helvétius, morality is considered here as a function of perceptions, individual needs, and desires, and these do not reflect the needs of civil society as a whole. This being the case, legislation should not content itself with taking citizens back to their natural state of liberty; instead, legislation must *change* human nature, so as to bring out a genuine public spirit and forge a national character. In fact, as Voltaire, Montesquieu, and Rousseau had shown, natural-law theory was wrong to assume that the features of human nature are universal and eternal. They are instead subject to history and change, depending on the spirit of a people, as well as on territory, religion, climate, language, tradition, and so forth. As such, the role of legislation is not only to make natural law effective in society: It is also to *improve* human nature through legal coercion.

It is time, for this subject as well as others, to assume a point of view which is more worthy of a period of regeneration: It is time [...] to dare to renew and correct the work of nature. This is a risky venture, that deserves all our attention! (Cabanis 1799, 298–9)





Jean-Étienne Marie Portalis (1746–1807)

A code of laws is the means by which to correct human nature on the basis of a perfect rational plan. This plan is provided by the science of government (by politics), a science to which belongs the science of human beings (Helvétius 1968, IV, 46; d'Holbach 1969, 129ff.; Morelly 1970): The rational plan so conceived thus consists in an *educative* process which leads human beings to become virtuous citizens, and which needs to be carried out, if necessary, even against their will. As Antoine L. C. Destutt de Tracy argued, all human beings, both children and adults, should be taught how to judge and behave wisely, and “legislation [...] is nothing but the education of adults” (Destutt de Tracy 1970, I, 213).

Xavier Martin has recently highlighted that this anthropological vision was widely shared by the French State Council during the discussion of the Code Civil (Martin 2003 and 2002). In particular, Martin characterizes this vision, and the idea of code supported by it, as a form of citizen “infantilization,” and this seems to contradict Kant’s famous representation of the Enlightenment as “the human being’s emergence from his self-incurred minority” (Kant 1999a, 17). However, one should not overestimate the influence of this educative and moralizing conception of legislation on normative contents that went into the code (Halpérin 2004). This is only one aspect of the manifold conceptual background that, during the French codification process, was used to justify the overturning of revolutionary legislation, especially as concerns family law.

#### 4.5.1.4. Portalis’s Reading of Montesquieu’s Science of Government

It can be appreciated, in light of these considerations, that there is no discontinuity between the revolutionary *idea* of codification and the final version of the Code Civil drafted by Portalis’s commission from 1800 to 1804, even though the code clearly appears more conservative than the idea behind it. Portalis seems to anticipate Tocqueville’s assessment of the French Revolution by criticizing the abstractness of the idea of liberty and equality upheld by natural law. In his work *On the Use and Abuse of the Philosophical Spirit during the 18th Century*, Portalis points out that while these principles do capture certain fundamental features of human nature, they have often been misconceived in philosophy, that is, they have been conceived as final ends that justify resorting to violence and imposition. These principles need to be brought back to earth if they are to serve as a basis on which better organize civil society. How can this be done? Portalis acknowledges the natural-law thesis that “the basis of morals has to be sought in the natural faculties of human beings” (Portalis 1834, II, 65), that is, in self-interest, egoism, a propensity for corruption, and the like. Natural-law theorists, by contrast, have used the study of the human faculties to affirm the primacy of society over men: “A false philosophical spirit leads to naturalize [human corruption] in morals and legislation” (ibid.,

II, 404). When this happens, “the disease becomes incurable, because it affects the remedy itself” (ibid.), and brings about the fall of the state and of civil society. The way out of this situation is to look at the principles of freedom and equality through the lens of “common sense,” by which is meant that these principles ought to be considered as real features of the nation, features dependent on experience and history rather than on “pure reason” (ibid., II, 47 and 403). These principles are already a matter of fact, and it is the task of legislation to bring them into harmony with the characteristics of the nation. The science of legislation is in this sense conceived by Portalis as a branch of the science of government: Its principle is derived not from natural-law theory but from the features of the land and the population. This was entirely in keeping with Montesquieu’s major work, *Spirit of Laws*, which in fact, in the second half of the 18th century in Europe, was regarded as a veritable “encyclopaedia of human knowledge” (Herdman 1990, 119): It gave the fundamental guidelines in history, anthropology, ethnography, economics, and politics—and so in the sciences of government in general—and every legislator accordingly turned to it as an essential tool of the trade (cf. chap. 3 of this volume).

Proceeding on the basis of Montesquieu’s theory of social improvement, and using language much closer to Hugo’s and Savigny’s than to that of the French Exegetical School<sup>1</sup> of the 19th century, Portalis argues that the Code Civil does not need to invent a new civil society but rather to give stability to the existing one by “maintain[ing] whatever does not have to be necessarily destroyed” (Portalis 1992, 20). The code has only to align with the peculiar attitudes of the nation, in harmony with the spirit of the time, and in so doing it will *improve* the habits, morality, and welfare of the population.

These general principles account for the method adopted by Portalis’s commission in drafting the Code Civil. In fact, the French Civil Code is a selection of French customary law, Roman law, and Revolutionary legal provisions, collected into a single code and unified by a common language and disposition. Natural law did not really contribute any legal provision to the code but rather gave a new sense to codification in general, which was now conceived as a means by which to establish a unified civil society. This process was justified on different bases, among which was the Ideologues’ sensistic and mechanistic anthropology, which sought to legitimize government through law as a form of education in social morality and citizenship. The selection of legal materials to be used in the code, however, was essentially guided by the principle of Montesquieu’s science of government and not by any theories of natural law, which remained in the background of the codification process.

<sup>1</sup> It has to be noticed that the French Exegetic School (*École de l'exégèse*) will not be treated in detail in this volume, the reason being that this movement made a relevant contribution not so much to the philosophy of law as to legal methodology. Some aspects of the French Exegetic School will be discussed in Volume 11, Part 2, of this Treatise.

In summary, the Code Civil of 1804 was not just a consequence of the French Revolution, or just a reactionary instrument by which to govern the masses, or just a legislative compromise between past and future. Rather, one can appreciate from its philosophical background that these elements were *all* in the code, coexisting as aspects of a common historical and conceptual development.

#### 4.5.1.5. Did Bentham Influence the French Path to Codification?

A further aspect of the philosophical background of the Code Civil traditionally considered by legal scholars is the relation that Bentham's science of legislation bore to French codification. Bentham's thought was still quite popular during the late 18th century in Europe. In 1796, the journal *Bibliothèque Britannique* published the translation of some selected excerpts from his *Introduction to the Principles of Morals and Legislation*, and a year later the schemes Bentham worked out in his *Theory of Criminal Punishments* were included as a supplement to the 5th French edition of Beccaria's *Treatise* (Solimano 1998, 69ff.). Moreover, there are evident analogies between Bentham's thesis on the nature of interest, the calculability of moral action, and the primacy of utility, on the one hand, and the thought of the French Ideologues, on the other, which infused vim and vigour into the discussion on civil codification, as can be appreciated from the preliminary works on the Code Civil (Martin 2002). This justified Karl Marx in polemically considering the French code as dominated by "liberty, equality, property, and Bentham" (Marx 1991, 160), and so in counting Bentham among the fathers of French codification.

These theoretical analogies have been used by legal scholars to support two opposite theses. According to the first thesis, Bentham influenced the French debate on legislation and thereby affected both the Civil Code of 1804 and the Criminal Code of 1810 (Solimano 1998, 69ff. and 147ff.). This influence could be appreciated especially in the statutory regulation of wills, marriage, and parental authority, which Bentham conceived as a means by which to govern domestic society under the principle of utility. Bentham, on this thesis, also contributed to crafting the regulation of property in the code: He did so by framing property not as a presocial natural right, as Locke did, but as a creation of society by which to guarantee security and peace—a view conceived in the manner of Hobbes, Pufendorf, and Hume.

On the second thesis, by contrast, Bentham did not influence the normative content of French codes (Martin 2003, 287–337). The theoretical analogies just considered might actually have to be read in the opposite direction, that is: It was French Enlightenment that influenced Bentham, not the other way around. As Bentham himself admitted in 1782, he took the idea of considering the good as decomposable in a certain number of pleasures from Helvétius (Gillardin 1987, 554), Helvétius being the French thinker who had conceived, before Bentham, that the "moral universe is subjected to the rule

of interest” (Helvétius 1967, 59) and that “self-love makes us what we are” (Helvétius 1968, IV, 337). At the same time, it was a widely held view of European Enlightenment that the morality of action can be predicated on the sensible, or perceptible, advantages and disadvantages resulting from such action: This principle had been expressed, before Bentham, by Locke, Voltaire, d’Holbach, Condorcet, and Turgot, among others. The same can be said of the principle calling for “the greatest happiness for the greatest number,” which Hutcheson introduced in his *Inquiry Concerning Moral Good and Evil* (1725), and which Maupertuis, Helvétius, Verri, and Beccaria took up and espoused before Bentham embedded it into a more articulated and incisive philosophical framework. According to the second thesis, therefore, the statutory regulation of family law and property provided by the Code Civil is a genuine product of French legal thought, which had all the resources it needed to draft the code of 1804.

Apart from the philological and theoretical problems arising in connection with the relation between Bentham and French codification, there is no reliable answer that the available documental evidence affords as concerns the previously formulated question, which therefore remains an open question. Still, it might be argued that the question is itself ill-framed. The analogies between Bentham’s theory of legislation and French Enlightenment show once more that philosophical discourse in the 18th century was communitarian in a way that prevents legal scholars from positing or identifying a causal relationship between one author’s thesis and a cultural artefact such as the Code Civil. Codes in general are the product of a complex intellectual process that involves the legal tradition as a whole. As Portalis declared, “codes *are made as time goes by*; but, properly speaking, *they are not made at all*” (Portalis 1992, 15).

#### 4.5.2. *The Constitutional Plan*

The philosophical background of the French codification leads us to focus on the constitutional plan of the Code Civil, which should form the basis of the pacified civil society of France in the wake of the revolutionary period.

Along the lines of an interpretive tradition that goes back to the Exegetical School, and is still widespread among legal scholars, the Code Civil is considered a “hymn to the individual” that “extols the power of [his] will” (Cornu 2005, 107) and thus celebrates “the triumph of liberal individualism” (Ghestin and Goubeaux 1994, 99). The foregoing reconstruction suggests that this view should be qualified, and we will accordingly revise it to some extent.

The most relevant technical innovation of the Code Civil consists in unifying the criteria of legal personhood under the state: Each citizen is considered in the abstract as a subject of legal rights and duties independently of his or her station in life, that is, independently of social status and personal circumstances. Individual differences between citizens have any legal bearing only in-

sofar as the citizens' legal personality is concerned, and so only as concerns their capacity to assert a claim or enforce a right. In fact, Portalis observed that [f]ormerly, the humiliating distinctions that political law had introduced among persons had even slipped into civil law. [...] All [those] traces of barbarism are effaced. The law is the common mother of the citizens, and it accords an equal protection to all. (Fenet 1968, I, cii)

This innovation radically simplifies the structure of the legal system: Regulation by law is no longer organized on the basis of the various activities and relations human beings engage in, that is, on the different sets of rights and duties that such engagement implies; the system is instead now based on the equal legal status and personality recognized for all citizens, and then on the relations that each citizen *brings into being* through the forms typified by the legislator. But is this enough to qualify the Code Civil as a milestone of European liberal individualism? The answer to this question is more complex than one may at first assume.

The technical innovation just considered is the main contribution the French Civil Code received from modern natural-law theory. According to the justification of legislative power offered by natural law, a justification based on the theory of the social contract, positive law (*la loi*) makes manifest the will of the people, which everyone recognizes as his or her *own* will within the state. In this sense, positive law makes human beings free, since the ought of law coincides with the will of the individual. Moreover, positive law makes each natural person equal to others, since everybody is equally *subject* to the law within the state: The status of citizen coincides with a person's subjection to the law, and hence with the independence of will that positive law guarantees. It turns out that legality, equality, and liberty are mutually connected from a conceptual point of view. Legality is a necessary and sufficient condition of liberty, and this condition is satisfied if those subject to the law are equal. At the same time, human beings are equal in the state if, and only if, positive law qualifies them as such, that is, if the law makes them free.

But this legalistic conception of liberty and equality—the basic premise behind the Code Civil—allowed French legislators to design a model of society that is far from making effective the principle of individual autonomy later affirmed by constitutionalism and European liberalism. In fact, the conceptual sequence this project is based on can be outlined as follows:

positive laws (code) → equality/liberty → individual rights

At the end of the 18th century in France, positive law (*la loi*) was conceived as a means by which to definitively release citizens from the bondage of the ancien régime and to harmonize their personal activities so as to ensure their common welfare. Individual rights played a derivative and residual role in the legal system: The French Civil Code does not assume a set of natural or fundamental rights limiting the state's legislative power, nor does it assume that government is subject to the principle of legality. Stated otherwise, the natural rights



of liberty and equality are not considered in the code as forming the basis of law and government. Quite the contrary: Citizens have any individual rights only insofar as positive laws attribute such rights to them. This is paradoxically confirmed by Sections 4, 5, and 6 of the 1789 *Declaration of the Rights of Man and Citizen*. In Section 4, the French National Assembly affirms that “the exercise of the natural rights of each man has no limits except those which assure other members of society the enjoyment of the same rights”; it then goes on to say that “law can only prohibit such actions as are hurtful to society,” and that “law is the expression of the general will. Every citizen has a right to participate personally, or through his representative, in its foundation.” According to the 1789 *Declaration*, therefore, positive law is not subject to the limit of natural rights; on the contrary, natural rights are subject to the principle of legality. In consequence of the French revolution, then, the basis on which to frame the legal system became the sovereignty of positive law, and this can be said to culminate in the enactment of the Code Civil (Jaume 1989, 60).

The French Civil Code can still be regarded, in this sense, as a “hymn to the individual,” in that its legal authority is legitimized by the conception of political community and government provided by modern natural-law theory, that is, by the science of the nature of the individual. But it cannot be considered a milestone of modern liberalism, because the code conceives individual rights and duties as a means by which to govern society, this in keeping with the legalistic conception of the rule of law (the law laid down by the state) implied by the primacy of the general will. In this sense, positive law is the means given to government for *constructing* a civil society composed of free and equal individuals; it is not a system of rules aimed at protecting the individual’s freedom and equality from encroachment.

#### 4.5.3. *Structural Features*

A brief look at some structural features of the Code Civil can be helpful in illustrating the model of civil society that the code was aimed at bringing into effect.

To begin with, the Civil Code of 1804 does not include any preamble containing theoretical remarks, references to natural-law principles, general rules of government, rules of procedure, and so forth. This choice was a true innovation for the time: Codes in the 18th century were still conceived, along the lines of Justinian’s *Corpus Iuris Civilis*, as encyclopaedias of legal knowledge containing all sorts of legal materials, and so as having an informational, educative, and guidance function. The French drafters, by contrast, considered the Code Civil as part of a more comprehensive codification process involving all areas of the law of the state, and based on the constitutional laws of the state (Maleville 1805, I). The Code Civil was regarded as a tool for regulating private relations among citizens, and in this way the code introduced a model that would be adopted by the civil-law systems right up to the present day.



Portalis's preliminary project included a more broad-gauged preamble containing general legal definitions and classifications that were considered redundant during the revision process and were thus stricken out. Article 1 of Portalis's preamble stated, in particular, that "natural reason, which governs human beings, is the source of the universal and unchangeable law, and the source of positive law" (Fenet 1968, II, 3ff.). The assumption in this article is not that the French legislators were simply laying down positive precepts derived from natural law. The article should instead be interpreted in light of Montesquieu's idea of natural-law reasoning as functional to the needs of government and the common welfare: If human reason is to enable us to discover the unchangeable features of human beings, it must also take into account the great legislations of the past; and government, in the effort to guide human conduct toward the common welfare, must accordingly proceed as well on the basis of the characteristics of the nation. Portalis cited natural law as a criterion of legal interpretation, too. In fact, under Article 4 of the code, the judge was bound to pass judgment even if "the law is silent, obscure or not enough to regulate the case." Article 11, Title 5, of Portalis's preamble, however, stated that "in civil matters, when the law is vague the judge becomes a minister of equity. Equity is the return to natural law, or to the recognized uses, when the law is silent." But this last article was stricken out by the State Council in the final version of the Code Civil, and so, in the outcome, the judge was bound to decide the case solely on the basis of the legal resources provided by the code.

The innovative nature of the French Civil Code can paradoxically be appreciated as well from the way its contents are organized. The Code Civil is divided into three books: (1) *On Persons*; (2) *On Goods and Different Modifications of Property*; (3) *On Different Ways to Acquire Property*. As was pointed out in discussing the draft (Fenet 1968, XI, 51, 149–50, 163–4), this division corresponds to the distinction, in Roman law, among *personae*, *res*, and *actiones*, a distinction that traces back to Gaius's *Institutiones*. The French drafters took up this classical organization of legal materials by way of signaling a continuity with the European legal tradition, but in doing so they wound up stripping this tradition of its original meaning, because they were proceeding on the basis of Pothier's *Treatises* of civil law.

Gaius's partition, and its use in Justinian's *Corpus Iuris*, was essentially meant as a classifying device: It organizes legal materials by on the basis of different types of personal status, of goods, and of transactions. This typification was worked out by means of a process of division (*diæresis*) that arranged personal, real, and transactional property based on how such property appears in social reality, and so on the *differences* existing among persons, as well as among things and among transactions. The French Civil Code is structured quite differently: The first book does not deal with personal differences (free man, serf, slave, etc.) but instead regulates certain aspects in the life of an abstract subject under the law—it thus regulates matters of birth, domicile,

marriage, paternity and filiation, divorce, death, and so on, as these relate to a subject that identifies every private person in the state. The second and third books regulate a person's property and patrimony, but it does so following a plan modelled after the Digest and is for this reason unsystematic (Gaudmet 2004). The third book in particular is much larger than the other two and is "a sort of a mixed bag where we can find, pell-mell, successions, donations, the general theory of contracts, delicts and quasi-delicts, matrimonial regimes, special contracts, suretyship, prescription and possession" (Bergel 1988, 1085). And the second book seems no less incoherent: While it takes as its fundamental principle the distinction between types of goods, it does not *regulate* the distinction; likewise, it regulates property but most of the provisions on this subject concern the right of accession, a way of acquiring property that should instead be regulated in Book III.

In brief, the Code Civil lacks structural consistency and coherence and so does not play a systematic function in the legal system: "Paradoxically, the weakness of the systematic plan of the code [...] reveals that the essential aspect was not the order of ideas but the political function that the code pursued" (Gaudmet 2004, 302). In other words, one should not overestimate the systematic spirit that characterized the age of codification. Above all, the function of modern codification was to affirm the political supremacy of sovereignty and of legislative power, so as to unify the state and construct a civil society of free and equal individuals.

But what were the fundamental features of this civil society according to the Code Civil? The two innovative pillars of the French Civil Code are usually considered *property* and *contractual autonomy*, whereas the conservative and authoritarian conception of family law that characterizes the code represents a step backward with respect to the revolutionary legislation on the relation between husband and wife, as well as on divorce and parental authority, and, more generally, on the condition of women.

Property, in particular, was regarded by the drafters as "the universal soul of any legislation" (Fenet 1968, XI, 133): "All institutions have to guarantee property, all governments have to pursue this special and unique end" (Cambacérès 1999, II, 4). In keeping with this general background, the famous Articles 544 and 545 of the Code Civil state:

544. Property is the right to enjoy and dispose of things in any way you wish with absolutely no limitation, provided they are not used in a way prohibited by the laws or statutes.

545. No one can be compelled to give up his property, except for the public good, and for a just and previous indemnity.

The drafters clearly wrote these articles drawing on Domat and Pothier (see chap. 2 of this volume), but then gave them a different meaning. In principle, owners of property have the right to use their property as they wish, but un-

der Article 544, the state can limit this right in the interest of the common welfare. This means that property can be understood as both an innate right forming the basis of individual autonomy and a social construction affirming the primacy of government over the rights of individuals. The latter interpretation seems borne out by the preliminary works leading up to the code: Chabot de l'Allier argued that "civil society is the only true source of property" (Fenet 1968, XII, 162), and Cambacérès agreed, saying that "property is a social creation, since in general all law should be enacted by public authority" (Cambacérès 1999, II, 4). Portalis's remarks on law and codification, by contrast, seem to support the opposite thesis. He invokes Locke and states that property "is inherent in the existence of any individual and derives from the constitution of a human being" (Portalis 1834, II, 289): Property originates not in civil society but in human nature, and so civil law need simply enable individuals to enjoy this right fully (*ibid.*, 290). However, as Grotius and Pufendorf had previously shown, even if property is considered a natural right, this does not mean that the government is thereby prevented from using that property to serve the needs of society: "If the prince, in case of necessity, uses the goods of one or many individuals, he acts not as owner of these goods but as the head of society, in favour of which each individual, by engaging in society, explicitly or implicitly committed oneself to make such a sacrifice" (*ibid.*, 301). This conceptual framework, which attempts to combine Locke's naturalistic understanding of property with Hobbes's and Bentham's artificial one, explains the normative content of the codified provisions concerning the right to property. Property is considered, as to its origin, an absolute right that admits no interference; but as to its function, this right can be claimed by the state for the purpose of ensuring the common welfare. From this point of view, therefore, property does not impose a limit on the action of government but does quite the opposite. This ambiguous characterization of the right to property in the French code—which here, too, reflects the two sides of the modern concept of liberty—makes regulation by law compatible with different social contexts, constitutional frameworks, and political regimes, and this contributes to explain the code's longevity.

Something similar can be observed in regard to the regulation of contracts. Article 1134 of the Code Civil states that "legally formed agreements have the force of law over those who made them." This provision is usually considered by legal scholars as affirming the principle of contractual autonomy, a benchmark of the modern idea of liberty affirmed by natural-law theory. This broad interpretation of Article 1134 has to be explained. As can be appreciated from the code's preparatory works, the drafters' intention here was to protect commerce and ensure public order by guarding against the consequences of not fulfilling contractual obligations (Martin 2002, 120), and so against the consequences of weakness of will. As Bigot de Préameneau pointed out, "human will [...] is too variable, it is not sufficient to assure the general order that

is necessary to the existence of society” (Fenet 1968, XII, 510). “The only way to maintain bona fide is making contracts obligatory from the moment of their drawing up and before their execution” (ibid., XIII, 219–20). The French Civil Code was in this sense designed, through Article 1134, not so much to uphold contractual autonomy in any strict sense as to make it possible to control and organize contractual agreements and to closely regulate contracts (Halpérin 2001, 33).

To sum up, the Code Civil set up a form of socialization of individuals within the state: It did so exploiting the legal *tabula rasa* of the French Revolution to reinstate several legal institutions of the past. In *post*-revolutionary France, however, these institutions came to be embedded into a new conceptual framework that endowed them with a new function within the state: Even the institutions of the past and the legacy of Roman law and French customary law were conceived as a means by which the individual could become a genuine citizen, and could thus learn to be free.

#### 4.6. The Prussian Model (ALR, 1794)

The Prussian General Code of 1794 (*Allgemeines Landrecht für die Preußischen Staaten*, or ALR) has traditionally been considered by legal scholars an outdated and imperfect legislative work in comparison to the subsequent European civil codes (Wieacker 1995, 264–6). The reasons for this assessment can be summed up as follows.

(1) The ALR does not have the formal qualities typically associated with the age of codification (on which see Section 4.2.1.). Especially, it lacks simplicity and clarity. The Prussian legislators chose not to generalize in any degree in drafting the ALR, which accordingly runs to nearly 20,000 sentences and often includes a pointless casuistry minutely regulating all aspects of social life. Moreover, there seems to be little rational basis for the organization of the code’s legal materials. Thus, only *after* regulating areas such as marriage, family, property, and inheritance does the code define different types of personal capacity and status; and so the code does not make it any easier, for judge or citizen, to find the law.

(2) The model of society outlined by the ALR is still bound up with the German “rank society” (*ständische Gesellschaft*) of the ancien régime, in which different people had different rights and duties according as they had this or that role in society. In this sense, the Prussian code seems to be only partially conceived as a means by which to uphold by law the modern principles of liberty and equality: The unification of the legal system did go so far as to unify legal personality. Instead, the code reflected the personal differences that still characterized Prussian society at that time.

(3) Prussian codification at the end of the 18th century was aimed at consolidating the absolutistic regime of Frederick II, this despite the fact that the

ALR seems to include some proto-constitutional legal provisions that actually *limit* the king's power (Conrad 1958), or at least it seems to include a "potential legislation" making it possible for Prussia to overcome its backward social and economic organization (Koselleck 1981).

The Prussian code of 1794 in effect outlined a model of socialization and private organization that stood as an alternative to both the French code and the liberal state. On this model, codification was not aimed at effecting a palingenesis of civil society or at guaranteeing individual autonomy against public powers. The code was conceived by Frederick II and its drafters as a means by which to "reproduce" in legal form the existing social order by reducing it to a common principle of government (the sovereignty of the state), for in this way society could be guided toward achieving a common end (perfection and happiness).

#### 4.6.1. *Theoretical Background*

It is a widespread opinion among legal scholars that the ALR embodied the spirit of the "Prussian natural law school" (Dilthey 1964, 152ff.; Hellmuth 1984, 16). In other words, the ALR is considered to be the outcome of a particular line of development in the 18th-century natural law, a line connecting Christian Wolff to G. J. Darjes, D. Nettelblatt, C. von Carmer, C. G. Svarez, and E. F. Klein, and so a line connecting the Wolffian school to the drafters of the ALR. But what are the main features of the Prussian natural-law school? Legal scholars have traditionally laid emphasis on the rationalistic attitude of Wolffianism (but see chap. 1), and hence on its influence on the legislative method and the systematic structure of modern codes. On Wolff's method, in particular, "juridical decisions should take the form of logical application of abstract principles and general concepts with a fixed and determinate place in the system" (Wieacker 1995, 255), so much so that the regulation of any aspect of social life was considered implicit in a set of judgments inclusive of both *a priori* truths and *a posteriori* ones. Although this consideration identifies an important aspect of Wolff's philosophical method, its influence on legislation has been widely overestimated. Carl Gottlieb Svarez argued that "the foundation of the Prussian code is still essentially Roman law" and not natural law (Svarez 1791, xxiii), observing that "most of the codified legal materials are taken from Labeus and Capitus, Severus and the Antoninis, not from Montesquieu, Rousseau or Mably" (Svarez 1791, xxiv). The same can be said of the other modern European codifications, even though there was a profusion of attempts in the 18th century at using the axiomatic method of natural law to systematize Roman legal materials, in the manner of Leibniz and the Wolffian school (Leibniz 1990; Wolff 1965, Heineccius 1740a and 1747, Nettelblatt 1772) and on the assumption of an identity between the principles of natural law and the maxims of Roman law (Cocceius 1748, §§ 4–6).

But the most interesting contribution the Wolffian school of natural law made to the codification process in Prussia concerns the *function* of legislation within the state and society. This contribution will be described in what follows by considering, first, some relevant features of Wolff's practical philosophy and the way it frames the relation between theory and practice and, second, the way in which this approach was revised by the Wolffian school, thereby providing the theoretical basis for the Prussian General Code.

#### 4.6.1.1. Christian Wolff and the German Rank Society (*ständische Gesellschaft*)

The effect of Christian Wolff's philosophy was to make the social and political structure of the German "rank society" (*ständische Gesellschaft*) consistent with the principles of modern natural law. Wolff's philosophical methodology shows how this task could be accomplished. For Wolff, the central idea of practical philosophy—understood as the science of free human action, and inclusive of ethics, economics, politics, and natural law—consists using a rigorous method (the method of mathematics) for the purpose of *explaining* individual and social reality as it is on the basis of the different sorts of knowledge we have of it. Wolff's philosophy can be described in this sense as devoted to an exclusively *amendatory* task. It does not suggest a new social or political order, as Hobbes, Locke, Pufendorf, Rousseau, and Kant had done: It simply seeks to explain *why* social reality and human action are the way they are, and this it attempts to do by giving a detailed and accurate representation of them. This representation is grounded not only in a priori truths about God and human nature, but also in common knowledge (*notiones communes*) and common experience (Wolff 1983a, § 7; Wolff 1972, § 497), and it is that common knowledge and experience that has to be cleared of contradictions using the mathematical method, which consists in correctly applying the principles of contradiction and sufficient reason (Wolff 1983a, § 4; Wolff 1983b, § 30).

As far as practical philosophy is concerned and on the basis of this method, Wolff comes to the conclusion that the notion of status should be recognized as having primacy over the notion of an individual. The term *individual* simply denotes the ontological *possibility* of concrete human beings, and so of beings who need to become real in order to acquire rights and duties. The notion of status describes the complex of relations an abstract individual can engage in, and in so doing it defines the condition for the possibility of a *real* individual or "person": It thus describes this person's *cause* in the system of practical knowledge, setting out on this basis the rights and duties this person may exercise, which make up his or her legal capacity. On this approach, each individual will have more than one status. A man, for example, can have at the same time the status of male, husband, father, head of the household, tradesman, Catholic, and citizen, and each such status comes with



a set of rights and duties specific to its sphere of action. Moreover, the different statuses are arranged on the basis of a *quantitative* order derived from Aristotle's *Politics* and described by Wolff through the mathematics of numerical series: The order goes from small status to large status and from internal to external, where *internal* refers to the relation between soul and body and *external* to the different forms of human association, such as marriage, family, home and work (farmer, middle-class person, nobleman), religion, civil society, and the state. Each status fits into the scheme of Wolff's perfectionism, thereby singling out a sphere of action that sets up a certain level of perfection and a corresponding form of happiness (*felicitas*) to be achieved (Wolff 1971, I, 240ff. and II, 25ff.; Wolff 1983b, §§ 36 and 43). In this way, each status contributes to the perfection and beatitude of the whole, conceived as the sum of the intermediate levels of perfection and happiness represented by the different statuses. This conceptual framework did not conceive any discontinuity between the state of nature and civil society, or between natural law and civil law, because the latter came about as the causal development of the former. Moreover, while legislation is a prerogative of the sovereign, it not the *only* mode of regulation within the state: There are *other* modes by which to regulate statuses, communities (*societates minores*), forms of civil association, and so on, and legislation neither absorbs nor neutralizes such other modes of regulation but has to instead be in harmony with them (Wolff 1968, I, § 133 and VII, §§ 194ff.).

Wolff's practical philosophy thus proceeds on the mathematical method to consolidate the Aristotelian tradition in Germany, thereby making it possible to base on principles of natural law a legitimation of personal differences within society. His philosophy shows, in this sense, that the modern scientific approach to practical knowledge was very flexible: It could design not only models of social and political organization centred on the individual, but also non-individualistic theories based on an essentially premodern conception of human beings and social community.

#### 4.6.1.2. The Wolffian School: From Practical Philosophy to the Science of Legislation

Although Wolff's theory of natural law was the last bulwark of the Aristotelian tradition in 18th-century Europe, it turned out to be a prelude to other philosophical ideas contrary to it, such as Thomasius's sensistic psychology, Pufendorf's theory of *entia moralia*, and Voltaire's and Montesquieu's historical anthropology. This is because Wolff's philosophy sought to *amend* all new knowledge about man and society in order to integrate it into the system. But in so doing—in the effort to systematically bring these new philosophical ideas into the system—the Wolffian school wound up changing the nature of the system itself. Thus, Georg Joachim Darjes, for example, pointed out that



Wolff's philosophy was incomplete, since it failed to account for some features of the social reality that were in fact central or pervasive (Darjes 1745, III, § 655), such as sovereignty and the state. And so it was that Darjes and Nettelblatt, in expounding their theory of natural law, faithfully reiterated Wolff's theory of statuses (Darjes 1748 and 1745) by assuming that "the word person refers to a human being considered within a certain status, which is the quality of a certain action from which rights and obligations derive" (Nettelblatt 1767, § 43). But when it came to deducing the features of the *status civilis*, however, they radically strayed from Wolff's approach, assuming that political power (*imperium*) is in the hands of the people, and so in a group of individuals as such, independently of their personal status, as argued by Hobbes and Pufendorf. Being a member of the state accordingly means having rights and duties (or being able to *exercise* such rights and duties), and in such a way that everyone is in this respect equal. This is not to say, however, that personal differences of status are thereby eliminated: "Differences between individuals [in the state], as far as their rights and duties are concerned, do not rely upon natural law but on positive legal sentences" (Svarez 1960, 261). In other words, the abstract position of *status civilis* will be filled by legislation, which draws a distinction in human action between the role one plays as a person (personal roles) and the roles one plays as a member of a group (social roles). In this way, the old social orders of the German tradition, which had been politically fundamental in framing the constitution that governed the ancien régime, were turned into organizations of the State and were assigned an administrative function in the State, thereby contributing to the perfection and happiness of the whole.

What did this conceptual transformation entail for the relation between natural law and positive law, on the one hand, and for the function of codification, on the other?

As concerns the first question, it became the view of the late Wolffian school, especially under the influence of Montesquieu, that natural law should be considered no more than a "theoretical introduction to the study of positive law" (EAGB, *Introduction*; Marcos 2000, 47). Natural law is essentially *descriptive*: It looks at a particular nation's features—those that distinguish its people, economy, territory, climate, and so forth—and seeks to explain on this basis how that nation developed historically and how such development gave place to a state; and this makes it so that natural law does not, properly speaking, serve a normative function, since "human conduct is regulated only by positive law within the State" (Svarez 1960, 582). Natural law does offer guidance in governing a nation, to be sure, but only by pointing out the nation's features and needs (Svarez 1960, 477ff.; Scheidemantel 1770, §§ 106ff.; Pütter 1777, 2ff.). It follows that the prescriptions of government cannot be deduced from natural law and universal reason but "have to be drawn from the general code" (EAGB, *Introduction*). The code becomes the only source of law within

the state, and natural law becomes a philosophical reflection on the origin, features, and aims of the state's positive legal prescriptions—a move that opens the door for legal positivism.

As for the second question, concerning the function of codification, the legislator is entrusted in the first place with the task of “recording” all the legal materials, prescriptions, orders, and relations that characterize the nation and have binding force within the state, and then grouping all these rules together on the basis of a unifying principle, that of sovereignty. There is no neglecting here Wolff's theory of human perfection in society, whereby society guides human beings toward a state of beatitude: Rather, this theory is adapted to fit the reality of the modern state. As von Carmer, Svarez, Achenwall, and Klein argued, the *status civilis* is not conceived as a homogeneous and undifferentiated space in which individuals each freely pursue their own interest; therefore, civil law does not serve to guarantee autonomy or equality. Civil law is rather conceived as a tool in the sovereign's hands for guiding the members of the State in the pursue of common good, since this is considered the only way to achieve individual happiness and welfare. A general code of law is the best way to accomplish this task: The code makes it possible to ascribe all valid legal prescriptions to the sovereign's will; it serves to rationalize the administration of justice and to organize society as one big clock in which each cogwheel contributes to the working of the overall mechanism (Mayr 1986; Stolberg-Rilinger 1986). Svarez pointed out, in particular, that a code “has to contain, as far as possible, legal sentences regulating all economic and social aspects of civil life” (Svarez 1960, 629).

[T]he higher the number of inhabitants of the State [...], the more social classes and ranks the inhabitants are divided into, the more complex and articulated the social activities, professions and commerce are, the higher the number of laws that guide all these persons, classes, orders, activities and relationships to common good, has to be. (Svarez 1960, 588–9)

In this sense, all these features of the ALR—its size and structural complexity, its low level of generality, the attention it pays to all aspects of social life, its distinguishing countless personal statuses depending on the place each member of the state ought to occupy in society—cannot be regarded as evidence of the code's backwardness and imperfection. These peculiar features outline instead a model of “disciplinary society” that would see a disquieting development over the next two centuries.

#### 4.6.2. *The Constitutional Plan*

The theoretical background against which the Prussian code of 1794 was drafted is to account for some peculiar features that distinguish this code from the other great legislative works of the time. The Prussian legislators assigned to the ALR a twofold task, in that the code was to (1) reproduce in

legal form the social and institutional reality of the time, with its fundamental rules and personal differences; and (2) ground such a reality in a single source of legal authority, thus making it possible to achieve a common end, which in consist, according to Wolffian ethics, in working toward the improvement (*perfectio*) and welfare (*felicitas*) of the community as a whole. It so happened that, at the end of the 18th century, Wolffian ethics became one of the main sources of the science of legislation, providing the theoretical basis on which to govern by positive law within the state.

However, it is not in a neutral way that the drafters of the ALR (von Carmer, Svarez, and Klein) set out to represent Prussia's social reality in legal form. The juridical regulation that characterized the German rank society was "privatized," in the sense that such a regulation was turned into a set of positive legal provisions enacted by the sovereign: Existing legal materials were considered an indirect expression of the sovereign, who was allowed to coordinate and modify them depending on what the common good and welfare required.

In consequence of this process, the principles of liberty and equality shaping modern natural-law theory acquire an innovative content. The Prussian code does not equate liberty with independence of will, in the manner of Hobbes, Rousseau, and Kant. Liberty is regarded as the form that individual participation takes in a collective sphere of action, such as marriage, family, the relation between master and servant, the professions, church, the army, the university, nobility, and public administration. These collective spheres of action determine their members' rights and duties according to the role each member plays in such a sphere. At the same time, the undistinguished equality upheld by Rousseau was replaced by an "equality of differences" (Canale 2000), that is, by equal treatment *within* each differentiated sphere of action: All persons with a certain status will have the same rights and duties, and a different status will entail a correspondingly different legal capacity.

The conceptual sequence this constitutional project is based on can thus be schematized as follows:

equality/liberty → positive laws (code) → individual rights

Civil society is conceived in the Prussian code as an organic and multiple complex of personal statuses, such that all persons having the same status are equal and so can each exercise their liberty. These statuses, however, will not have any binding force unless they are established by positive law, or recognized by the code. This recognition implies that each person will be ascribed a unique set of rights and duties specific to the social role the legislator attributes to her or him. Thus, for example, a Catholic university professor who is married, has children, and lives with his family will have a combined status as professor, Catholic, husband, father, head of a household, and citizen, with

an accompanying set of rights and duties corresponding to each of the components making up this composite status (Kleinheyer 1998, 284). Hence the law regulating his behaviour will be found in many different parts of the code, depending on the sphere of action his behaviour belongs in.

#### 4.6.3. *Structural Features*

The Prussian code (or ALR) bears in its title the word *general*, giving a clue to the structure of this complex legislative work. But for an understanding of what this means, we should first briefly consider the code in context. Which is to say that, even though ALR had a nominally subsidiary force with respect to regional legislation, the code itself abrogated all preexisting law, and in this way it brought about the legal unification of all Prussian territories (EAGB, *Einleitung*, § 2; ALR, *Patent*, vi–viii; Schwennike 1993, 91ff.). The code was thus general in the sense of its containing *all* valid legal prescriptions, and for this reason many commentators came to regard the ALR as being “at the same time a civil, penal and constitutional code” (Tocqueville 1952–1953, II, I, note 3): The code regulated relations not only among citizens but also between citizens and the state. Now, this idea was misconceived, and yet for a long time it continued to influence the code’s interpretation, and did so with adverse consequences. This is to say that, according to the Prussian science of law, only civil or private law can be codified, that is, considered the expression of the sovereign’s will. Domestic *public* law, by contrast, setting forth relations between citizens and the state, could *not* be regulated by positive law, because this would imply greater authority than the sovereign’s (the authority of law as such) and would be inconsistent with the nature of the state. It was held, in keeping with Hobbes and Pufendorf, that what the common good is and how it must be pursued depends on the decision of the sovereign within the Prussian codified legal system (Klippel 1987, 281; Klippel 1990, 198), and such a decision falls subject only to the judgment of the tribunal of history, in Hegel’s words, and not also to the judgment of positive law. In this sense, the ALR did not uphold the principle of legality where the sovereign’s activity was concerned, nor did it uphold the principle of the separation of powers. Its first task was to set down the content of existing laws in order to guarantee the inviolability of the sovereign’s will against any arbitrary interpretation of it and concurrent political authority (ALR, *Cabinet-Order*, 37; see Hattenhauer 1988, 39; Hübner 1980, 30).

These broad remarks set the background against which to consider the ALR’s formal structure. Like the French and Austrian codes, the Prussian code of 1794 is divided into three parts. But this division does not correspond to Gaius’s distinction between *personae*, *res*, and *actiones*, nor does it correspond to any reinterpretation of it. In fact, the ALR is divided into an Introduction, containing general provisions of law; a First Part, regulating the *sta-*

*tus civilis*, or the behaviour of individuals as members of the state; and a Second Part, regulating personal differences, or the behaviour of individuals as participants in the different spheres of action defined by the different personal statuses. The part of the code that has most drawn the attention of scholars is its Introduction, which has traditionally been regarded as the first genuine constitution of the Prussian state (Thieme 1937; Schmidt 1943; Conrad 1958, 1961, 1965). This is so because the Introduction, has been supposed to set forth both the principle of equality and liberty (ALR, Introduction, §§ 22 and 83), and the principle of separation of powers (AGB, Introduction, § 6, which, however, was removed and never made it into the final version of the ALR). According to the latter principle, in particular, the sovereign would have no longer the power to modify a judicial decision by an imperative act:

§ 6 [AGB, removed in the ALR] The sovereign's judicial decisions do not produce any right or legal obligation.

§ 22 The laws of the State constrain each member of it, without any distinction of rank, class and gender.

§ 83 Universal human rights are grounded on natural liberty, i.e. on the possibility for anyone to pursue her or his own wellbeing without detriment to others.

Even so, as can be appreciated from the ALR's preliminary works (Schwennike 1993, 20ff.), the Introduction to the ALR does not regulate any constitutional matter: It does not set forth the rights and duties of citizens but rather contains rules for legal experts and judges, or secondary rules concerning the enactment, efficacy, application, and interpretation of codified legal provisions (Canale 2000, 215ff.). In this sense, Article 6 AGB did not take away the sovereign's power to modify a judicial decision (see ALR, II, 17, § 18) but instead prescribed that Prussian judges not interpret any such modification as having the force of law in subsequent cases. At the same time, Article 22 ALR simply stated that codified legal provisions are the only law of the land (to which everyone is subject), and not that personal differences are done away with through positive law, because this would be inconsistent with the second part of the code. Finally, Article 82 ALR did not establish the primacy of human rights over positive law: It is simply a provision setting out the sources of law, and it needs to be read in combination with the subsequent Articles 83–87. To put it in Wolffian terms, the provision states that human nature is such that everyone has the right to pursue his or her wellbeing. This is understood by Wolff to be the fundamental principle of *natural* law, and yet its binding force in the *state* is owed to its being set forth in *positive* law. It follows that what individual wellbeing consists in, and how it ought to be realized, will be specified by the sovereign by enactment of legal provisions.

The First Part of the ALR is devoted to legal personality in general, that is, to the condition of individuals as members of the state (to their *status civilis*) regardless of their personal circumstances and statuses. This, then, is the most modern and “bourgeois” section of the code, and it would survive the ALR’s revision in the 19th century. In this part of the code, all persons are regarded as equally subject to the law and so as free and equal: Their natural rights, duties and obligations are levelled out by the code from the start, and the code accordingly establishes from that point onward the way by which to acquire rights, duties, and obligations, that is, it sets out the general regulation of contracts, torts, property, and so on. It bears pointing out, however, that this first part of the ALR does not attribute any rights or duties to individuals but only sets forth the general conditions (*status civilis*) under which rights may be acquired and duties will be incurred.

Most of the ALR’s interest and originality, however, lies in its *second* part. Here, personal differences among persons are regulated according to the system of statuses outlined by the Wolffian school of natural law. Having set forth in the first part the *formal equality* of individuals as persons equally subject to positive law—and so as equally entitled to acquire rights and equally liable to incur duties—the code now regulates the *material inequality* of individuals, who are now considered with respect to their role in society. As Svarez pointed out, “individual rights and duties within the State spring from three sources: 1) birth; 2) social rank (*Stand*); 3) actions or facts to which positive law attribute this effect” (Svarez 1960, 260). Differences in rank or status will obviously be reflected in most legal institutions, such as marriage, inheritance, contracts, and property, and these institutions will accordingly take on different regulative contents. Thus, for example, farmers will be obligated to work their plot of land according to its designated use as established by law or by social needs (ALR, II, 7, § 8); they and their descendants “are not allowed to undertake a bourgeois profession without state licence” (ALR, II, 7, § 2); moreover, servant farm workers are subject to relevant restrictions as to marriage, freedom of movement, and parental authority, this to ensure their full and continuous contribution to the common welfare (ALR, II, 7, §§ 150, 161ff., 171ff.). The regulation of middle-class status appears to be more progressive and flexible: This was considered “normal rank” in Prussia (Kleinheyer 1998, 286), but the code minutely regulated the different commercial and productive activities for the purpose of coordinating them under an overall plan (ALR, II, 8, §§ 128, 150, 161, 180). Industry and commerce were treated in the code not as expressions of individual autonomy or of the market economy, but as social functions serving the common good and the general welfare. The ALR was in this sense aimed at setting out a system under which to realize a planned economy regulating every aspect of social life, a system in which the regulation of the private sphere is strictly functional to the common interest. Under the ALR, in conclusion, the nobility lost the po-



litical role and most of the privileges it had during the ancien régime. This class became a “service class” (Baumgart 1969, 152), one that enjoyed greater capacities than the other classes when it came to marriage, wills, and patrimony, but that could not take up commercial activities and was subject to the state’s administrative control.

The ALR was thus aimed at transforming Prussia’s old rank society (*ständische Gesellschaft*) into a “service society,” one in which each person was bound by a unique set of personal spheres of action set forth by the code itself, and in which everyone’s activity was conceived as functional to a common, overarching end. It thus happened that the reinterpretation made of Wolff’s eudemonistic ethics at the end of the 18th century wound up legitimizing the authority of the sovereign’s enacted positive law as the only means by which to guide the members of society toward the state’s welfare—and only in consequence of this greater good could individuals look to their own happiness and welfare.

#### 4.7. The Austrian Model (ABGB, 1811)

The *General Civil Code of the German Hereditary Territories of the Austrian Monarchy* (or ABGB) has traditionally been regarded by commentators as Janus-faced. Indeed, on the one hand, it appeared to be the most perfect example of natural-law codification (Wieacker 1995, 266ff.), for it seemed to positivize according to reason the principles that govern human nature, at the same time as it set forth the primacy of fundamental rights under the law, and was in this sense viewed as combining “the rationalistic natural law of the 18th century with the political and economic liberalism of the 19th century” (Ogris 1989, 380). But, on the other hand, the ABGB continued to recognize many institutions of the ancien régime, and was in this sense regarded as a conservative code (Brauneder 2006 and 1992), a characteristic appreciated by its contemporaries because it preserved the features of traditional German society, in contrast the French style of lawgiving, which was egalitarian (Gönner 1814; W. 1814; Dölemeyer 1978, 187–8).

These two faces of the ABGB, however, are only *seemingly* contradictory, for they outline a social and institutional model that can be compared neither to the old rank-based social order nor to the subsequent liberal state. In fact, what the code proposes to do is resolve the tension between individual freedom and legal coercion, and it does so seeking a third way different from both the ALR and the French Code Civil.

This model was strongly influenced by the modern Catholic school of natural law, which survived in Austria thanks to Karl Anton von Martini, but it was also influenced by Kant’s critical philosophy, which in the early 19th century became widespread among legal scholars, among whom Friedrich Karl von Zeiller, the head of the legislative commission that drafted the



ABGB. An overview of these two influences making up the ABGB's theoretical background will thus make it possible to arrive at a consistent picture of this legislative work and to illustrate its historical significance.

#### 4.7.1. *Theoretical Background*

##### 4.7.1.1. Catholic Natural Law and Legislation

Although a general code for the Austrian territories had been in the works since the early 1700s, its actual drafting did not begin until the 1750s. There had been earlier attempts at such a code—examples being the *Codex Theresianus Iuris Civilis* of 1766 and the *Josephinisches Gesetzbuch* of 1787, and above all *Martini's Project* of 1794 (Ofner 1976), named for its main drafter, Karl Anton von Martini—and they all had an equal influence on the history of Austrian codification, setting the stage for the future ABGB.

Martini was the first professor to teach natural law at the university of Vienna, and he was at the same time a typical exponent of the syncretistic attitude of natural-law theory in the 18th century: There are accordingly many different elements of European culture that Martini's work on natural law and legislation brings together, such as the theological thought of the School of Salamanca, Wolff's mathematical method, Pufendorf's natural and state law, and Montesquieu's analysis of the forms of government and legislation. However, his chief contribution to the history of natural law and to the science of legislation can be said to lie in his effort to reconcile modern natural law with Christian theology, as can easily be appreciated not only from his manuals but also, and especially, from his codification project.

According to Martini, the first principle of natural law is not natural liberty but the pursuit of the good as established by God's revealed will. This leads Martini to affirm in the codification project the primacy of the good over justice (Ofner 1976, § 1): The good learned from our love of God determines the measure of justice and, consequently, the content of natural liberty. Natural rights therefore take the form of faculties to act in accordance with justice and with God's revealed will: They are in this sense *innate* rights (Ofner 1976, § 4), for which reason *all* human beings have such rights and all of them are on that account equal. The pursuit of the good in keeping with God's will requires all individuals to live in society (Ofner 1976, § 5) and to set up the state, for in this way they can each protect their rights and enforce the duties owed to them. It should be pointed out that Martini postulates a full continuity between the state of nature and the civil state: The birth of the state does not mean that individuals must altogether relinquish all their natural rights to the community in order for these rights to be administered by the sovereign (Martini 1783–1784, §§ 27ff.; Martini 1809). Martini is thus saying that individuals retain their natural rights within the state, but that such rights can be attenu-

ated or modified by the sovereign through positive law, so as to ensure social order and the wellbeing of the community (Martini 1783–1784, §§ 71ff.).

In this way Martini tries to integrate into modern natural law the theological tradition of Second Scholasticism—with the idea of reason as a source by which to gain knowledge of the good—as can be appreciated as well from Martini’s frequent quotations of Francisco de Vitoria, Petrus Fonseca, Domingo de Soto, and Francisco Suárez, which is also a way of criticizing Thomas Aquinas (Martini 1781, §§ 31, 32, 46, Scolia). But in making this integration (that is, in working Second Scholasticism into modern natural law), Martini models the Christian theological tradition on the basis of both Pufendorf’s natural law and Wolff’s systematic method, a method he appreciates far more than the *content* of Wolff’s philosophy (Martini 1781, § 246). The conceptual basis of these two quite disparate sources, or the reasoning on which basis Martini uses both of them, can be understood by way of the references he makes to the theological works of Jovenel de Nonsberg (Hebeis 2007, 47). These references reveal, in particular, Martini’s familiarity with *Theologia naturalis* (1436), a celebrated work by the Catalan theologian, philosopher, and physician Raimundus de Sebunda, arguing that Nature and Revelation will ultimately meet, and so that our rational knowledge of nature has the same content and value as our belief in God.

This conceptual framework shows up the differences between Martini’s foundation of civil law and the Wolffian school. For Wolff, individuals are persons, and so have rights and duties, insofar as they share in a personal status attributing content to their innate faculties and attitudes. For Martini, human beings have innate rights and duties in a strict sense, and so they have them from the start. But in the light of the circumstances the society may happen to find itself in, such rights and duties can be limited or modified on the basis of each person’s rank and condition in society. So, the different conceptual frameworks that Martini and Wolff relied on to justify legal authority did not simply serve a rhetorical purpose: They also serve to explain, as we will see, the structural differences between the Austrian code and Prussian code.

#### 4.7.1.2. Zeiller’s Reception of Kant’s Philosophy of Law

The diffusion of Kant’s philosophical work in early 19th-century Europe exerted a deep influence on the logical form and the systematic order of both legal theory and positive law (Tonella 2007, 11ff.; Kersting 1982, 152ff.; Stühler 1978; Negri 1962), and it also brought about a change in the conceptual framework so far examined. This can clearly be appreciated from the writings of Franz Edlen von Zeiller, the head of the legislative commission charged with drafting the ABGB: It was Zeiller’s view that natural law is deeply indebted to Kant’s critical approach for the important achievement of clarifying and singling out the fundamental principles of natural law, thereby

making it possible to keep natural law distinct from history, anthropology, and politics (Zeiller 1802, § 37). We owe it to Kant if natural law can focus on “*formal* principles that are drawn from Reason and brings them into legal doctrine, which thereby becomes a real science” (ibid.). This makes it possible to come at the fundamental principle of natural law, namely, liberty, understood as consisting in the autonomy of the will. This principle “immediately derives from the form of Reason and from the essential concept of a rational human being” (Zeiller 1802, § 40), and it lays the foundation for objective law, governing the exercise of freedom consistently the freedom of others, as well as for legal duties, which “prohibit treating others as a means to achieve one’s own purposes” (Zeiller 1802, § 7). These general premises are shared with the Kantianism of the late 18th century, but then Zeiller does not conclude on this basis that it is the task of legislation in the state to translate the principles of pure practical reason into positive legal provisions. In fact, the science of law (*Rechtslehre*) is distinguished by him from the theory of prudence (*Klugheitslehre*): The former is a “science of rights,” drawing its principles from pure practical reason and aimed exclusively at stating what justice is; the latter is instead a “science of means for exercising and guaranteeing rights” (Zeiller 1802, § 17), and it accordingly draws its principles from experience and is aimed at achieving the wellbeing of a nation by taking into account its territory, its social makeup, its people, and so on. Moreover, the nation’s temporary needs, as well as any extraordinary circumstances, may make it necessary for legislation to take a radically different course from rational law: This would be effected by means of “political laws,” and these cannot be codified, the reason being that they are an arbitrary tool in the sovereign’s hands.

Even though Zeiller’s natural law was based on the secularized principles of pure reason, and not on God’s revelation, its implication for positive law and legislation are exactly the same as Martini’s. Natural law teaches that individuals have an innate right to personality and freedom consisting in “the right to have rights”: This right is logically inviolable and inalienable, and it distinguishes human beings from things. But then the natural rights that conceptually *follow* from this fundamental right may be modified or suspended by the sovereign based on the principles of legislative and political prudence. Moreover, while everyone may be equal in principle, not everyone is equal in practice. Which is to say that different people have different capacities and attitudes and are bound by different relations, all of which translates to different social positions:

Claiming that individuals have the same rights would be similar to claiming that, since a human being cannot be thought of without a body, each human being has the same physical features, shape, and the same face. (Zeiller 1802, § 50, note)

In a similar way to Kant, natural rights are considered by Zeiller as no more than *regulative* ideas: It is the state’s task to pursue them by appropriate legis-

lation and government, and their function is clarified by opening them up to the citizens' criticism (Zeiller 1802, §§ 21–3). Positive legislation can accordingly be described as having a number of tasks as follows:

a) to assess what modifications of natural rights are possible in general [...] and necessary in the light of civil law, state law and politics; b) to organize the juristic acts [*Geschäfte*] that characterize a certain State according to a natural order; c) to determine the concept of all juristic acts; d) to determine what is still vague and ambiguous in the latter on the basis of its general concepts, in order to avoid legal disputes; d) to formulate as precisely and completely as possible the juridical laws drawn from the principle fixed thereby. (Zeiller 1802, § 24)

This points up the continuity that Zeiller's principles of legislation have with Martini's project, and it is this continuity that is key to understating the conceptual structure of the ABGB.

#### 4.7.2. *The Constitutional Plan*

On the face of it, Martini's and Zeiller's approach to natural law and legislation seems to affirm and justify the primacy of human natural rights over positive law. This understanding seems borne out by Article 16 of the ABGB, stating that "each human being has innate rights which are still evident through Reason, and hence ought to be considered as a person." This famous article has convinced many legal scholars to regard the ABGB not only as setting forth the principle of unified legal personality, as the Code Civil had done, but also as introducing modern constitutionalism in the Austrian territories.

However, as the foregoing discussion on the theoretical background to the ABGB suggests, this understanding is wrong. In fact, it was observed that freedom is considered by the ABGB as an end for law and legislation to pursue in light of contingent situations and of the nation's distinctive traits, even if this means that individuals will not have their rights protected and will not be able to exercise or enforce them. If the personal privileges and rank differences that defined the ancien régime are considered by government to be a necessary condition of the state's cohesion and prosperity—a condition on which depends the fulfilment of individual liberty—then it will be justified for such differences and privileges to be recognized by positive law, precisely as differences and privileges *functional* to individual autonomy, even though they seem to deny such autonomy. As Article 17 of the ABGB states, "what is in accordance with innate natural rights will be considered in accordance with the law until a legislative limitation of these rights is demonstrated."

This justifies incorporating many feudal forms and institutions into the ABGB, and it explains how the code might provide for personal differences all the while (and without contradiction) affirming the principle of unified legal personality. In order to keep an open door to the past without rejecting the natural-law principles of liberty and equality, the Austrian drafters used

the legislative techniques of cross-reference and hetero-integration, with many codified legal provisions either (a) making *explicit* reference to political laws (i.e., the sovereign's laws) for the regulation of some key areas of social relations or (b) making an *implicit* exception to a rule of law. At the same time, customs were allowed to supplement the codified legal system if positive law expressly so provides (ABGB, § 10). Zeiller's legislative politics, then, stood in contrast to those of Svarez and Klein. The Prussian drafters sought to exhaustively regulate by positive law every single aspect of social and economic life within the state. The ABGB, by contrast, reduced to a minimum the amount of codified subject matter, so to allow relevant areas of civil law to be regulated by political laws. Furthermore, the Austrian code was made up of general provisions stating general legal principles by way of abstract definitions and by reference to the general tasks the law was entrusted with accomplishing. Indeed, Franz von Zeiller took the view that a code should not set out a complex casuistry but "should look for the general in the particular" (Zeiller 1811, § 19).

In summary, the conceptual sequence the Austrian Civil code is based on can be schematized as follows:

individual rights → liberty/equality → positive laws (code)

Every human being is considered by the ABGB as having certain fundamental freedoms designed to guarantee for each person an independence of will and for all people their formal equality as citizens. However, individual liberty cannot be secured in civil society unless individual conduct is regulated by the law set forth in codes, which thus become the only legitimate source of juridical obligation within the state: There is no way for codes to be supplemented or made complete by custom, natural law, or equity unless such a possibility is expressly provided for in the codes themselves. But then, positive laws may (directly or indirectly) restrict and modify the content of fundamental rights, since these rights are regarded as an end to be pursued and not as a limitation on legislation and government. The legislator becomes in this sense the sole administrator of individual rights and duties and is accordingly entitled to restrict or expand them depending on historical conditions and events. At the same time, while individuals are considered to be free human beings, their liberty is subject to the guardianship of the state, which may not regulate every aspect of their social life but is nonetheless empowered to suspend legality and the exercise of freedom whenever it deems this necessary.

#### 4.7.3. *Structural Features*

The Austrian General Civil Code of 1811 consists of an Introduction and three sections respectively entitled "On Rights in Personam," "On Rights in

Rem,” and “On the Common Determination of in Personam and in Rem Rights.” This distribution of legal materials recalls, here too, Gaius’s triad (*personae, res, actiones*) and is in this respect more in keeping with the system of Roman *Institutiones* than is the Code Civil or the ALR. The normative content of in personam and in rem rights, however, is strongly influenced by Martini’s and Zeiller’s systems of natural law, as well as by the tradition of German feudal and customary law.

The Introduction to the ABGB is different from the first parts of Martini’s and Portalis’s projects or most of articles in the introduction to the ALR in that, while the former introduction concerns “civil laws in general” (ABGB, §§ 1–14), it does not have an encyclopedic function. Instead, it contains technical prescriptions addressed to legal professionals in regard to the sources, the criteria of validity, and the interpretation of positive law. The ABGB sets out in particular a thorough regulation of legal interpretation that became paradigmatic in European legal systems, together with Savigny’s theory of interpretive canons, and that still influences contemporary legal dogmatics. According to §§ 6–8 and 10–12 of the ABGB, legal provisions ought to be interpreted according to their literal meaning (plain meaning) and the legislator’s intention (legislative intent). If these criteria do not suffice to determine the content of legal provisions, then the judges must resort to analogical reasoning, that is, they must look to either other legal provisions regulating similar cases or to the general principles of law. And, finally, “if the legal case remains dubious,” the judges must consider the context of the case “in the light of the natural principles of law.” In this sense, by pointing to natural law as the final criterion of legal interpretation, the Austrian legislators seemed to contradict the project of reducing all existing sources of law to the sovereign’s will, and so of accomplishing the state’s political, legal, and social unification. So, too, they wound up opening the Austrian code to judicial discretion because, as Franz von Zeiller observed in 1801, the principles of natural law are often created by the judges, so that “false equity (*aequitas cerebrina*), as Thomasius calls it, takes the place of positive law and the judge becomes legislator” (Zeiller 1801, 40). But the ABGB’s interpretive rules were in fact explained and justified by the nature of the code itself, which did not regulate all areas of civil law, preserved a high degree of generality, and introduced forms of hetero-integration by way of customary law and provincial legislation. The task of ensuring the unity of the legal system was thus entrusted to the judiciary. The judge is not a “judicial machine,” Zeiller observes, but is instead bound by positive law in the sense of being obliged “to penetrate the spirit of law” for the purpose of defending the inviolability of the sovereign’s will and of making it effective by application (Zeiller 1801, 61).

The first part of the ABGB is devoted to “personality rights,” which in Zeiller’s system of natural law are understood as rights and duties that people have on account of their being rational human beings. On the one hand, this way of framing the first part of the code introduced into the legal system the



principle of a unified legal personality. All individuals are equal in the eyes of the law, in the sense that they are equally capable of having the rights and duties set forth in a legislative provision (ABGB, § 18). On the other hand, this abstract legal capacity did not prevent different personal positions from being regulated in different ways by positive law, precisely as was the case in the old rank society (*ständische Gesellschaft*) that still survived in the Austrian territories in the early 19th century. In fact, Article 13 states that “privileges and exemptions that are attributed both to single persons and social bodies are to be considered the same as all other rights, as long as political laws do not prescribe something different.”

But the Austrian legislators did not follow the model that had been offered by the ALR, that is, they did not organize the code’s normative material on the basis of a complex system of personal statuses. Thus, for example, the legal provisions concerning the nobility and farmers are treated in the ABGB in the manner of Martini’s 1794 project, that is, as special or exceptional laws regulating not individual behaviour but the use of particular goods. In other words, the ABGB is based on a legislative technique whereby the civil law eliminates the plurality of personal statuses, along the lines of modern natural-law theory. This is not to say, however, that personal differences altogether disappeared: They were simply “transferred” to the *goods* and to the way in which goods can be used (Tarello 1976b, 528). The ABGB sets out a detailed typology of legal goods that makes up the systematic basis for the code’s second and third parts. In this way, an individual’s rights and duties in the sphere of civil law are not simply determined by the individual’s arbitrary will within the bounds of positive law, but by the *relation* between the individual and the types of good provided by that relation. We can see, in light of the ABGB’s conceptual background, that this approach was meant to guarantee the *rationality* of private deliberations, and so, in Kantian terms, it was meant to guarantee for individuals an authentic autonomy.

Thus, for example, the right to property is not just defined by the ABGB as the free use of a thing (ABGB, § 354), along the lines of the French Civil Code, but is in the first instance defined as the “belonging” of a type of good to somebody (ABGB, § 353). This logically enables the legislator to distinguish between property understood as the *substance* of a good (*dominium directum*) and property understood as the *products* or *use* deriving from a good (*dominium utile*) (ABGB, § 357), and to regulate the property regime applicable to “fiefdoms” and “feudal goods” (ABGB, § 359). What made it possible to coherently include these legal institutions of the ancien régime into the code was that the content of property rights was based in the code on the *rationality* of the relation between a type of good and the person to whom the good belongs.

Something similar can be said in regard to the law of contract. The ABGB recognizes the principle that no contractual obligation can arise without the



parties' mutual assent, for it states that a "contract is born from an agreement between the parties" (ABGB, § 861). However, this agreement (the parties' mutual assent) will not suffice to bind or make final a contract for the transfer of ownership: In order for this to happen, the goods must be physically delivered (in the case of movable property) or otherwise deeded (in the case of immovable property) (ABGB, § 426 and 431). It is on these conditions—and not on the parties' free will—that depends rationality of this type of contract, meaning by its rationality its ability to contribute to individual wellbeing and to the social welfare.

In summary, the ABGB outlines an original way to build up civil society by means of positive law. The Austrian legislators sought to create through the code a society of free individuals, that is, of persons who behave in accordance with the principles of universal reason. In order for this to be accomplished, however, individuals have to be *guided* to freedom by the state, the existence of which requires that personal natural rights be limited, personal differences be acknowledged, and many legal institutions of the ancien régime be preserved. Moreover, positive law and codification only establish the *general* principles of law, which can be specified by political and local laws, that is, by authority of the government. The Kantian principle of autonomy was thus interpreted by the Austrian legislators as the basis of a model of society in which liberty was something that law and government had to accomplish by placing limitations on equality and individual free will. The boundaries of such a limitations, however, were not dependent on the law itself but on the "prudential" choices of political power.

#### 4.8. Conclusion

Having analyzed the three modern codes that mark the passage from the ancien régime to bourgeois society and the liberal state, we can now go back to the main promises of the age of codification and see whether these promises were kept. Did the codification of law bring into effect the principles of liberty; did it ensure that everyone be treated equally; did it ensure the certainty of law and the coherence of the legal system; and did it enable the state's unification and the development of a free civil society? In other words, did the code actually transform the legal system and society, or is this rather a "myth" (Grossi 2005, 85ff.) conceived by legal positivism in the 19th and 20th centuries, a myth used to this day to justify the legal enforcement of political decisions, and which continues to exert a strong influence on legal interpretation and adjudication in civil-law countries (Cappellini 2000, 19)?

There is no single answer that can be given to these questions, the reason being that the modern codification of law was not a unitary process. The Code Civil, the ALR, and the ABGB had quite different theoretical backgrounds, outlined different models of civil society, ascribed different mean-

ings to liberty and equality, gave different interpretations of the past and its legacy, and were drafted using different legislative techniques. What they had in common was their inheritance of Roman law, which provided the normative devices of civil regulation; they also took up and shared the method of natural law, a method on which basis codified legal materials were organized; and, finally, they shared the principles of liberty and equality, regarded as the values guiding the entire modern codification process. These elements distinguish the “natural-law codes” from the later models of European codification, such as the German Civil Code of 1900 (BGB). In fact, the BGB was the main legislative product of the German Pandectistics (see chaps. 6 and 8 of this volume), a conceptualist approach to law and legislation which rejected the codification models based on natural law covered in this chapter, and which therefore lies outside the scope of this discussion.

The standard view of the legal code—a conceit that, with its symbolic force, still inhabits the minds of legal practitioners—actually derives from the success the French Civil Code attained in civil-law countries all over the world, and from its being idealized by European legal scholars in the 19th and 20th centuries (see chap. 6 of this volume). This helped support the idea that a codified legal system is a necessary precondition of liberty, equality, and justice. And yet the study of the modern codification process shows, by contrast, that a code is neither a necessary nor a sufficient condition for achieving these principles but rather gives a legalistic interpretation of them serving to subject citizens to a common power and to unify the state and found a civil society. Moreover, the transition of natural law from theory to practice—a transition that the age of codification seems to have helped along—cannot be regarded as a necessary historical process leading from the theories of natural rights to modern constitutionalism (see chap. 7 of this volume). This transition was instead the result of social and political transformations that often took place in contrast to or in spite of codified legal prescriptions.

## Chapter 5

# GERMAN LEGAL SCIENCE: THE CRISIS OF NATURAL LAW THEORY, THE HISTORICISMS, AND “CONCEPTUAL JURISPRUDENCE”

by Paolo Becchi

### 5.1. Introduction

There are two different conceptions of law that legal science in continental Europe evolved in the early 19th century: These two conceptions developed out of two different language areas—the French area and the Germanic area—and with this also came two different ways of understanding the activity of the jurists, theoretical and practical alike.

The watershed between these two lines of development lay in the idea of codification, which through a long process of elaboration was brought to completion in France with the Code Napoléon, promulgated in 1804. This event gave birth in France to a theoretical orientation that looked back nostalgically to the Exegetic School, entailing an all but total subordination of legal doctrine to the law in force, understood as the law set forth in the code itself. The *science du droit* was, in essence, a technique by which to interpret a certain well-defined object, namely, codified law.

It was instead a different line of development that, in the same arc of time, flourished in the Germanic cultural area. To be sure, even in Germany, especially at the time of the Confederation of the Rhine and in the ensuing period, certain tendencies grew that were favourable to codification; but it was a different model that wound up prevailing with the Historical School and so-called conceptual jurisprudence. The founder of the Historical School was Savigny, but its most important precursor can be said to have been Hugo, and it is for this reason that we will start from Hugo, considering him against the background of the legacy of the late German natural law theory. Only then (in Section 5.3) can we take up the birth of the Historical School proper, which must be considered as closely bound up with the codification debate that took place in Germany between Thibaut and Savigny. We will then consider Hegel's unique view (in Section 5.4) and will finally present Puchta (in Section 5.5), whose conception can only be presented in outline, regrettably losing much of its complexity.

## 5.2. Gustav Hugo and the Crisis of German Natural Law Theory

### 5.2.1. *From Natural Law Theory to the “Philosophy of Positive Law”*

Gustav Hugo was born in Lörrach, in the German state of Baden, a border city and a crucible of different cultures (French, German, and Swiss). He was born on 23 November 1764 but received his legal training in Göttingen, where he spent the rest of his working life. He died in 1844. The two moments at either end of this time span encompass between them two periods (the second half of the 18th century and the first half of the 19th century) that neatly mark the transition from one culture to another, the former being rooted in natural law theory and finding its completion in the work of Kant, and the latter being that of the historical movement, and Hugo can be considered its initiator in the study of law.<sup>1</sup>

Someone approaching Hugo’s work for the first time might be surprised by the importance he had in his time: His most comprehensive work, the *Lehrbuch der Geschichte des römischen Rechts* is a series of lectures making up a course on Roman law which was reprinted a dozen times in Hugo’s own lifetime, and its nature was specifically philological. Indeed, Hugo was an editor of documents of Roman law and a reviewer of works—a tireless reviewer at that, and (regretfully for those he reviewed) an exactingly fastidious one, criticizing these works especially from a philological standpoint. Thus, for example, his famous criticism of Hegel’s 1820 book on the philosophy of law started out by observing (justifiably so) that two frontispieces for a single book are one too many.<sup>2</sup> Hugo was referring to the fact that Hegel’s textbook bore two separate titles, *Grundlinien der Philosophie des Rechts* and *Naturrecht und Staatswissenschaft im Grundrisse*.

Hugo’s most significant work from the standpoint of the philosophy of law is the textbook titled *Lehrbuch des Naturrechts, als einer Philosophie des positiven Rechts, besonders des Privatrechts*, first published in 1798. The title of this book and its date of publication both deserve a few comments. First the date: Just one year earlier, Kant’s *Metaphysics of Morals* had come out; and also published about the same time (1796–1797) were Fichte’s *Foundations of Natural Right* and Schelling’s *New Deduction of Natural Law*.

This was an especially fecund period for German philosophy of law. But there is a world of difference between the works just mentioned and Hugo’s. In the older Kant, the mature Fichte, and the young Schelling alike, the subject of

<sup>1</sup> For an overview of his work, see Marini 1969, which remains to date an essential reading in the literature produced in Italy on the subject. See also Lavranu 1996. I might also point out, among the more recent literature, my own *Gustav Hugo, Friedrich Carl von Savigny und die Anfänge des Rechtspositivismus in Deutschland* (Becchi 2008a).

<sup>2</sup> Hugo’s review first appeared in *Göttingische gelehrte Anzeigen* in 1821 (on pages 601–7); it now appears in Hegel 1973–1974, 377–83.

discussion, and sometimes the object of criticism, was the metaphysical principles underpinning a legal doctrine worked out a priori. It is only with Hugo that natural law was seen to stand on shaky ground. Indeed, it was Hugo's view that natural law resolves itself, or rather dissolves, into positive law.

And that segues into the point about the title of Hugo's work. There is no law, for Hugo, other than positive law; and natural law is conceived by him not as a freestanding system, or a distinct set of rules separate from positive law, but as a complex of philosophical considerations regarding positive law itself. Natural law is the philosophy of positive law, or, more simply, it is the philosophy of law—period—given that positive law was understood by Hugo as being the *whole* of law; and so the qualifier *positive* becomes redundant. It is therefore to Hugo that we owe the name of that discipline which to this day is called philosophy of law. In fact, it is in his writings that the term *Rechtsphilosophie* first appeared, used as a shorthand for the expression *Philosophie des positiven Rechts* (philosophy of positive law).<sup>3</sup>

But let us take a closer look now at the definition that Hugo offers of this expression in Section 1 of his work: “Die Philosophie des positiven Rechts ist Vernunftkenntniß aus Begriffe über das, was Rechtens sein kann, und zwar hauptsächlich über das Privatrechtliche, als über das eigentlich Juristische” (Hugo 1971, 1–2).<sup>4</sup>

This is a very well-known passage, and it may be translated as follows: “The philosophy of positive law is rational knowledge, obtained through concepts, of that which may be in accordance with law, and so principally with private law, understood as that which is properly legal.” This is a point to be discussed in some detail, for it is crucial in understanding the origins of the Historical School.

For Hugo, to speak of the “philosophy of positive law” means in the first place to conceive the philosophy of law as no longer a part of philosophy but of positive law. Which in turn means taking *law* to be an object of philosophical consideration, and doing so from a point of view internal to law itself. Nor does *law* mean here a universally valid law but rather positive law.

The focus of Hugo's study was no longer the metaphysical principles of law worked out a priori by Kant, but the distinctly empirical contents of positive law. With this collapsing of natural law into the philosophy of positive

<sup>3</sup> This expression would later be mentioned by John Austin, with explicit reference to Hugo, in *Lectures on Jurisprudence*, of 1832, not incidentally subtitled *The Philosophy of Positive Law* (cf. Austin 1885, vol. 1: 32).

<sup>4</sup> Hugo 1971 is the anastatic reprint of the 4th edition (Berlin: Mylius, 1819). The same passage in the previous edition (3rd edition; Berlin: Mylius, 1807) sounded like this: “Die Philosophie des positiven Rechts oder der Jurisprudenz ist Vernunftkenntniß aus Begriffen über das, was im Staate Rechtens sein kann” (at page 1). It is significant that in the more recent 4th edition, Hugo should have decided to remove the reference to the state (“im Staate”), laying emphasis instead on private law.

law, the natural law tradition came to an end and law wound up entirely in the jurists' hands, so much so that the philosophy of law as a subject of study would thereafter tend to be taught at law schools and no longer under a philosophical curriculum.

In this sense, Hugo's work marked the passage in Germany from natural law theory to legal positivism. Even though Hugo was not yet using the term *Rechtspositivismus* (legal positivism), it was here that the thing itself first appeared, at least in the sense that Hugo (unlike what had hitherto been the case) did not believe in a natural, rational, universal law existing alongside the various systems of positive, empirical, national law. What for him does in fact exist is a law that differs from one country to the next, and from one time to another, and so a law that is not natural but positive. And this law is essentially *private* law: It is this branch of the law that Hugo, the Romanist, understands as being law par excellence.

It remains to be seen in what sense this way of considering law can still be understood as philosophical. Indeed, the starting point for Hugo is not the question *Quid ius?* (What is law?) but the question *Quid juris?* (What is right?). That this is unequivocally the case can be appreciated from the fact that in the previously quoted definition, Hugo uses the word *Rechtens* and not *Recht*. Hugo's interest lies not in what law *is* but in what it prescribes at different times and places.

This consideration of law was nonetheless regarded by Hugo as philosophical because, even though there was no longer any attempt to come at an ideal timeless law—valid everywhere and at every time, and hence universally binding—the investigation was not exhausted by looking at the positive law in force in a given country but rather took into account such positive law as may exist in *any* political organization.<sup>5</sup>

It also bears pointing out here that Hugo's use of the formula “what can be the law” stands in open contrast to such natural law formulas as “what ought to be law”: This was the first statement in German legal culture affirming the historical character of law over against any metahistorical character it might have.

### 5.2.2. *A Few Comparisons with the Late Natural Law Tradition in Germany*

For an idea of the distance separating this conception from the natural law conception, it will help to have a comparison in the first place with Kant's view. In his introduction to the *Metaphysics of Morals*, Kant distinguishes two

<sup>5</sup> It may be that what prompted Hugo to recast his definition of the philosophy of positive law by ultimately removing from it his earlier reference to the state (as discussed in footnote 4 above) was precisely the risk of being so misunderstood, or of suggesting that the philosophy of positive law is the philosophy of a *particular* legal system.

ways of approaching the legal phenomenon: the jurists' way and the philosophers'. He writes:

[The jurist] can indeed state what is laid down as right (*quid sit iuris*), that is, what the laws in a certain place and at a certain time say or have said. But whether what these laws prescribed is also right [*recht sei*], and what the universal criterion is by which one could recognize right as well as wrong (*iustum et iniustum*), this would remain hidden from him unless he leaves those empirical principles behind for a while and seeks the sources of such judgment in reason alone, so as to establish the basis for any possible giving of positive laws [...]. Like the wooden head in Phaedrus's fable, a merely empirical doctrine of right is a head that may be beautiful but unfortunately it has no brain. (Kant 1996, 6: 229–31, at pages 386–7; cf. Kant 1977, vol. 8: 336)

Hugo certainly did rejoice in a keen mind. What he did not have was precisely that universal criterion which Kant spoke of, and reason has entirely dissolved into history.

It should be stressed here that Hugo's position did not entail any irrationalism or Romanticism on his part—no rejection of reason. After all, the philosophy of law consists for Hugo in “rational knowledge obtained through concepts,” except that at its foundation is a disenchanting and pragmatic reason, understood not (in Hegel's fashion) as an aim to be accomplished in history but as a present possibility, as something that might already be present in history, in the rights historically established and in force in the different states.

To be sure, neither Hegel nor Marx can be said to have been in the wrong when they took Hugo to task in this regard, arguing that in this way he justified the widest array of institutions in history, including those institutions, such as slavery, that are most repugnant to a modern conscience.<sup>6</sup> But both Hegel and Marx were looking at only one side of the question. The other side, the focus of our present discussion, had not been adequately explored. Which is to say that, as much as Hugo's approach may have been reactionary from a *political* standpoint, it was by contrast revolutionary from a *methodological* one. The idea of no longer seeking an abstract rational understanding of law, and looking at law in historical terms instead, was a significant innovation in legal philosophy at the end of the 18th century.

Indeed, the dominant approach of the day was a *habitus demonstrandi*, in the manner of Leibniz and Wolff, conducive to an understanding of legal materials as a set of legal propositions to be systematically rearranged. Leibniz had conceived private law as a manifestation of reason not subject to the changeability and contingency of history (see in this regard Becchi 1999).<sup>7</sup>

<sup>6</sup> For Hegel's criticism of Hugo, see the celebrated § 3 of his *Philosophy of Right*. An important commentary on this important section is offered by Marini 1990 (cf. Valori 1984). For Marx's criticism of Hugo, see Marx's own early article originally published in 1842 in *Rheinische Zeitung* (Marx and Engels 1956, 78–85). On Marx and Hugo, see also Guastini 1974, 59–70.

<sup>7</sup> See also the recent book by G. Torresetti (2008), *L'impero della ragione. Ars Combinatoria: la concezione ermeneutica del diritto in Leibniz*.



This inherently rational nature of law was such that one could apply to law the rules of deductive logic—the logic proper to the exact sciences—proceeding by demonstration. In this way legal science could attain an understanding of its object (law) equal in certainty to that which distinguishes logic and mathematics. Even though Leibniz never got to be point of building on these premises an organic theory of law, his ideas permeated the legal culture of the 18th century by way of Christian Wolff, who as professor of both mathematics and natural law had propounded a single method for both fields of study.<sup>8</sup>

Legal material was fashioned as a system of principles deductively derived one from the other proceeding from general to particular, all the way down to the rules of social life. The law was a complex of legal propositions ordered in the same way as are the propositions of mathematics: One would therefore start out from the general definitions (the axioms) and then work one's way down to the more particular developments (arrived at by demonstration, as though they were theorems).

The effort among legal scholars in the late 18th and early 19th centuries was to use this rationalistic approach to explain the law in force in a “systematic” way. Three works are fundamental in this regard: K. S. Zachariä's *Ueber die wissenschaftliche Behandlung des römischen Privatrechts* (1795), A. F. J. Thibaut's *System des Pandektenrechts* (1803), and G. A. Heise's *Grundriss eines Systems des Gemeinen Zivilrechts zum Behuf von Pandektenvorlesungen* (1807) (see, in this regard, Rückert 1987).

With Zachariä's book, the project begun by Leibniz was resumed, consisting in an effort to systematize and rationalize Roman law. Zachariä laid emphasis on the need to treat Roman law scientifically, by which he meant reducing it to a set of general principles. With Thibaut's book, this set of principles assumed the form of a system, but it nonetheless remained a system of Roman law. With Heise's book, finally, that system became a system of “private *ius commune*” and no longer one of Roman law as such. The whole effort was now to rationalize and systematize the law in force, but in this way legal material was regarded as given, as something to which it was the jurist's task to give systematic form. What in this reconstruction was being neglected is the historicity of law.<sup>9</sup>

It was Hugo's view, by contrast, that the origin of law is to be found in the first place in historical reality, and what we find in this reality is not a universally valid law but rather those different systems of law whose different origins lie in the concrete legal experiences of different peoples. But then, what is for Hugo the origin of positive law? Hugo frames the problem as follows:

<sup>8</sup> See, among the recent literature, Canale 1998.

<sup>9</sup> Two works that remain authoritative on German legal science between the late 1700s and the early 1800s are Schröder 1979 and Stühler 1978. See also the first three chapters in Schöler 2004, 11–130. For an overview, see Becchi 2008b.

Must all legal propositions [*Rechtssätze*] be grounded in the explicit or at least the implicit will of the supreme power, meaning the legislator, or is there in addition to the legislator a source of positive law which is similar to a people's language and customs, and which may be called customary law, legal doctrine, or jurisprudence? (Hugo 1971, § 153, 196; my translation)<sup>10</sup>

It is in order to answer this question about the origins of positive law that the analogy was introduced here by Hugo between law and language.<sup>11</sup> This is an analogy that would later be taken up by Savigny, and Hugo used it to elevate to the status of a source of law not only custom but also legal doctrine, or jurisprudence. But Hugo's answer is worth looking at in full:

Where a constitution tends toward unlimited power, or where false concepts have at any one time been drawn from such a constitution, or where the certainty of law is placed before any other thing, it is the former view that is often asserted [the view that custom and legal doctrine are not sources of law]. What instead works in favour of the latter view is not just the natural history through which every system of positive law has formed, or just the example offered by all civil peoples, but also the greater likelihood that a system of law freely accepted by the people will be applicable and suitable, and even the absolute impossibility of covering all cases within the purview of expressly stated laws. (Hugo 1971, § 153, 196–7; my translation)

We are looking here at a complete break with the natural law tradition. Indeed, it was one of the features of Leibniz's and Wolff's natural law rationalism that law had to be complete and hence certain as to its application, but for Hugo it was better to instead have an uncertain law: uncertain though not despotic, and free to accept in full the legacy of the past along with all the modifications the jurists might make to this legacy.<sup>12</sup>

Completely alien to Hugo's attitude was the idea, proper to natural law and then taken up by the Enlightenment, of a legislation capable of solving whatever case might arise, in such a way as to leave as little room as possible for interpretive activity. Hugo recognized that laws remain in any event abstract and general, and it is up to the judge to make sure that such abstract law becomes living law: The judge therefore cannot be reduced to a "pure judging machine" that applies the law mechanically.<sup>13</sup> While we can appreciate here the clear stand taken against natural law theory and the Enlightenment, it also emerges that legal positivism developed in Germany in a differ-

<sup>10</sup> It should be noticed the term *Rechtssatz* is used here by Hugo not in the usual sense of "a legal rule," nor even in the sense that Kelsen would later introduce, of a "legal proposition," but simply in the sense of "law." What Hugo is saying, then, is that it would be a mistake to equate the law with statutory or enacted law the reason being that among the sources of law there also figure custom and legal doctrine.

<sup>11</sup> Two essential readings on the subject of this analogy are Dufour 1974 and Marini 1987.

<sup>12</sup> The same point is made in Tarello 1988b, 121–22.

<sup>13</sup> The expression was used by Hugo in a 1789 review of an important book by Schlosser: see Hugo 1828, vol. 1: 114. The book under review was J. G. Schlosser's (1789), *Briefe über die Gesetzgebung überhaupt, und den Entwurf des preussischen Gesetzbuches insbesondere*.

ent manner than did the legalistic legal positivism which took hold in France with the *École de l'Exégèse* (Bonnecase 1924).

Having laid out some of Hugo's main theses, we can now ask in conclusion what innovation Savigny introduced to them. There is no intention here of diminishing this great jurist's oeuvre, but it can be observed that Savigny took Hugo's ideas and forged out of them the program for a school of legal thought, using these ideas as tools in the pursuit of a political objective: that of defeating the codification advocated by Thibaut. On reading Savigny's most well known and significant passages against codification, one cannot but observe a seamless correspondence of ideas and intents with Hugo. There is in Savigny the same way of setting up the problem of the origin of law, the same critique of the natural law and Enlightenment tradition, the same attitude to the law as an intrinsically historical phenomenon. With Savigny, as we are about to see, Hugo's mode of thought had sent down its roots.

### 5.3. Thibaut and Savigny: The Polemic on Codification

#### 5.3.1. *Premise*

The polemic on codification in the early 19th century marked one of the most important chapters in the history of that century's legal culture.<sup>14</sup> In the programmatic writings of 1814, Thibaut and Savigny expounded in pamphlet form their view on the reorganization of law in Germany in the post-Napoleonic era. But beyond this, there emerged from their polemic two different conceptions of law and of the role of legal science. It is to these questions, then, that the discussion in this section will be devoted.

#### 5.3.2. *Thibaut's Position*

##### 5.3.2.1. Political Background

Thibaut (1774–1840) was professor in Kiel and Jena, and then in Heidelberg beginning in 1805. He was a musician in addition to being a jurist, and he wrote numerous works, among which the *System des Pandektenrechts* (published in Jena in 1803).<sup>15</sup> His fame, however, is owed to a short essay in which he made a case for unifying the whole of civil law under a comprehensive na-

<sup>14</sup> A reconstruction of the debate is offered in Becchi 1991c.

<sup>15</sup> There has been, surprisingly, a dearth of literature specifically devoted to Thibaut. No worthy contribution came out until Kiefner 1960. This essay, elaborating on Kiefner's unpublished dissertation written in 1959, offers the best critical reconstruction of Thibaut's work as a whole (and does so by considering only in passing, on page 310, the polemic on codification). This polemic is specifically treated in Kiefner 1983. On Thibaut, see Polley 1982, vol. 1. On the controversy with Savigny, see Schöler 2004, 106–12.

tional code. But before we get to this important essay, we should first consider the context in which it appeared.

The question of codification had already been taken up by Thibaut in a long review of *Ueber den Code Napoléon und dessen Einführung in Deutschland* by August Wilhelm Rehberg, a book published early in 1814 and written on the occasion of the victory achieved in the struggle for liberation waged during the Napoleonic Wars.<sup>16</sup> Rehberg was essentially advocating the abolition of the French code in those German territories where it had been introduced, arguing it would have been advisable to simply go back to the pre-existing situation. National pride and straightforward reactionary sentiment found common ground in the idea of rejecting French civil law. Opposition to the Code Napoléon was nothing new.<sup>17</sup> What did develop as new was instead the political situation in which such opposition was being expressed. Rehberg addressed a genuine problem that remained such independently of the conclusions his book came at: This was the problem of how to organize civil law in Germany once the resistance movement had achieved victory over the Napoleonic occupation.

The question had occasioned a long series of publications that did not just concern the organization of civil law but also took the form of a discussion on the national and constitutional question.<sup>18</sup>

There was a variety of reactions that Rehberg's book had elicited with regard to the more specific question of Germany's legal framework: One after the other came the writings of Brinkmann, Schmid, Pfeiffer, Gönner, and journal reviews in the meantime multiplied (Brinkmann 1814; Schmid 1814; Gönner 1815; Pfeiffer 1815).<sup>19</sup> Among these writings, it was Thibaut's that stood out. Although Thibaut had supported the Code Napoléon during the occupation, he hadn't done so opportunistically; instead, he had been balanced in his assessment, not neglecting to point out its undeniable value. It is for this reason that, while not calling for an extension of the code to other German territories, he urged caution in assessing Rehberg's proposal to abolish the code in those countries where it had been introduced.

<sup>16</sup> Thibaut's lengthy review appeared in *Heidelbergische Jahrbücher der Literatur* (Thibaut 1814). Other reviews of Rehberg's book (anonymous ones) are in *Allgemeine Literatur Zeitung* (Anonymous 1814b) and in *Jenaische Allgemeine Literatur Zeitung* (Anonymous 1814c).

<sup>17</sup> There had already come out, in 1807, an article by von Kamptz arguing against introducing the French code in the Confederation of the Rhine: Kamptz 1807.

<sup>18</sup> Following are some of the earliest such writings, which can only be mentioned here without making them a specific object of study: Feuerbach 1813; Anonymous 1813a; Anonymous 1813b; and Anonymous 1814a. A collection of significant documents can be found in Spies 1981. In this regard, see the fundamental Brandt and Grothe 2007.

<sup>19</sup> I am mentioning these writings (though there are many more of the same kind) only to point out a fact that seems often unremarked, which is that the polemic on codification did not just pass between Thibaut and Savigny but called into action a whole array of forces, some of which may even not be traceable to either Thibaut or Savigny.

The influence of the French code had been particularly strong in the states making up the Confederation of the Rhine, which states (as of 12 July 1806) had come under the French emperor's high protection. On the left bank of the Rhine the code had come into force since its promulgation in France, and so deeply entrenched had it become during the occupation that its effect continued to last up to the end of the century. Heidelberg, where Thibaut had been living since as early as 1806, had been annexed to the Grand Duchy of Baden. And the University of Heidelberg itself, along with the University of Freiburg, had been at the forefront in the effort to study and disseminate the Code Napoléon in Germany. This code had had a warm reception among jurists precisely on account of the liberal spirit with which it was imbued, as well as on account of the clarity and simplicity that distinguished it.<sup>20</sup>

But while Thibaut, unlike his detractors, recognized the merits of the French code, he also held that the time was ripe for a national code designed *by* and *for* the Germans. Although the national movement that had sprung up during the Napoleonic Wars did not quite have enough momentum to effect a *political* unification of Germany, it did gain enough strength to support a *legal* unification under a national code. This was a point that Thibaut had clearly expressed early on, since his review of Rehberg's book.<sup>21</sup> But it is difficult to see how a book review could have given birth to an authentic program for a politics of law. Whence the need to fashion the review into a political pamphlet, a manifesto laying out the case for codification.

### 5.3.2.2. Codification as a Way to Supersede “Legal Particularism” and Simplify the Legal Framework

Every page in Thibaut's pamphlet is filled with passionate rhetoric denouncing the disarray and uncertainty present in the legal framework of the day. Let us look at a significant example:

Our entire national law is a farrago of provisions beyond number that contradict and void one another, designed to divide the Germans and to prevent judges and lawyers from having any deep knowledge of the law. But even a perfect knowledge of this hodgepodge will not take us

<sup>20</sup> Among the best-known commentators of the Code Napoléon in Germany deserving mention were, aside from Thibaut, J. N. F. Brauer, K. L. von Grolman, J. A. L. Seidensticker, and K. S. Zachariä, all of whom devoted textbooks to the code. See in this regard Becchi 1991b.

<sup>21</sup> As mentioned in footnote 16, Thibaut's review appeared in the *Heidelbergische Jahrbücher der Literatur*. I am translating here from pages 24–25: “At this very moment we have before us an unexpected opportunity to reform the civil law [...]. All German peoples are now in agreement, all united behind a single overarching purpose; everybody is fighting with and for everybody else [...]. If the German governments wanted to come together to draft a code of civil, criminal, and procedural law, spending over the course of five years what it costs to maintain half a regiment of soldiers, then we would not fail to achieve something excellent and solid.”

far, since our national law is so incomplete and lacking that ninety-nine out of one hundred legal questions have to be solved by recourse to foreign received codes or to canon and Roman law. (Thibaut 2002, 42; my translation)

Clearly implied here is a stark contrast between a legal framework that has fragmented into particular systems and a unified framework born of a unified codification. Codification would have put an end to that fragmentation that still characterized Germany's legal framework in the early 19th century. The great innovation the code would have introduced essentially consisted in making it possible to overcome that state of affairs which goes by the name of "legal particularism."<sup>22</sup> The expression is never used in Thibaut's pamphlet, but it describes precisely that reality to conserve which Rehberg had taken a stand, and to overcome which Thibaut had in turn taken an opposite stand.

It will be useful to reconstruct here in very broad strokes the legal situation in which the Germanic territories found themselves in the early 18th century. Private law was split in two main parts: On one side was a patchwork of particular systems of private law, and on the other was that law which under those systems was recognized to be valid as *ius commune*; on the one hand, in other words, were the different laws of the land (or *Landrechte*), and on the other was the received Roman law that the courts looked to as a source with which to supplement their own law. And such was the development of local law in some of the German territories (especially in the south) that opposition grew to the tendency to make Roman law the prevailing law.

The first codifications (the Prussian one of 1794 and the Austrian one of 1811) had underscored how the crisis of Roman law in the Germanic area unfolded following different models of development.<sup>23</sup> In Prussia, Roman law fell into crisis but not so the structural system based on the *ius commune*, so much so that the 1794 Allgemeines Landrecht für die Preußischen Staaten (ALR) presented itself as a new *ius commune*, acting to supplement the particular systems of law. In Austria, by contrast, the 1811 Allgemeines Bürgerliches Gesetzbuch (ABGB) tended toward a uniform private law not subject to exception, even as it took up much of the content of Roman law. At the time when the polemic on codification flared up, the legal organization of the Germanic territories was profoundly diversified. There were states where the *Prussian* code was in effect (as a *ius commune*), and ones where the *Austrian* code was in effect, and ones where the *Napoleonic* code was in effect. Then, too, these modern codes existed alongside the different territorial laws—the object of written consolidations—which in turn existed alongside Roman law.

<sup>22</sup> Thibaut had already denounced such particularism in his review of Rehberg's book: "For many centuries the Germans have been paralyzed, oppressed by one another, divided by a maze of heterogeneous, in part irrational and pernicious uses" (Thibaut 1814, 24; my translation).

<sup>23</sup> For an insightful overview, see Tarello 1976a. See also Chapter 4 of this volume.



For Savigny, any change brought to the existing situation would have been risky: Roman law had to be preserved in those territories where it was in force as a supplementary law; and the Prussian and Austrian codes did, too, since their abolition would have bred confusion. (The French code was something of an exception in Savigny's discussion.) This heterogeneous legal material had to be unified, and this was the peculiar task entrusted to legal science.

For Thibaut, by contrast, it was necessary to put an end to this *mélange* of sources by introducing a new code: a single code for the whole of Germany. As we will see, in criticizing this proposal for a new code, Savigny reaffirmed at the same time the value of legal science and its most outstanding product, namely, Roman law. As a proponent of the code, Thibaut could not but take the opposite stand: "The last and principal source of law thus remains for us the Roman code, the work of a foreign nation quite unlike ours; then, too, it traces back to the period of that nation's deepest decadence, and it bears the mark of this decadence on its every page!" (Thibaut 2002, 42; my translation).<sup>24</sup>

It so happened that a historically false but rhetorically effective argument came into being: This was the argument that the use of Roman law amounted to adopting a foreign law. If a foreign law had to be, then it was better to go with the French code, for it was certainly more responsive to the needs of the time. Thibaut criticized Roman law in the form in which it had been received in Germany. The Roman law of the day could not even be identified with Justinianian law as such: It was instead the Justinianian *Corpus Iuris* such as it had been interpreted over the course of the Middle Ages, and so the *Corpus Iuris* interlarded with glosses and comments: "We have in Roman law [...] a code whose text we do not possess, and whose content can therefore be likened to an *ignis fatuus*" (Thibaut 2002, 43; my translation).<sup>25</sup>

Even Savigny, at bottom, could have subscribed to this criticism of received Roman law, but only to take it in a direction exactly opposite to that in which Thibaut took it. Very much alive in Savigny was a desire to go back to the origins; the doctrine of the medieval practitioners had in his view "corrupted" authentic Roman law. A massive undertaking was therefore in order to reconstruct authentic Roman law and to understand it through the study of its genesis. Thibaut regarded such an undertaking as utterly futile and even counterproductive: It was in any event an entirely academic and antiquarian investigation.<sup>26</sup> Roman law was no longer current, and any attempt to revital-

<sup>24</sup> On Thibaut's attitude to legal science, see Sections 5.3.3.3.2 and 5.3.3.3.3 below.

<sup>25</sup> And, on the following page: "We follow not an authentic or approved text but an ideal law, as one might call it, scattered in countless manuscripts that have come down to us and whose tenor ranges across the widest spectrum. The mass of these variants is huge indeed" (*ibid.*, 44; my translation).

<sup>26</sup> Going back to the polemic later on, Thibaut would define Savigny's as "a dryasdust antiquarian tendency, distancing us from the present [*eine nüchterne antiquarische, von der Gegenwart abführende Richtung*]" (Thibaut 1838, 411; my translation).



ize it would have been vain. So it was not that path that needed to be followed but the path of the code, which in a context of laws lacking unity and coherence would introduce a law unified by a uniform a codification: Codification was thus seen as a simplification of the legal framework.

In fact, *simple* is the adjective that most frequently turns up when Thibaut speaks of the code.<sup>27</sup> Codification was regarded as simplifying the legal framework in two ways: in a material way, with a uniform content replacing the plurality of prior legal orders, and in a formal way, with a single text for the whole of Germany replacing the jumble of existing sources. The code was to become the only source of law; that is, the code would not have come as a mere addition to the prior law in force but would have abrogated such law and so would not be amenable to any integration with the legal texts hitherto in force. Civil-law subject matter had to be fully set forth in the code, which would consequently have presented itself as regulating civil (private) relationships not only with simplicity but also in a complete and comprehensive way.<sup>28</sup>

Yet no legal system can be structurally simple if it sets up differences in personal status based on one's class, trade, religion, and so on. And this is why the Prussian code of 1794, despite its formal perfection, could not be considered modern: Not only was it too complex, but this complexity was owed to the plurality of legal persons it distinguished, as well as to its role as a supplemental law. From this point of view, Thibaut's proposal was doubtless modelled on the Napoleonic code or the Austrian code. The new code had to guarantee equality under the law,<sup>29</sup> and it had to contain the rules by which to resolve any dispute. In this way, the code was to substantially exclude any exogenous supplementation, which would have reproduced the old conflicts between different normative systems. Codified law would give rise to stable and exceptionless relationships based on there being a single legal person.

### 5.3.2.3. Legal and Political Ideology

At the core of Thibaut's proposal was the idea that the entire positive law must be contained in the code and that every subject matter therein contained must be regulated comprehensively and in full. The ideology behind this proposal was driven in the first place by the belief that regulation by law should

<sup>27</sup> Here are a few examples: a "simple national code" (Thibaut 2002, 45); "simple laws for the homeland" (ibid., 46); "a simple code for the whole of Germany" (ibid., 48); "a wise, reasoned, simple, and sensible code" (ibid., 48); "the Austrian code, with its beautiful purity and simplicity" (ibid., 55; my translation throughout).

<sup>28</sup> "A simple national code [...] will finally enable our lawyers and jurists to have the law at their fingertips for every single case" (ibid., 45; my translation). Cf. Chapter 4 of this volume.

<sup>29</sup> "Equal laws foster equal uses and customs, and such equality has always exercised a magical power to elicit friendship and loyalty among peoples. [...] A lack of equality under the law, then, will usher in the dreadful disorder of collision among laws" (ibid., 48; my translation).

make it possible to resolve any kind of dispute; it was driven, in other words, by the idea that positive law must be complete. One direct consequence to flow from this idea was the doctrine under which it is in effect possible and entirely desirable for the judge not to add to what is established by law (or at least the judge *shouldn't* do so). If the code sets forth the entire law, then it is possible for the judge not to add anything to what the legislator has willed.

The jurist's activity is essentially reduced to a technical task. Thibaut goes so far as to compare the jurist's profession to that of a physician capable of automatically (*mechanisch*) treating all illnesses and conditions with a few universal remedies.<sup>30</sup> Professional legal practitioners were to fulfil their institutional functions by making a technical use of a science devoted to a preconstituted object external to the science itself, this object being the code, which in this way becomes the exclusive "object of their investigations" (*ibid.*, 46; my translation). The code was to become the jurists' single object of study, and legal science was to have for an object only the law set forth in the code. Legal science studies an object external to it, the code, and operates as a means by which to endow the given legal material with systematic form. The jurist's scientific activity essentially consists in systematizing that which is contained in the legislative provisions. The legal system resulting from such an intellectual activity will therefore be something constructed from the outside, meaning it will be something constructed by the jurist, who represents the law as a set of interconnected rules. This conception of legal science is linked to the theory of interpretation worked out by Thibaut, and just as the scientist is tasked with describing the given object, so the interpreter is tasked with recovering the meaning of that previously constructed reality which is the law.

This is a way of conceiving the jurist's work and the function of legal science which reveals not a few affinities with the *École de l'Exégèse* (see Tarello 1988a; cf. Tarello 1969 and Chiassoni 2005, 336–62). Like the jurists of the *École de l'Exégèse*, Thibaut conceived of only two ways to go about interpreting the law: by way of "grammatical interpretation" and by way of "logical interpretation." The latter was in turn distinguished into "interpretation according to the legislator's intent" and "interpretation according to the purposes of the law." Logical interpretation according to the legislator's intent was in reality a "psychological" interpretation. Thibaut held that in those cases where it proves impossible to follow the letter of the law, it is necessary

<sup>30</sup> "The citizens [...] can always say they did not come into this world for the jurists [...]. All your legal expertise, all your variants and conjectures—all this doing has unsettled in a thousand ways the citizens' peaceful security, and has only served to line the lawyers' pockets. The citizens do not depend on learned scholars for their happiness, and one can only wholeheartedly thank the heavens if simple laws made it so that our lawyers could do without any erudition, just as we would have every reason to rejoice if our physicians could automatically cure all diseases with six universal remedies" (*ibid.*, 44–5; my translation).

to resort to interpretation according to the will of the historical legislator. And as concerns logical interpretation according to the purposes of the law, Thibaut seemed instead to resort to a number of interpretive tools, among them the *ratio legis*, which the École de l'Exégèse thought could stand in contradiction to the historical legislator's will.<sup>31</sup> No less than the theory of interpretation, then, the accompanying model of legal science that had taken hold where the codification process had most successfully been accomplished, namely, in France, became the model favoured by those who, like Thibaut, hoped to see a codification process carried through in Germany as well.

As Thibaut saw the matter, the project for a code was likewise connected with a specific political conception of law, a conception grounded in the Enlightenment. The code had to be “the common patrimony of all,” and its principles had to be “made known to all” (Thibaut 2002, 46; my translation). Transparency in the law was being hailed as an absolute necessity and a hallmark of the new age to come. The basic contrast was that between those who, like Thibaut,<sup>32</sup> wanted a law that everybody could know, and those who, like Savigny, wanted a law crafted by and known to the jurists only.

It is this stance in particular that underscored Thibaut's politically liberal outlook.<sup>33</sup> Such a clearly set out political conception of law, however, was not matched by adequate means by which to achieve it. Thibaut's proposal was designed to counter the conservative tendency that, after Napoleon's defeat, simply called for a return to the previous legal framework, but the proposal fell short of presenting a realistic political conception of law as an alternative to that tendency.

This is to say that Thibaut seemed to be of the opinion that the goodwill of the German princes and governments, under the protection of “the great sovereigns who have now brought peace to the world” (Thibaut 2002, 59; my translation),<sup>34</sup> was a sufficient condition on which basis to promote the draft-

<sup>31</sup> See Thibaut 1806. Cf. Otte 2001. Thibaut also took up the theory of interpretation in his *System des Pandektenrechts* (Thibaut 1803, § 43–56). Other writings are collected in Guyet 1842, 363–480. On Thibaut's theory of interpretation, see Kitzler 1986.

<sup>32</sup> Hegel was with Thibaut on this point: The approach advocated by the Historical School would inevitably bring about a situation in which “cognizance [*die Kenntnis*] of this or that aspect of right, or of right in general, is the contingent property of only a few people” (Hegel 1991, § 211A, at page 241).

<sup>33</sup> “If [...] a robust national code were the patrimony of all, if it were drafted by statesmen and learned men of recognized fame, upon thorough reflection, and taking public judgment fully into account; if its foundations were made known to all with unequivocal frankness, then it would indeed be possible for an authentic legal science, the kind that discusses philosophically, to move freely and lithely, and everyone could look to the prospect of working together to further perfect this great national work” (Thibaut 2002, 46; my translation).

<sup>34</sup> Criticism in this respect was directed at Thibaut by some who agreed with his proposal. See, for example, the reviews of Thibaut's pamphlet published in *Jenaische Allgemeine Literatur-Zeitung* (1814, at page 185), and in the *Allgemeine Literatur-Zeitung* (1814, at pages: 152–3).

ing of a code. These expectations would soon prove to be deluded; I do not think, however, that this is reason to conclude that Thibaut's programme was a fanciful conceit. At the time when he framed his proposal, the situation in Germany was quite fluid, open to a number of different solutions. The Restoration had not yet begun, and at least until 1819 (when Humboldt stepped down) the German governments were not a pliant tool for Metternich's reactionary politics. And for this reason, the trust that Thibaut placed in the German princes and governments does not seem entirely unjustified. Certainly, such trust is evidence of his moderate political stance but not of any inconsistency on his part. That Thibaut was far from embracing a politically revolutionary or democratic stance comes through clearly was well from his pamphlet in support of codification, since the proposal he put forward was simply to reform the existing legal framework. In fact, his closing words evince not just a traditional attitude sympathetic to the sovereign but also a certain uneasiness with the whole notion of a grassroots movement. The reform project has to start from the top, since "the people cannot be kept from voicing their outrage, and so the furor of these times will irresistibly swell and rise up from the bottom" (Thibaut 2002, 58; my translation).<sup>35</sup> But even with all of these shortcomings, the gap that kept Thibaut politically apart from Savigny cannot be closed, at least not in what concerns their political conception of law.

### 5.3.3. *Savigny's Criticism*

#### 5.3.3.1. Meaning and Limitations of an Interpretive Guide

When Savigny (1779–1861) intervened in the polemic on codification, he had already gained prominence as a respected legal scholar in Germany. He had been made full professor in 1808 in Landshut, and in 1810 he had been invited to teach at Berlin's recently founded university, where he also served as rector.

In a book of fundamental importance to Savigny studies over the last decades, Joachim Rückert has cast serious doubt on the idea that Savigny and Thibaut stood on opposite ends of the political spectrum (see Rückert 1984, esp. 160–93, as concerns the present discussion).<sup>36</sup> The dualism they are seen to embody, between protoliberalism and the Restoration, is way too simple.

<sup>35</sup> That Thibaut's position was far from any sort of political radicalism can be appreciated as well from the attitude he took to Germany's political unification. The code was ultimately meant as a way not so much to facilitate a future national integration as to "effectively bring into balance" (*ibid.*, 68) a political breakup or dispersal regarded as necessary.

<sup>36</sup> For a summary in Italian, see Rückert 1986, 504. The literature on Savigny is vast indeed. I will only mention here Meder 2004, a recent work specifically devoted to his theory of interpretation.

The attempt to shorten the distance between Savigny and Thibaut, however, wound up obfuscating a real difference between their different positions: Savigny did, after all, take up a position against Thibaut, and its main thrust lay in its opposition to the plan of introducing in Germany a structural type of legal framework based on code law which in continental Europe turned out to be the organization best suited to serving the needs of the liberal bourgeoisie.

It is for this reason that the interpretive guide which lays emphasis on the political element of the polemic on codification does, I believe, stand its ground.<sup>37</sup> That Thibaut's political thinking was genuinely liberal and Savigny's (just as genuinely) in favour of the Restoration can be appreciated from the start by looking at the different relationships they forged and the different political choices they made—as well as at the different, indeed opposite, attitudes they took—with respect to the Enlightenment and the French Revolution. This is not to say, however, that all of the issues involved in the polemic on codification have thereby been adequately addressed.

Indeed, what is essential is not to determine whether Thibaut's thinking was liberal or Savigny's reactionary, but to see whether a political explanation of their writings can do justice to the true potential they both express. Now, while Thibaut's pamphlet does certainly reverberate with a clear political message, Savigny's reply, as we will see, would end up being sapped if we reduced it to a reading along these lines. Indeed, Savigny's reply contains some theoretical considerations that are bound pass unnoticed if his critique is considered exclusively in light of its immediate political implications.

### 5.3.3.2. The Historicity of Law and the Role of the Jurists

Even on a first reading it cannot escape one that Savigny's reply, however much it may have been prompted by a specific political situation, cannot simply be reduced to this situation alone. Thibaut's pamphlet merely provided the occasion and pretext for Savigny to reply. True, Savigny seized here the opportunity to intervene in the debate and take a public stand on the question of the shape to impart to Germany's future legal framework, but the complexity of the issues treated and the way they are discussed clearly show that Savigny had been reflecting on them for quite a while. Indeed, there are many clues suggesting that some of his *Beruf* had been set down even before the publication of Thibaut's pamphlet. And Savigny, skilfully taking a prompt from the interest aroused by that publication, resolved to develop his reflections further, adding to them that “review of modern codes” which alone ac-

<sup>37</sup> This reconstruction of the polemic was begun by a now-famous essay by Walter Wilhelm titled *Zur juristischen Methodenlehre im 19. Jahrhundert: Die Herkunft der Methode Paul Labands aus der Privatrechtswissenschaft* (see Wilhelm 1958, 25). Another paradigmatic example is the essay, by F. Wieacker, titled *Privatrechtsgeschichte der Neuzeit* (see Wieacker 1967, 395–6).

counts for one-third of the entire essay.<sup>38</sup> But while this part, where Savigny passes a stern judgment on the French, Prussian, and Austrian codes, may be considered in certain respects unilateral, the first part, much more important than this one, amounts to nothing short of a founding document, and may rightfully be considered the manifesto of the Historical School of law.

While *Beruf* does criticize Thibaut's proposal for codification, it even more importantly and fundamentally criticises the proposal's legal-philosophical assumptions. What forcefully emerges from the discussion is a new, historical way of thinking set in contrast to the natural law and Enlightenment roots of Thibaut's thought. It is not as if Thibaut had left history entirely out of account, but the historical conception expressed with Savigny is something new and different. As Savigny observes at the very outset of that pithy chapter devoted to the origin of positive law,

Wherever we find recorded history, the civil law exhibits a definite character peculiar to a people, in the same way as happens with that people's language, customs, constitution, and so on. These manifestations do not in fact each have their own separate existence but rather spring from the energies and activities of a single people: They are by nature indissolubly connected, and it is only to our eyes that they present themselves as so many unrelated elements. What connects them as parts of a single whole is the people's common consciousness, the shared feeling of an interior necessity that rules out any idea of an accidental or arbitrary origin. (Savigny 2002, 65; my translation)

There is no room, in such a vision, for a single system of laws, identical for all times and all places: The law is not an artificial construction of reason, as the natural law theorists had pretended it to be, but is rather a product of history; it originates in and develops out of history, just like all other social phenomena, such as language, custom, and the constitution.

The natural law conception had pretended to ground the law in an abstract universal nature of man; Savigny set against that the concrete history of a particular people. The law issues not from a rational calculus carried out by us as individuals but from "the people's common consciousness." And each people is characterized by features specific to it that distinguish it from all other peoples: "The law thus develops together with the people; it perfects itself with the people and finally extinguishes itself as that people loses its peculiarity" (Savigny 2002, 67; my translation).

In contraposition to the metahistorical universality of law, Savigny brought in a distinctively historical perspective which he connected with a sort of philosophy of the history of law revolving around the role of the jurists. The essential passage laying out this vision is worth taking a look at in its entirety:

<sup>38</sup> An important contribution on the genesis of *Beruf* among the older literature is Caroni 1969. An essential reading among the more recent literature is Savigny 2000 (edited by H. Akamatsu and J. Rückert), where Savigny's *Beruf* is reprinted along with many of its preparatory materials. For convenience's sake, Savigny's *Beruf* will be quoted from Stern and Hattenhauer's edition (Savigny 2002).



In a developing society, we in fact witness a progressive separation in the activities the people engage in, and what was once carried out in common becomes the domain of single classes. Even the jurists now form their own class. The law will henceforth perfect its own language, taking a scientific orientation, and as much as it once lived in the people's consciousness, it now belongs to the jurists' consciousness, by which the people are now represented where the function of law is concerned. The law's existence becomes more artificial and complex insofar as the law now leads a double life: It continues to be a part of the people's life at large, but it is also a particular science in the jurists' hands. The key to all future development thus lies in making this double life force into a whole, which also explains how that immense particularity may have so far developed organically, without any specific intention or design. For the sake of expediency, the law's relation to the life of the people in general will hereinafter be called its political element, and its separate life as a science will instead be called its technical element. The gist of this conception, then, is that every system of law originates in what in current use is somewhat erroneously called customary law; which is to say that law is first created by popular customs and beliefs, and only then by legal doctrine: The law is therefore always the work of interior forces that operate silently, and never the outcome of the legislator's free will. (Savigny 2002, 67–8; my translation)

So, however much Savigny understood every system of laws as originating in customary law, in a people's customs, he also pointed out that this properly holds for the stage of its development only. In fact, the more the law evolves, the more it becomes autonomous, and even though it retains that original bond, it winds up becoming a law known and administered by a particular class—that formed by the jurists—who act as the people's representatives in what concerns that peculiar function which is the law. It is now they, the jurists, who describe the people's legal life. However, even Savigny could not deny that this organism which is the law had by then been living a rather “artificial and complicated” existence: two lives in one, since on the one hand the law continues to shape the life of the people, but on the other hand it is now an activity unto itself, entrusted to the expertise of a particular profession. The problem, then, was how to strike a balance between these two lives. And Savigny sought to solve this problem by putting forward the idea that legal doctrine may emerge as an authentic source productive of law; indeed, he was speculating that—out of the heat of the polemic on codification—legal doctrine would emerge as *the* source par excellence.

### 5.3.3.3. Legislation and the Jurists' Law (*Juristenrecht*)

#### 5.3.3.3.1. The Law

When viewed in light of this conception of law, Thibaut's proposal could not appear as anything but the outcome of the discretionary use of legislative power. This should not suggest, however, that legislative activity was found by Savigny to have no importance at all. Even in *Beruf* he described at least two circumstances in which legislation plays a relevant role: Legislation is necessary in framing the form of a process (or trial) and in recording the ancient



customs in writing.<sup>39</sup> So, even in *Beruf*, where the polemic against statutory or “legislative law” is strongest, Savigny’s critique is not cast in terms of an all-out rejection of this form of law.

What was being called into question, then, was not legislation as such but the tendency to use this tool pervasively, almost exclusively. Savigny, in other words, viewed with scepticism the kind of legal framework that, by favouring statutory law over all other forms, prevents legal doctrine from having any role in shaping the law: “On such a conception, the source of law under normal circumstances will be the enacted laws, meaning those rules expressly laid down by the supreme power of the state. Legal doctrine takes as an object the content of the laws exclusively” (Savigny 2002, 65; my translation).

It is precisely this conception that Savigny rejected, blocking out a system of sources that foreshadows the one he developed in his later *System des heutigen römischen Rechts*. Even the doctrine according to which the whole of the law originates in “the people’s common consciousness” can be accommodated within this system. In fact, this consciousness is the source of all sources, onto which are grafted custom, legal doctrine, and legislation itself. Certainly, this last source is considered more favourably in the more comprehensive and organic first book of *System* (1840),<sup>40</sup> but even *Beruf* does not rule out recourse to legislation. Even so, as we trace out the line of continuity that in different ways connects *Beruf* to *System*, it remains clear that Savigny understood the formation of law in such a way as to afford much latitude for the jurists’ activity.

With Thibaut, by contrast, the focus of attention falls exclusively on legislation: The law is exclusively that which finds expression in statutory form. The upshot of such a conception was that the jurist and the judge are tightly bound to the letter of the law. And the leitmotif was that only a legal framework based on codified law could ensure the formal legal guarantees the citizens needed to be secure against arbitrary judicial decisions.

<sup>39</sup> Here is Savigny on the first role he recognized for legislation (its role in framing the form of a judicial proceeding): “The lawyers’ anarchy, abusing terms and making them longer and longer, multiplying appeals, and multiplying even more so the handing over of records, briefs, and proceedings—a process that would give great service if it were used with discernment” (Savigny 2002, 114; my translation). And on the second role: “The second object of legislation consists in the recording of customary law, which in this way would come under an oversight similar to that exercised in Rome through the edict” (*ibid.*, 115; my translation). This revivification of the edict in the polemic against codification can be found as well in a book published one year after *Beruf* came out: See Schrader 1815.

<sup>40</sup> Here is Savigny on statutory law in *System*: “The positive law expressed in print, and endowed with an absolute authority, is called the law [*Gesetz*], and its formation ranks among the noblest prerogative of the state’s supreme power” (Savigny 1840, vol. 1: 39).

### 5.3.3.3.2. The Jurists' Law

The polemic on codification was also a polemic on the way in which legal science should be conceived (and for Savigny this is *primarily* what the polemic was about). In pointing up the necessity for a code, Thibaut was also pointing up the exclusive role of the legislator's will—that is, of a corps essentially extraneous to legal science—in the production of law. Legal scientists thus became “servants of law.” And the law remained extrinsic to them: As we saw, they had to confine themselves to explaining an external object, this being the code. The jurists' scientific activity essentially consisted in systematizing the content of legislative enactments: Their science was meant to impart a systematic form to a given legislative content. The legal system resulting from such an activity is thus built from the outside.

Turn this around and you have Savigny's view, on which this very activity, namely, legal science, is instead assigned a role intrinsic to and productive of law. It may at first blush strike one as curious, at the very least, to learn that legal science—precisely as a science, that is, as an activity whose essential purpose consists in the quest for knowledge—can be a source productive of law: If the task of science is specifically limited to *describing* its object, it is not immediately clear how science can equally contribute to *producing* such an object. If legal science is devoted to describing the reality of law, then scientific activity can only appear to be a dependent activity, for its object is given from the outside. And yet, with the scientific form that the jurists impart to legal material, a new organic life begins for the law which reacts with this material, in such a way that science itself becomes the form of production of law. Legal science thus takes on an essential function for the life of the law,<sup>41</sup> its role being to discover that which potentially is already present in the reality of the law, understood as a living organism. Legal science is unified because unity is already inherent in the law; it is systematic because systematicity is a quality proper to law (rather than a scheme by which to *describe* law); it is historical because history is inherent in law. There is no separation between an object and our knowledge of that object but only a compenetration, such that science, by virtue of studying its object, develops the same object and brings out its essential core. The insights presented in *Beruf* would be retained many years later in Savigny's chief work, the *System des heutigen römischen Rechts*, whose first volume was published in 1840:

<sup>41</sup> A commentator who in the 1950s grasped the originality of Savigny's thought is R. Orestano in his fundamental *Introduzione allo studio storico del diritto romano*, whose latest edition dates to 1987. See, along the same interpretive line, the more recent Viola 1987, 228–62; and, more recently still, Barberis 1998, 175–88. A different view is instead expressed in Losano 2002, 261–8.

The jurists' activity appears at first sight as if it were in a condition of dependency, since its object is given and so is external to it. However, the scientific form imparted to this material—a form tending to bring out the unity inherent in such material, thereby integrating it—gives rise to a new organic life that acts on the material itself in such a way that from science as such necessarily derives a new form of legal production. (Savigny 1840, vol. 1: 46–7; my translation)<sup>42</sup>

What is methodologically truly revolutionary about this approach is that law is conceived here as a self-referential system,<sup>43</sup> for it is by reflectively developing the law's own inherent systematicity that the concepts of legal science are derived. These concepts are therefore not external to law but are constitutive of it: They are its own reproduction revealed. This was a way of conceiving legal science that made it possible to overcome the gap between subject and object. The mutual relation between legal science and law—each dependent on the other—is such that legal science plays an essential role in the production of law, and the results it comes at thus become *integral* to the law.

One can also understand in light of these remarks the importance that Savigny ascribed to what he called the general principles of law. Which is to say that it should be the primary concern of legal science—as a *scientific* or explanatory endeavour—to “identify such principles and use this as a basis on which to grasp the close connection and the kind of relation by which all legal principles are bound” (Savigny 2002, 71; my translation). This was regarded by Savigny as being “among the most difficult tasks of our science; in fact, it is exactly what confers a scientific status on our work” (*ibid.*, 71; my translation). And not only is this among the most difficult tasks, but it is also a never-ending one, since these principles' mode of presenting themselves is determined by history, and in such a way as to never be exhausted in history.

The jurists, then, uncover or disclose the object of their study, but such a disclosure can proceed only partway, because the jurists in any event confine themselves to bringing out the internal cohesion, not of law itself, but of law in its historically given form. For Savigny, there is a characteristically Kantian sense in which science seems in certain respects precluded from entering into a relation of complete coincidence with its object, even as the model of science he developed bears certain striking analogies to the *objektives Denken* that Hegel spoke of (though there is not in Savigny the same metaphysical depth one finds in Hegel).<sup>44</sup> On a reconstruction along these lines, Savigny

<sup>42</sup> The method followed in *System* is so described in the preface: “I locate the essence of the systematic method in its recognizing and expounding the close bond or affinity whereby the single legal concepts and the single rules are connected under an all-embracing unity. These affinities are often concealed, and their discovery will increase our understanding” (Savigny 1840, xxxvi). For Savigny, the legal system is at once normatively closed and cognitively open.

<sup>43</sup> An affinity can be found here with what, in systems theory, is known as the autopoietic turn. See Luhmann 1982, 1983, and 1986.

<sup>44</sup> There is no way to elaborate here on this analogy, but it was Joachim Rückert who should be credited with bringing it out: See Rückert 1984, 232–99; Nörr 1991, 18–25.

would fall within that complex and distinctly philosophical movement that runs from Kant to Hegel. It should not escape our notice here that this innovative approach, at the time when it was conceived, served to bring into effect a specific political conception of law. And, in light of this connection, it entirely apropos to point out that at the time of the Restoration, a conception of legal science like the one worked out by Savigny saw the formation and production of law as exalting the role of a class of people—the jurists—whose social and political outlook was conservative: The law of the past was valued for its inherently legal status as law to be defended from the onrush of new law produced by the legislator. But it also bears pointing out that, in a different historical context, a failure to recognize the law-creating role of jurists might have contributed to eliciting in them a servile attitude of mere acceptance of any legislation regardless of content.

The view that ascribes a relevant role to the jurists' law is in itself neither progressive nor conservative: Once we are clear that legislation and legal doctrine are not mutually exclusive but rather complementary, we should also see that whether or not a greater role recognized for jurists or for legislators is progressive depends on the concrete political situation. The *Juristenrecht* conception that would become the basis of the German model was first expressed by Savigny, to be sure, and there is no denying that in Savigny's time this conception could aptly support a conservative agenda—but change the historical context and the same conception can just as easily be observed lending itself to uses in the exact opposite direction.<sup>45</sup>

### 5.3.3.3.3. The Problem of Interpretation: A Brief Overview

This section I would like to end by devoting a few words to the question of the law's interpretation: This is not a question that figures centrally in the debate on codification, to be sure, but it will nonetheless help us further bring out the contrast between Thibaut and Savigny, since they can be expected to have taken different views in this regard, and in fact they did.

Both Thibaut and Savigny understood the law as a reality that *precedes* interpretation, and interpretation they accordingly understood as an activity by which to uncover the true sense of that reality. But for Thibaut that reality lay in the code, whereas for Savigny it lay in something much more complex that

<sup>45</sup> Suffice it to mention here the use of this conception made by Gustav Radbruch, where the historical context was altogether different: See Radbruch 1952, 31–4. And in Radbruch's own time—in the early 20th century—the *Juristenrecht* conception became a tool serving opposite political interests, a prime example being its use by the *Freirechtbewegung* movement (bearing an ideal connection to Radbruch), and especially by Hermann Kantorowicz in his 1906 *Der Kampf um die Rechtswissenschaft*, in contraposition to the authoritarian shape it took with Hermann Isay in his 1929 *Rechtsnorm und Entscheidung*. See, in this regard, Baratta 1990, 189–90. See also Chapter 8 of this volume.

no code could possibly ever capture, this being the unitary and complete system governing all legal relations.

For Thibaut, by contrast, it was precisely the code's regulation that offered the possibility of solving every legal controversy, by making it so that the interpreter need not supplement the legislator's will in any way. The contrary attitude was that represented by Savigny. Criticizing the proposal for a code equally meant for Savigny relieving the interpreter from that condition of subordination to the code that the code itself would set up. It must be stressed here that just as Thibaut never made this question a bone of contention, neither did Savigny. And yet, even in *Beruf* we can clearly appreciate what Savigny's attitude was. While Thibaut's defence of codification meant for the jurists a strict adherence to the legislator's will, Savigny's critique of Thibaut's proposal acted to amplify and elevate the jurists' role.

In bringing out the importance of the jurists' *theoretical* activity, Savigny thereby also highlighted their *practical* activity: There is no real separation between the two activities. Savigny did not distinguish theoretical activity strictly understood from the activity of the practical jurist qua interpreter and applier of law: For Savigny, legal science must never lose contact with concrete legal relations, which make up the lifeblood of this science, and this led him to establish a closer connection between the theory and the practice of law:

In fact, the law does not have an existence of its own; on the contrary, its essence lies in the very life of men as considered from a particular point of view. If legal science veers away from this object, scientific activity will proceed along its own path without being accompanied by an adequate understanding of legal relations themselves; whereupon legal science can reach a high degree of formal perfection, but it will nonetheless be devoid of any true reality. (Savigny 2002, 74; my translation)<sup>46</sup>

This looks not so much like a criticism of the day devoted to Thibaut as an anticipatory criticism of what would come to be known as conceptual jurisprudence. We will consider in the next section the extent to which it may be justified, but before we get there I would like to underscore a certain aspect. The reason why legal science, for Savigny, can properly become a source of law is precisely its not being reducible to a merely theoretical activity but its being, at the same time, a practical activity as well, one that “does not confine itself to the content of the sources of law in and of themselves. It is equally concerned with the way such content relates to the living world of the law, the world onto which such sources must be grafted, and which consists in the state and the needs of our time” (Savigny 1840, 90; my translation). An important part of the jurist's practical activity consists in interpreting and applying the law. This activity is conceived by Savigny as involving four elements that must be taken into account any time a law is being interpreted. We thus have a

<sup>46</sup> Compare also Savigny 2002, 112–3: “Our theory must become more practical, and our practice more scientific, than what has so far been the case.”

grammatical element, whose object is the meaning of words; a logical element, whose object is the logical relations between words; a historical element, whose object is the state of affairs regulated by a law and existing at the time when that law was enacted (the historical element does not, however, also encompass an investigation of legislative intent, or of the reasons the legislators had for enacting the same law); and, finally, a systematic element, whose object is the meaning ascribed to the connection that gathers all legal concepts under a comprehensive unified whole. There is no way that we can enter here into Savigny's theory of interpretation.<sup>47</sup> But there is nonetheless a question worth mentioning in passing which links the question of interpretation to that of legal science. Which is to say: Interpretation is doubtless understood by Savigny as a cognitive activity (one taken up in the process of knowing), but does this rule out its also being a creative activity? In other words, is interpretation deprived of any creative power by virtue of our ascribing to it a cognitive status? And, vice versa, is interpretation deprived of any cognitive power by virtue of our ascribing to it an interpretive status? This is a question that continues to this day to be a focus of attention among philosophers of law.<sup>48</sup>

Savigny's approach may offer an insight in working toward a solution to this problem. We can see emerging from his work a conception of legal science that makes it possible to grasp the originality of his position with respect to this problem, too. It was pointed out a moment ago that while interpretive activity is indeed cognitive for Savigny, this does not rule out its also being creative at the same time. So, in the process of knowing an object, the jurist likewise contributes to *creating* it, by "discovery." This peculiar feature of legal science—its being inherent in law itself—thus makes it possible to argue for the creative or productive power of knowledge. The rules and meanings are thus already there, *before* interpretation comes in, but this does not entail that interpretation is reduced to a purely mental activity. Interpretive activity is at once cognitive and creative: On the one hand it consists in coming to know something which exists before it and which must accordingly be presupposed; but on the other hand this presupposition is somehow posited by the interpreter's own productive activity.

## 5.4. Hegel, Law, and the Jurists

### 5.4.1. *The Traditional View*

Having discoursed at some length, in the last section, on the polemic on codification—a polemic that saw a confrontation between two of the most important

<sup>47</sup> See, in this regard, the wide study by S. Meder: Meder 2004.

<sup>48</sup> See, among the more recent literature, Comanducci 1999, laying out a map of all current theories of legal interpretation; Viola and Zaccaria 1999; and Guastini 2004.



makers of 19th-century legal culture—we should now consider the perspective offered by a great philosopher who has specifically devoted to the philosophy of law an entire work and several lecture courses. This philosopher is of course Hegel (1770–1831), and the work referred to is his *Grundlinien der Philosophie des Rechts*, published in 1820.<sup>49</sup> If we confine our view to this work alone, we can easily appreciate which side Hegel is on: The arguments Hegel presents here seem to leave no doubt. Even though there is no mention of Savigny anywhere in the text, we can still trace the discussion to him by way of the polemic against Hugo, especially in the annotation to § 3 (on which see Section 5.2.2, footnote 6). And if we next consider § 211, where Hegel identifies law with positive or enacted law, then we can definitely say he was unequivocally for codification.<sup>50</sup>

This stance is attested as well by the published lecture course falling chronologically closest to *Grundlinien* (*Rph* III, 1819–1820). Not only does Hegel offer in these lectures an apology proper of the Code Napoléon,<sup>51</sup> but he also proceeds to unqualifiedly state: “The form whereby the right is law is an essential form. When one asks, What is now the right? According to what right may I be treated? The answer is: According to what is law” (*Rph* III, 173, ll. 3–6; my translation).

<sup>49</sup> All bibliographic references are to G. W. F. Hegel, *Vorlesungen über Rechtsphilosophie*, edited by K.-H. Ilting (Hegel 1973–1974), comprising four volumes. Hegel’s *Grundlinien* is in vol. 2. The letters *Rph* (for “Rechtsphilosophie”) identify a published text within this collection, and an uppercase roman numeral identifies a lecture within a course. The letter *A*, for “annotation,” identifies an annotation to the section referred to, and this is followed by page and line numbers. *Rph* III is quoted from G. W. F. Hegel, *Philosophie des Rechts*, edited by D. Heinrich (Hegel 1983b), and from G. W. F. Hegel, *Vorlesungen über die Philosophie des Rechts*, edited by E. Angehrn, M. Bondeli, and H. N. Seelmann (Hegel 2000). *Rph* I and *Rhp* II will be quoted from G. W. F. Hegel, *Die Philosophie des Rechts: Die Mitschriften Wannenmann und Homeyer*, edited by K.-H. Ilting (Hegel 1983a). The literature on Hegel is of course vast, so I will confine myself to pointing out Bogdandy 1989, and K.-H. Ilting’s original interpretation in Ilting 2006.

<sup>50</sup> Here are the two key passages: “When what is right *in itself* is *posited* in its objective existence [*Dasein*—i.e. determined by thought for consciousness and *known* [*bekannt*] as what is right and valid—it becomes *law*” (*Rph*, § 211, 654–5; English quotation from Hegel 1991, 241). This stance in favour of codification is then taken up in the annotation to the same section: “To deny a civilized nation, or the legal profession [*dem juristischen Stande*] within it, the ability to draw up a legal code would be among the greatest insults one could offer to either” (*Rph*, § 211A, 657, ll. 12–4, 18–20; English quotation from Hegel 1991, 242). For sake of simplicity, I follow here and in what follows the translation choices made by H. B. Nisbet (for an explanation of such choices, see the Translator’s Preface to Hegel 1991, xxxviii), although they appear to me as extremely debatable.

<sup>51</sup> “The Code Napoléon is recognized as a beneficial work wherever it has been introduced [...]. It may be considered a sad thing for our youth if on a solemn occasion the Code Napoléon should be burned. A good many of the people who have written and railed against the Code Napoléon were very much aware of the danger it posed for them. The Code Napoléon contains the great principles of liberty and property, and it wipes out everything that comes down from the feudal age” (*Rph* III [Heinrich], 172–3; my translation). The point is even more emphatically stated in the recently published lecture notes edited by E. Angehrn, M. Bondeli, and H. N. Seelmann: “Burning the Code Napoléon was the error of our youth [...]. It would have been an act of bravery if we had instead set fire to the *Corpus Iuris*” (*Rph* III, 129; my translation).



In the first lecture course on the philosophy of law from the Berlin period (*Rpb* II, 1818–1819), Hegel presents himself from the outset, in the preface, as the true antagonist of the Historical School of law. Too bad that Homeyer—to whom we owe the lecture notes that have come down to us, and who was a faithful pupil of Savigny—only wrote these words in his transcription of the decisive § 104: “[A] code [is] in itself absolutely necessary, the calling of our time for legislation” (*Rpb* II, § 104, 263, ll. 24–5; my translation). It would seem, then that the matter is settled, were it not that Hegel’s first published lecture course on the philosophy of law holds a few surprises in store.

This course is significant because it *does* explicitly mention Savigny (*Rpb* I, § 27A, 54, ll. 30–2). It is true that a problematic chronology is used in making this mention, since Hegel refers not to the polemicizing Savigny of *Beruf* (1814) but to the systematic Savigny who in his youth had produced the masterful *Das Recht des Besitzes* (first published in 1803).<sup>52</sup> But still, one may speculate that what prompted Hegel to refer to Savigny in this way was a scientific interest he took in Savigny’s work, an interest that the political polemic under way in Berlin eventually caused to subside, even though it was an underground polemic. This hypothesis (of a scientific interest on Hegel’s part) is borne out by a few initial comparative textual analyses. The highly polemical remarks found in § 3 of *Rpb* (*Grundlinien*) have no counterpart in the corresponding annotation in this first lecture course (*Rpb* I, § 1A). Further, *Rpb* I has no trace of what goes on in § 211 of *Grundlinien*, where the contrast with the Historical School is at its starkest. These elements suggest a conclusion, namely, that Hegel’s polemic against the Historical School should exclusively be ascribed to the Berlin period.

The problem now will be to determine if and to what extent this very circumstance may be to account for the position Hegel took with respect to the polemic on codification. It should be clear, before we start, that even in the earlier Heidelberg lectures Hegel was doubtless in favour of codification. And yet, in these earlier lectures, he seems to chart a middle course between Thibaut and Savigny, pointing out an original position that one is tempted to describe as forged by synthesis (however paradoxical this may seem).<sup>53</sup>

To begin with, Hegel did not imbibe any of the ingenuousness proper to the lingering 18th-century codification ideologies that Thibaut continued to embrace. While Hegel did understand the code to be necessary, he did so clearly realizing that such a work was bound to remain incomplete, constitutively open to additions and improvements: “A perfect, complete code is an

<sup>52</sup> This problem does not concern us directly, and for this reason it will not be treated here. For a full discussion, see Becchi 1991a.

<sup>53</sup> A reconstruction is offered by Schiavone 1984. The reconstruction offered in the following pages explores instead a different direction.

unattainable ideal; a code must instead always be improved upon. A code of laws must therefore exist, but this code always perfects itself: It is always in the making” (*Rph* I, § 109A, 126, ll. 25–8; my translation).

Hegel thus recognized the need for a codified legal framework,<sup>54</sup> but even as took Thibaut’s side in supporting the code, he argued that such a code should not (and could not) have stanchd the course of history by crystallizing it into an image. And this argument brought him closer to the objections made by Savigny himself, or at least it shows that he was taking these objections into account.

It should be noticed that this idea resurfaced, however much in modified form, in later versions of the *Philosophy of Right*. Thus, Hegel does not spare the Prussian code from criticism. This much can be conjectured from an annotation that Ilting suggested making to § 105 of *Rph* II: “The laws <are> only formal. Like all finite things, so also the code can never be complete. It is an error <of the Prussian *Allgemeinen Landrecht* to strive to be a complete, perfect code” (*Rph* II, § 105A, 264, ll. 6–9; my translation).

A criticism of the Prussian code is implicit as well in the published text of the *Philosophy of Right*: “It is [...] mistaken to demand that a legal code should be comprehensive in the sense of absolutely and incapable of any further determination (this demand is a predominantly *German* affliction)” (*Rph*, § 216A, 662, ll. 25–8; English quotation from Hegel 1991, 248). Hence, in synopsis: Codification is fine, but on the understanding that this is not a cure for all ills. A code *is* needed, to be sure, but we also need to realize that a code cannot chase an unattainable perfection, for a code is the product “of its own people” and “of its own time” (*Rph* II, § 104A, 263, ll. 25–6; my translation) and is accordingly amenable to a process of change and integration.

#### 5.4.2. *A New, and Different, Start*

Hegel’s solution to the problem of codification—a solution that had clearly been laid out from the outset, in his first lecture course—would reemerge in subsequent courses as well as in *Grundlinien*. It does not seem that we can yet justify, then, the claim of an alleged uniqueness or originality of his first lecture course: If anything, we can speak of a shift in emphasis owed to the polemic he carried on against the Historical School. But this first impression needs some rethinking.

<sup>54</sup> In his first lectures on the philosophy of law, Hegel went so far as to comment that “the citizens’ liberty and law needs a sound legal system more so than it needs a new code” (*Rph* I, § 115A, 133, ll. 17–9; my translation). But this should not be taken to mean that he was somehow leaning toward a common law system. As we will see shortly, and as can be appreciated from his overall reflection, he was instead pointing out that even with a code in place, the jurist’s shaping hand would still have been decisive in the formation of law.

In his first lectures on the philosophy of law, Hegel extracted from his view on codification a consequence that would not be taken up again later, at least not explicitly. Which is to say that if a code is necessary and yet inevitably in need of integrations, then we may also derive from this premise that positive law cannot entirely be identified with code law, and hence with statutory law (a code does not account for the *whole* of what is posited as law); and there consequently emerges—alongside this source of law—the role and work of the jurists, theoretical and practical alike, in producing and applying the law. Now, this is a problem that had not been adequately dealt with in the Enlightenment conception of law, a conception that Thibaut subscribed to. Indeed, it was Thibaut's concern that a set of clear, simple, and succinct laws forming a coherent and complete system would have reduced the jurists' activity to a mere technical task.

It is a significant aspect of Hegel's first lecture course that he did not seem willing to subscribe to this view. Whereas in the published *Philosophy of Right* the need to have a code was argued in a discussion where statutory law is brought into relation to customary law (*Rph*, § 211A), the dominant relation that statutory law enters into in this first lecture course is instead with the jurists' law. What emerges from this first statement of the *Philosophy of Right* is not so much the need to positivize the right in legislative form as the (much more urgent) need to recognize the complexity involved in the development of the right in society, a development essentially entrusted to the jurists. It is the right which, constitutively intertwined with "the system of needs," must make for itself "a free existence": "The *formal right* reaches its representation. Just as the formal right is essentially intertwined with the aims implicit in needs, and has its essential content in such aims, in the same way it must receive as its substance an existence free of such content" (*Rph* I, § 108, 125, ll. 26–9; my translation).

There is no doubt that the laws (*die Gesetze*) play an important role in this opening up of the right to society, but they will not as such suffice. As much as legislation may be a source of law, so too, it would seem, is the jurists' activity, and the emphasis here falls on the activity by which the judges interpret and apply the law: "In the courts' practice and in the distinctions resulting from the indeterminately different cases that come up lies that from which the need for further determinations arises and from which the indeterminate perfecting of the legal intellect develops, over against the likewise requested simplicity of the laws" (*Rph* I, § 109, 126, ll. 6–10; my translation).

Hegel did not question the legitimate claim for a code of laws, but he did underscore how illusory it would have been to expect such a code to reduce the legal practitioner's activity to a mechanical task. In fact, the code's self-same necessary simplicity acted to instead require on the jurists' part a constant effort to interpret or apply the law. This is a point on which Hegel moves clearly away from the tight restrictions that interpretation was subject

to under the Allgemeines Landrecht für die Preußischen Staaten.<sup>55</sup> With this criticism of the Prussian code, Hegel was heading in the same direction as Savigny. This meant that much latitude was being afforded for interpretive activity and judicial decision, in what Hegel did not hesitate to call “the indeterminate perfecting of the legal intellect” (ibid.).

The more abstract and general the language in which a legal rule is formulated, the more pressing will be the need to rework and adjust the rule so as to match it to the facts of the matter. Statutory law (*das Gesetz*) requires interpretation because legal norms are always and exclusively be applied to a concrete case. It is in this sense, then, that however the right (*das Recht*) is codified, it must have a constitutively open structure; or, in Hegel’s words, it must have “a free existence” (*Rph* I, § 108; my translation).

What Hegel wanted to underscore was the creative thrust of the jurists’ law. The judge’s activity now appeared to him to form an essential part of the law-creating process. Having just reiterated the necessity for a code, he cautions us:

In this realm of infinity, matter is empirical; the determinations fixed by the intellect divide up forever and anew; this is the realm of pros and cons, where there is never an end. This real judging, that is, the practice of the courts, is that from which all laws originally derive; the real activity of the courts provides decisions that, however much they may be suited to single cases, become general laws [*Gesetze*]; and so a law is formed even from *similiter judicatis*. The courts cannot be idle organs of the laws; instead, there is always the intellect which comes in—the understanding proper to the judge. (*Rph* I, § 109A, 126, 27–35; my translation)<sup>56</sup>

This passage is especially important in view of the fact that nowhere in Hegel’s published text entitled *Grundlinien* or in the other lecture courses can similar remarks be found. Hegel does more in this passage than just recognize for the jurists a decisive role in forming and perfecting the law: He goes to the point of locating in the very “practice of the courts” the source from which “all laws originally derive.” It seems that Hegel is even ahead of Savigny here, prefiguring the modern theories of legal realism: The legal phenomenon appears closely bound up with the development of society.

The more society increases in complexity, the greater will the development of the legal determinations that regulate it; “and the more the laws [*die Gesetze*] are developed, the more varied they become in relation to the concrete case” and, consequently, “the more will judgment and application de-

<sup>55</sup> Under §§ 34–6 of Svarez and Klein’s *Entwurf*, the judge was prohibited from interpreting the law and was required to turn to the Legislative Commission whenever a hard case might have come before the court. But under the final framing of the code (*Einteilung*, §§ 46–8), the judge was enabled to resort to the interpretive devices of *analogia legis* and *analogia iuris*, in such a way as to limit recourse to the Legislative Commission. See, in this regard, Tarello 1976b, 492ff.

<sup>56</sup> It is significant that Hegel should shortly hereafter observe, with respect to Roman law, that “the Romans masterfully perfected the legal intellect: Public life was oppressed by despotism, and so the intellect turned to it [to public life] with all its quick-wittedness” (*Rph* I, § 109A, 126, ll. 38–41; my translation).

pend on the judge's subjectivity" (*Rpb* I, § 115, ll. 32–4; my translation). This daisy chain of associations is one that Hegel was well aware of. When he says that "the judge must therefore not be a mere organ of justice," but that "there is much work in store for the judge's reflection" (*Rpb* I, § 115A, 133, ll. 24–5; my translation), he is clearly referring to the important role the judge plays in a complex society.

#### 5.4.3. *The Judge and the Law*

Let us now go deeper into Hegel's conception of the judge's role. The judges should not be confined to mechanically applying the law (*das Gesetz*), nor are they in a position where they *can* do so in the first place. Indeed, only if the law were the same thing as the right (*das Recht*) would such a possibility be open. But each law is only an abstract and general rule valid for a multiplicity of possible cases, whereas the judge is always asked to make a decision with respect to a real and specific circumstance. It is the rule's own abstractness, then, that calls into play the judge in the process of application to a concrete case—and it is in this transitioning from the abstract to the concrete that the judges find the space within which to carry out their law-creating function.

The laws (*die Gesetze*) represent as such no more than a formal guarantee. The judges, for their part, must make it so that the citizen is provided not only with formal guarantees and protections but also with actual justice: Their task is to make sure that, when a law's abstract determination comes into contact with the concrete cases of life falling under its purview, the law itself can acquire concreteness; and in order for this task to be at all possible, the judges must have at their disposal enough room for manoeuvre. For they must operate in such a way that the determinations of law may freely perfect themselves.

If any discrepancy should arise between the formalism of the law and a citizen's rightful claim, the judge must accord primacy to the latter:

A will, for example, may lack certain formalities that seem utterly inessential, and the entire will thereby comes undone. The judge could easily point out that if such formalities were disregarded, forged wills could easily be made. But in doing so, the judge would be acting in the interest of the law, in order recognize as prior a possibility, an extraneous possibility, with respect to the right strictly understood. For the layman it must be a terrible thing that the lack of a formality, the empty possibility of a deed being forged, can bring about a judgment contrary to the true right [...]. A judicial system must provide for the formalities by which rights can be known; but these formalities should be so framed as not to obstruct the right: On the contrary, where contrast emerges between formalities and the right, it is the formalities that must give way. (*Rpb* I, § 115A, 133, ll. 5–13 and 20–2; my translation)

It is a fundamental distinction that Hegel draws here between law (*das Gesetz*) and right (*das Recht*). It is in the nature of law to universalize, or to work by abstraction to extract general validity from the concrete cases so acquired. But this very feature is such that the law makes up only one moment

in the life through which the right is accomplished. Another moment is made up by the activity through which the judge brings the law to its concrete fulfillment. And at this stage in the process, the law's formalism is relativized, meaning it is dialectically superseded (which does not amount to its being abstractly negated). As Hegel at one point remarks in the annotation just quoted, "the right must therefore happen as right, but the courts must decide according to their own formulas and cannot depart from the formal law" (*Rph* I, § 115, 133, ll. 333–4; my translation).

The judge must decide in a concrete situation, here and now: Although the judge, in applying the law, must make it so that justice be done, or that the right be actualized, the courts' activity remains dependent on the law so applied, regardless of how innovative such activity may be with respect to the law. Indeed, while Hegel rejected the view that reduces the judge's function to the automatism of subsumption, he likewise rejected the view that equates this function with the legislator's. The judge's relation to the law should not be understood to mean that the judge's activity can replace the legislator's. In fact, any judicial decision depends on and presupposes the law, and no judicial decision would be possible absent such a presupposition. The judge's activity must therefore be kept distinct from the legislator's. Hegel is explicit on this point: "It is clearly the case that legislating and judging cannot be unified into a single person, for if they were, the judging power would be making laws fit for the very facts to be judged, and so there would not be any subsumption" (*Rph* I, § 109A, 126, ll. 15–8; my translation).

Hegel speaks here of *Subsumtion*, but this is not to say that he accepts the reduced view of the judge as the "mouth of the law" (*la bouche de la loi*). Certainly, such a subsumption must take place, but it forms only a part of the judge's activity, and not the most important part, either. The reason why Hegel speaks of subsumption is that the judge's decision is not an original creation of right but is rather the outcome of an activity that takes as its terms of reference that which the legislator has laid down. In this sense, then, judicial decision is subordinate to the law, but it is so in such a way as to *innovate* on the law: an innovative subordination.

A "reasonable" subordination of the judge to the law—though without neglecting to recognize the innovation involved in the judge's work—remains the best guarantee in protecting the citizen, and it is, too, the political choice best suited to satisfying the need for a greater transparency and publicness of power. In this respect, Hegel can safely be made to fall under the Enlightenment conception of law. For he points up the importance of bringing the judge's activity under the critical scrutiny of public opinion: The jury, the collegiate form for the court (with a panel of judges sitting *en banc*), and the publicness of the courts had all been introduced with that end in view.<sup>57</sup>

<sup>57</sup> In § 116 of his first lecture course, Hegel lists all of five conditions that must all be



Hegel viewed it as essential that a relationship of mutual trust obtain between the citizens and the administration of justice. This trust becomes especially important precisely in those cases where the increased complexity of social relations makes it in turn necessary to develop legal determinations to such an extent that the single citizen is no longer in a condition to become fully aware of them:

The administration of justice and the judicial process become for the individual a true destiny, a completely extraneous power. The right itself, where man must be conscious of his freedom—the right and its procedures become for him an extraneous power. In fact, the fees that jurists and the state charge make it so that he should see working against him a conspiracy from the top, a conspiracy formed by the upper classes creating a hiatus between him and the right; he learns to know the right only through the fees charged [*sportulae*]. The subjective side—the individual’s ability to know how the right will apply to him—is totally absent. This estrangement of the right from the subjective conscience we owe to those thousands of German youths who studied Roman law in Bologna. And since the multiplication of laws is such that one can no longer gain an understanding on one’s own, it is of the utmost importance that a relationship of trust be established between the jurist and those who claim the right. (*Rpb* I, § 116, 134, ll. 13–24; my translation)

In a situation where the law, as a system of legal provisions tending to grow increasingly complex and autonomized, seems to advance so far in this process as to become extraneous to the citizen’s consciousness, it falls to the judges to ensure—through their concrete activity—that this sense of estrangement be overcome.

If on the one hand the judges cannot but depend on the formalism of the law, they must on the other hand overcome this formalism and decide according to justice. These two sides—the fact of the judge’s activity being at once dependent and innovative on the law—must both be taken into account, for otherwise one risks falling into either of two extremes: that of overestimating the judge’s role or the opposite one of underestimating this role. The judge’s dependence on the law acts as a *formal* guarantee, ensuring the citizens’ protection and the certainty of the law itself; the innovation brought about by the judge’s activity is instead what the citizens can rely on in seeking *actual* justice, or in demanding that justice be *done*. There is not necessarily any contraposition between these two sides of the judge’s activity: In fact, they complement each other. And while Hegel’s position in favour of codification

satisfied if the citizens are to have any trust in the system of justice. The first two—the “jury trial” and the “publicness of the courts”—are presented as the two most important guarantees in ensuring an impartial administration of justice; the remaining three are “the collegiate form for the court,” a “system of appeals,” and the “independence of the judges, as concerns both their public function and their appointment” (my translation throughout). As is known, in the corresponding sections of the published text (*Rpb*, §§ 224, 228), Hegel lists only the first two guarantees, and does so without laying on them the same emphasis found in the lecture course just quoted.



may be something we should after all expect from him, the same cannot be said of this conclusion he came at, for we have here a much different Hegel than the one we have so far been accustomed to.

## 5.5. Puchta and the Autonomy of Legal Doctrine

### 5.5.1. *Premise*

What emerges from the lecture material considered in the last section is a different view of Hegel than the one traditionally associated with him. Indeed, while Hegel did recognize the fundamental role of the law, he also insisted that the law will acquire any concreteness only with the judge's interpretation and application of it: It is only in this transitioning from the abstractness of law to the concreteness of judicial decision that the right becomes real. With Puchta (who, incidentally, had had none other than Hegel as a teacher at gymnasium in Nuremberg) the emphasis shifts to a different aspect of the jurist's activity, the main focus now being on the jurist not qua judge but qua master of legal science.

Georg Friedrich Puchta was born in 1798 in Cadolzburg, not far from Nuremberg, and studied at the University of Erlangen, where he initially also taught. In 1828, he became full professor of Roman law in Munich and was then transferred to Marburg (1835) and to Leipzig (1837); then, in 1842, he was called by Savigny, who in the meantime had become Minister for Legislation and wanted Puchta to take his place in Berlin; not long after that, however, in 1846, Puchta died (while still in Berlin), and thus came to an end a short but brilliant career.

Still hanging over Puchta is the judgment of someone who had initially even devoted a book to him: Rudolph von Jhering. Here is a passage describing, with pungent sarcasm, the way in which jurists were formed at Puchta's school:

Toiling the night away by lamplight with the *Corpus Juris* close to hand—this senseless reservoir of legal knowledge—are the keepers of the science of the *jus commune*. What in the world are they doing? I bet half of them—at least the younger ones, on whom rests Germany's future—are at this very time *constructing*. But what does it mean to construct? [...] In the lower storey they do the handwork: The raw material gets selected, processed, cleaned—in a word, it gets interpreted. The material is then moved to the upper storey, where it gets handled by the expert hands of civil law artists whose task is to shape it into legal-artistic form.<sup>58</sup>

But let us leave metaphor behind: The charge was that the legal science advocated by Puchta would lead to a scientific law disconnected from life, and the

<sup>58</sup> My translation. As is known, this text initially appeared anonymously in a journal under the title *Briefe über die heutige Jurisprudenz von einem Unbekannten* (Berlin 1860–1866) and was later published, in 1884, in Jhering's *Scherz und Ernst in der Jurisprudenz: Eine Weibnachtsgabe für das juristische Publikum* (see Jhering 1992b, 6–7).

law's intrinsic historicity would thereby be entirely replaced with abstract conceptualizations devoid of any real substratum. From that point on, and for a long time thereafter, Puchta—with his “conceptual pyramid,” or what he himself called a “genealogy of concepts”—has been called to answer for all of the problems of legal formalism (Wilhelm 1958, 79–86; Larenz 1960, 18–22; Wieacker 1967, 400–2).

Although to this day these charges continue to stick, the judgment Puchta has received in the literature over the last several decades is much more even-handed and diversified.<sup>59</sup> We certainly cannot enter here into the maze of different interpretations. What instead will be done is to underscore that, however paradoxical this may seem, precisely where the traditional view has identified the limit of Puchta's approach, in its “worship of the logical element,” therein lies its peculiar value.

### 5.5.2. *A Formally Equal Law*

There is a certain misunderstanding that must be dispelled in order for us to grasp the meaning of Puchta's conception. Which is to say that, while Puchta, as we will see, did go beyond (and even against) Savigny, and in so doing went down the road of so-called conceptual jurisprudence, this should not be taken to mean that he thereby failed to recognize the weight of material social relations or, in other words, that his conception of law was abstract and immaterial. But to unpack this point we must have a look at his *Cursus der Institutionen*, on which several generations of scholars were formed.

According to Puchta, there is inherent in law a principle of liberty, for it is through liberty that we become legal persons (or subjects of legal rights and duties), and we are legal persons only insofar as we are capable of willing. It is important here that what matters where law is concerned is the possibility of willing as such, and this does not in itself imply making a specific choice, as it does in morality: Whereas *moral* freedom is something we attain by determining ourselves for the good, *legal* personhood is something we retain regardless of whether we are good or bad. So it is the abstract possibility of willing that counts with respect to law, and not our actually determining ourselves to do good. This philosophical premise, here only briefly sketched out, forms the basis on which Puchta singles out the distinguishing principle of law:

Inherent in the possibility of willing—understood as the foundation of law—is a principle more proper to law: the principle of equality. The law amounts to the recognition of the liberty to which men are entitled in equal measure as subjects of the power of liberty. (Puchta 1881, 7; my translation)<sup>60</sup>

<sup>59</sup> This has been the case ever since Bohnert 1975, followed by the important reconstruction in Haferkamp 2004.

<sup>60</sup> The two volumes making up Puchta's *Cursus der Institutionen* were first published in

But what does it mean to say that the “principle more proper to law” is equality? As soon as we answer this question we will already get a sense of Puchta’s “formalism.”<sup>61</sup> The law is equal law in the sense of its being unresponsive to diversity. People as subjects with real needs to satisfy, and so the material lives of people, make up a factual circumstance to be kept separate from law, because what really has any bearing on law is the person considered in the abstract as a subject of legal rights and duties. It would be a mistake, however, to think that this amounts to disregarding or denying the real inequalities present in society. In fact, these inequalities make up the very substance of law, the raw material that resists the abstractions by which legal form is characterized. The task of the law is not to get rid of them but to subdue them. Law thus means equality, yet built into such equality is an immanent inequality. In Puchta’s own words:

The validity of legal propositions [*Rechtssätze*] has its foundation in the fact that law is the medium through which inequality must be brought under the principle of equality without thereby eliminating such inequality. The formation of law happens through a continuous pressure exerted by relations, with their inequality, and their continuously being overcome. And from this process spring the legal institutions: We thus have the legal propositions on property, *obligatio*, and so forth, in all their diversity; and as we make our way downward we find the particular institutions and the legal propositions by which they are framed. If these institutions are brought forth in such diversity, it is because the law is equality affected by inequality. (Puchta 1881, 21; my translation)

So, although the law does produce abstractions, it does this in the effort to deal with the inequalities present in society’s material relations; and in the attempt to overcome the resistance offered by this substratum, the law evolves a complex structure within which such material differences are overcome, which does not mean that they are levelled out—under the Hegelian logic of *Aufhebung*, one is tempted to say—but rather that they are resolved into a variety of logical forms, or propositions. We can see, then, that however much law may have its ultimate foundation in liberty, law is conditioned by necessity, and precisely by that internal necessity that makes it possible to infer one proposition from another based on the rules of logic. The law thus presents itself, in its positivity, as “something rational”: “Its propositions acquire a systematic connection because they condition and presuppose one another, because from the existence of one of them can be inferred the existence of the other” (*ibid.*; my translation). It is from here that we get the ideas of a “conceptual pyramid” and a “genealogy of concepts” that have attracted so much negative criticism.

1841–1842. It is this fundamental work that we will mostly refer to in the following pages. We will not, instead, take into account Puchta’s other great work, *Das Gewohnheitsrecht* (pt. 1: Puchta 1828; pt. 2: Puchta 1837).

<sup>61</sup> This is an aspect of Puchta’s thought clearly brought out in De Giorgi 1979, 45–57.

Certainly, Puchta can well be criticized for failing to see that that legal abstraction—the formal “purity” of concepts—in reality did nothing but reproduce the reality of society’s material relations. But on the other hand Puchta did not rule out that a critical attitude can be part of the jurist’s scientific activity; in fact, he stated this expressly: “Criticism is thus also a task for the jurist. Criticism is necessary with respect to all legal propositions that have come down to us in the form of documents [...], especially as concerns legislative law” (ibid., 24). In summary, then, while there is a need to purify legal science of all content, thereby affirming its autonomy, this is a specific task that, as we will see shortly, is assigned not to the jurist at large but to the theoretical jurist.

### 5.5.3. A “Pure” Science of Law

The role that Puchta envisioned for legal science is another matter with respect to which an initial clarification is in order. Which is to say that Puchta, not straying from his mentor’s teaching, held on to the idea of law as an organism characterized by a “simultaneous and successive variety”: simultaneous in that the content of law is made up of organic parts that condition and presuppose one another; successive in that this organism is subject to change. And therefore, if the law presents these two aspects, so must the *science* of law have two matching components: a systematic one, which looks at law from the standpoint of its simultaneous variety, and a historical one, which instead investigates the law’s successive variety (Puchta 1881, 56).

But now we should also note how the systematic element is listed first by Puchta, and that is in itself a clue signalling its primacy: Only a systematic study can guarantee a complete knowledge of law. And this can be appreciated from two points of view, an external one and an internal one: Externally, only a systematic knowledge can ensure an understanding of all the parts in their organic interconnection rather than as pieces of a mere aggregate; internally, we cannot choose but be systematic in our knowledge of law, the reason being that the law is itself systematic, and so only on a systematic approach will we be able to get to its essential nature. Scientific knowledge thus means knowledge of the connections, or mutual relations, that hold among legal propositions. This brings out the rationality inherent in positive law, and therein lies the specific task of legal science.

This primacy accorded to the systematic side of legal science over its historical side has often been interpreted as a progressive tendency to seek comfort in that “deceptive and illusory appearance of logical certainty” (Savigny 1840, vol. 1: 323; my translation) against which Savigny had cautioned, albeit in the specific context of a different discussion. Puchta, on the traditional view mentioned at the outset, got caught up in these logical formulas and was consequently led off in a direction that caused him to lose contact with reality,

with the material substance of law. Even the close connection between theory and practice—the connection between theoretical and practical jurists postulated, as we have seen, by Savigny—would have been sacrificed on the altar of “the system,” giving way to a static conception of law with an irredeemable disconnect from the historicity of legal phenomena.

Now, there is no doubt that in Puchta the systematic concern prevails on the historical, just as there is no doubt that the jurist’s activity strictly understood—the practice of the courts and the judge’s interpretation and application of law—is clearly distinguished by him from the properly scientific activity by which law is produced, but this need not be construed as a step backward with respect to Savigny. For Savigny, the jurist proceeds inductively from an analysis of the real facts and relations that unfold under the law; for Puchta, legal science has to do instead with *propositions*, meaning the language in which laws and customs are expressed. It is the jurist’s task to reconstruct the system made up of such propositions, a reconstruction that can only be carried out deductively, by using the tools of deductive logic. More to the point, the jurists’ activity qua legal scientists consists in “isolating” their object from the other manifestations of the human spirit, in such a way as to come to know this object in its specificity.<sup>62</sup> Puchta’s interest thus lies in the relations internal to an object so specified: The law is a closed system whose constituent parts are interconnected by an internal necessity that the jurist’s scientific activity is entrusted with bringing to light. Here is how Puchta explains this activity:

It is the task of science to know legal propositions by their systematic connection: This means knowing them as mutually conditioning propositions deriving from one another, in such a way that we can climb up the genealogy of the single propositions until their principle is found, and can then make our way down from these principles to their farthest offshoots. This work makes us cognizant of and brings to light those legal propositions which, being concealed in the spirit of rational law, could not be manifested either in the immediate consciousness of the members of the population and in their actions or in the legislator’s provisions, and so they become visible as the product of a scientific deduction. So it is that science presents itself as a third source of law alongside the other two: The law so produced is *scientific law*, and since it is brought to light by the jurists’ activity, it may also be referred to as *jurists’ law*. (Puchta 1881, 22; my translation)

As with Savigny, so with Puchta the jurist’s scientific activity is understood as more than just cognitive, or as exclusively concerned with *knowing*. For in taking up this task of bringing to light what is only implicit in positive law, legal science becomes in its own turn productive of new law. And so among the sources of law there also appears the jurist’s “scientific law,” which takes its place alongside the law expressed by custom and by the legislator’s proposi-

<sup>62</sup> In Puchta’s own words: “The object of legal science as a particular science is the law conceived as being this particular organism purely, independently of its being part of the whole. [...] The jurist conceives the law in its isolation” (Puchta 1881, 55–6; my translation).

tions. Like Savigny, then, so Puchta offers a conception on which legal science does not confine itself to knowing its object but also transforms it in so doing. But only in Savigny did the same term, *Juristenrecht*, encompass the jurists' theoretical and practical activity alike: In Puchta, the idea of a "pure science" is driven to extremes, and the jurists' theoretical activity is therefore kept clearly distinct from their practical activity. Taking an explicit stand against Savigny, Puchta has this to say in an important review (published posthumously, two years after his death, and which effectively sums up his conception):

It is in the first meaning specified that Savigny referred to jurists' law [*Juristenrecht*] as scientific law. I disapprove of this usage, in part because there is no substantial connection between the jurist's function and the jurist qua keeper of science—so much so that the former was someone you would turn to as a simple man of laws (or *jurisperitus*) even before the birth of a legal science properly so called—and in part because the expression so used [the expression *Juristenrecht* as used by Savigny] would come to mean that the jurists' productive work as a whole is exhausted in the reduced function of lawyer and judge, or it would mean that this expression encompasses under a single concept both the jurist's work and the legal scientist's, without denying the jurists' properly scientific activity but without distinguishing it, either. (Puchta 1844, 12–3; my translation)

It is for two reasons, then, that Puchta took exception to Savigny's use of the term *Juristenrecht*. The first reason is practical: Legal science came into being only after the jurists had been practitioners engaging in a practical line of work, and this means the two activities are not connected by any essential entailment relation such that the one cannot exist without the other. The second reason is instead distinctly theoretical: Subscribing to Savigny's usage would mean depriving legal science of its autonomy from the jurists' typical activity of merely interpreting and applying the law. This failure to keep the jurists' purely scientific activity distinct from their practical activity would have wound up bringing the historical side of law to the forefront, thereby pushing the properly scientific side into the background. The originality of Puchta's view thus lies precisely in what he has often been criticized for; that is, in pointing up the need for a legal science clearly distinct from the jurists' other various activities. It is not in this effort that Puchta's limit is to be found but, if anything, in his pretence that by a mysterious alchemy a science so understood—as having a specifically theoretical and rational status—can engender new law, this being, appropriately enough, the scientific law born of the jurists' science.<sup>63</sup>

<sup>63</sup> Here is, in exemplary fashion, how Puchta expresses this thought in the text that collects his lectures: "The jurists are keepers of scientific truths: They expound and apply those legal propositions which rest solely on internal foundations, and which have authority even only on account of their scientific truth. Here, the jurists' law is the law of science" (Puchta 1849, vol. 1: 40; my translation). The validity of this law rests on a threefold, purely logical foundation, that is, "(1) on the rationality of existing law; (2) on the truth of the principles there from deriving; and (3) on the correctness of the conclusions drawn from those principles" (*ibid.*, 39; my translation).

The line of development traced out in this chapter can be brought into view in a single sweep by observing that once legal science reached the point of positivity, it was ready to be rethought from the ground up. And once it proved no longer feasible to introduce in Germany a code of laws on the model of Napoleon's grand codification, a shift took place in German legal culture with Savigny and Puchta, a shift which even invested philosophical culture (where Hegel's conception was prominent) and through which the focus would fall on the role of the jurists and on the meaning to be ascribed to their scientific construction.



## Chapter 6

# SCIENCE OF ADMINISTRATION AND ADMINISTRATIVE LAW

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### 6.1. Definition of the Topic and Problems of Method

If we were to take the title of this chapter literally, our treatment could not begin prior to the 19th century. Indeed, throughout the course of the Middle Ages and the early modern age, not only had it never entered anyone's mind that administration could constitute the object of a specific "science," but moreover, the very terms of "administration" and "to administer" did not at all occupy an important place in the vocabulary of legal doctrines. Although these expressions had been used quite frequently by jurists since antiquity, they had no particular technical connotation. In fact, in order to express what was being administered each time, they were mostly accompanied by an object (administration of a house, of a feud, of an office, of a tax, of a sacrament, and so on). When "Administration" was instead used alone—as the *Encyclopédie* still recorded in 1751—it could mean either "régir des biens" or "gouverner un État" (Diderot and D'Alambert, 1751–1780, vol. 1, 140). The first meaning was common (and still is today) in the sphere of private law, the second in the political language; but in neither of these two cases did the word evoke a public function with its own well-defined features. It was only with the end of the 18th century and the consolidation of the theory of the three powers of the State that "administration" began to take on the significance it still has today in the legal tongue: namely, an activity typologically distinct from both legislation and jurisdiction, and consisting in the concrete action that the State performs for the benefit of its citizens. Even later appeared the expression "administrative law," which won ground only as of the first half of the 19th century.

On the other hand, it is obvious that the European States certainly did not wait for the invention of our current vocabulary to start administering. Since the beginning of the modern age, we see them engaged in mustering large armies, collecting taxes, building impressive public works, preventing serious social risks such as famines and epidemics, and so on. All these activities undoubtedly fall within the spectrum of what the "administrative function" is today, but they were described by the means of a non-administrative language. In the first part of our chapter (Sections 6.1, 6.2, and 6.3) we shall specifically attempt to give an idea of this more ancient administrative culture, whose basic concepts are very far from those of nowadays. With Sections 6.5 and 6.6, respectively dedicated to the novelties introduced by the French Revolution

and the Napoleonic period, we shall see how the actually modern image of public administration begins to take shape; whereas Sections 6.7, 6.8, and 6.9 will describe the making of the contemporary administrative law systems, and seek to focus on the diversity of timings and declinations that distinguish the continental European model from the common law countries. Finally (Sections 6.10 and 6.11), we shall push onward to examine the effects that the passage towards the Welfare State and the outset of the long parabola of public interventionism produce on both sides of the Channel.

## **6.2. Between the Middle Ages and the Modern Age: The Primacy of Justice**

According to the perception that still today dominates our political culture, public authority manifests itself in three essential forms: legislation, jurisdiction, administration. The first corresponds to the function of the creation of law, the second to the application of law to contentious matters, the third to the “makings” of the State, that is to say, to all the practical and concrete activities that States carry on in order to satisfy the daily needs of its citizens, within the limits of law. Beyond these elementary meanings, these three expressions have certainly never had a univocal content. Every national tradition, every school of legal thought, and almost every single jurist has given a different interpretation of them. It is certain, however, that in the past two hundred years, this Trinitarian scheme has been by far the most used to conceptualise the wielding of power. It has become so familiar to us that even to think of a different one proves difficult. If we go backwards, however, past the middle of the 18th century which marked the appearance of our formula, we discover that power was represented according to models that were very different from this one. In particular, for a very long time, instead of instituting decisive differences between the various types of public functions, jurists preferred to imagine the State’s authority as a unique entity and its exercise as an undifferentiated process. At the basis of this choice lay the idea, quite well-rooted in medieval culture, that the true *raison d’être* of power consisted in making everyone observe a law of natural origin, immanent to things themselves and prior to every creative act by man. Sovereigns and magistrates were not intended by God to rule over men by their own will, but to guarantee respect of the rules which He had already inscribed in the natural order of the world. Every act of power, therefore, was aimed at revealing, declaring and imposing an *already given* law; and only towards this end were rulers invested with certain rights of supremacy over their subjects. The prince’s law, the judge’s sentence and the magistrate’s order were not truly different from one another. Though on a different level, each of them contained the authentic statement of a legal rule, and was therefore the expression of a unitary function, which the medieval legal vocabulary indicated everywhere with the same expression: “*iurisdictio*” (Costa 1969; Vallejo 1992; Grossi 1995, 130–8). This

term covered an infinitely broader area than the simple contentious justice, indeed up to the point of completely embracing the government of the State. As Bartolus of Sassoferrato observed towards the mid 14th century, summarising the conclusions of a long theoretical debate, “potestas et iurisdictio idem sunt” (Bartolus 1570, f.48, co.1, n. 4, ad D.2.1.3). “Iurisdictio” was not only the resolution of a suit on the petition of the parties, but also any act of power in which the prince or his officials were called to realise a “utilitas publica”—such as, for example, summoning a parliament, issuing a general law, confirming a local statute, granting a privilege, punishing a crime, levying a tax (Hespanha 1984 and 1990). Briefly, the civil power of giving orders (what in Roman law was termed “imperium” and which, according to the *Corpus Iuris Civilis*, constituted the most important prerogative of public magistrates) had no autonomy before the power to judge. Indeed, the *imperium* was granted solely in view of defending law and “establishing equity,” as the Glossa Magna read.<sup>1</sup> From this postulate ensued that for any act of public power to be valid, it had to be preceded by a trial. Every order was a ruling, and “every ruling that was based on merely unilateral affirmations eventuated in a manipulation of the facts and therefore in a *perversio ordinis*” (Giuliani 1988, 519). In essence, on the organisational level, the State was imagined as a pyramid of judges and, on the functional level, as a great trial machine.

Of course, this entire conception seems to belong to an archaic and deeply medieval universe. In effect, as the territorial States gradually consolidate, between the 15th and 16th century, and public power concentrates in the hands of sovereigns, the medieval theory of “iurisdictio” tends to fade in favour of other theoretical constructions. With the crisis of Scholasticism and the beginning of the modern age, political philosophy assumes an increasingly more voluntaristic content. Jurists and political writers begin to represent the prince more as a legislator than as a judge, and to see “the essential note of sovereignty itself, its specific peculiarity,” in sovereigns’ capability to contravene pre-existing law (Isnardi Parente 1988, 43). Nonetheless, it would be mistaken to think that the Renaissance marked a moment of radical discontinuity in the way of conceiving and wielding power. The States of the early modern age are still, in their essence, jurisdictional States. And this they are because their structure, their “constitution,” is fundamentally pluralist and composite. These States indeed take shape as conglomerates of minor political entities (cities, provinces, *Stände*, farming communities, religious and corporative bodies, and so on), each of which, as in the Middle Ages, retains its own administrative self-government, almost always its own law and, very often, even an ample jurisdiction over its members. In short, to use Michael Oakshott’s categories, the State is still much more *societas* than *universitas*

<sup>1</sup> “Est enim iurisdictio potestas de iure publico introducta cum necessitate iuris dicendi et aequitatis statuendae”: gl. acc. forma ad D.2,1,1: “Ius dicentis officium.”

(Oakeshott 1975, 199). In this context, the primary function of central power certainly does not consist in expressing a uniform will, and all the less in supplying services for the benefit of the subjects, but rather in maintaining a proper equilibrium between the various constituent parts of the State. To guarantee each body the enjoyment of its rights, protect it against the prevarications of its neighbours and resolve conflicts that continuously arise amongst them: This is still the true mission of the king and his officials. And this is why, despite its new voluntaristic accents, legal doctrine continues to reflect the image of a fundamental judiciary administration of power.

Very significant in this regard is the great debate about the true nature of the power of magistrates that unfolded in Europe, and especially in France, through the middle decades of the 16th century. Thanks to legal Humanism and its new, philologically conscious way of reading the texts of classical antiquity, jurists began to realise that the whole medieval theory of “*iurisdictio*” had no foundation in the ambit of Roman law. A serried host of scholars, from Alciato to Le Caron, from Zaas to Sigonio to Bodin, thus devoted themselves to denounce the arbitrary character of the interpretation of public power that the “*bartolists*” had ostensibly drawn from Justinian’s text (Gilmore 1941, 46–92; Mannori 1990, 358–99). The “*culti*” pointed out that the typical connotation of the Roman magistrate was not so much formed by jurisdiction, but by “*imperium*”: that is to say by the power to “*edicere*,” “*iubere*,” “*vetare*” and “*prehendere*.” With respect to this power, the judicial competences due to the figures such as the consul, the praetor or the “*praeses*,” were purely accessory. The government of the Romans therefore was founded much more on the production of unilateral decisions, such as ordinances or regulations, than on sentences. Precisely these conclusions of a historical-learned character induced Jean Bodin (1529–1596), in several chapters of his *République* (1576), to completely rewrite the theory of the magistrates and their functions. On that occasion, Bodin indeed asserted that, today as yesterday, the true peculiarity of any public magistrate consisted in his “*puissance de commander*” and that his orders did not oblige the subjects because consistent with the law, but simply because they were assumed by a public person having the right to issue them (Bodin 1962, Book 3; Reulos 1980; Comparato 1981). And yet, the attentive research that Bodin himself conducted about the specific competences of the French magistrates of his time revealed, in the end, that only very few of them were holders of a pure and simple right of command. In practise, he realised that almost all of those magistrates continued to be invested with some kind of contentious, general or special, jurisdiction. The power to command, although now envisaged as something distinct from the judge’s power, still appeared usually linked to a judiciary task, precisely as it had been in the course of the Middle Ages. Moreover, for the great majority of jurists, this link was an ineluctable necessity. As Milanese lawyer Jacopo Menochio (1523–1607) pointed out, if a public official endowed *only* with “*imperium*” and totally deprived of

“iurisdictio” had truly existed, he should have been called “potius executor, et carnifex, quam magistratus” (Menochio 1695, 7). Even admitting that, on the theoretical level, “imperium” and “iurisdictio” were no longer joined by a relationship of reciprocal implication, the possibility of a *practical* divorce between them remained almost inconceivable. A good example of this way of seeing things is offered by the great French jurist Charles Loyseau (1564–1527) who in 1610, under the title of *Droit des offices*, published the first systematic treatise on the public offices of the Kingdom of France. Though clearly pro-absolutist and a great admirer of Bodin’s doctrine, Loyseau believed that in a “royal monarchy” like the French one, in which the king had always considered his subjects as his children, the only type of authority that magistrates could be invested with on a regular basis, was the “command of justice”: that is to say, a form of command “mixed with jurisdiction” and “inseparably inherent” to it. Conversely, the use of “pure command,” of “command of force,” of what, in short, the Romans called “merum imperium,” was a general attribute of magistrates only in the ambit of “patrimonial monarchies,” where the monarch was presented as the master of the people and of his subjects’ goods by virtue of a right of conquest, while in “regal” governments, this kind of non-judiciary authority belonged only to the officials in charge of military government (Loyseau 1640a, 65–8). The topical model of a just, not despotic State was still, to all effects, that of a law-based government.

### 6.3. The Seventeenth and Eighteenth Centuries: The Growth of Public Tasks

Nevertheless, it is likewise true that, from the end of 16th century, both the number of the State’s servants and the catalogue of public jobs began to grow at a very fast rate. It was precisely Loyseau who observed with some preoccupation, in 1608, that the holders of offices in the service of the French crown had by that time become some 60,000. Only part of these people—he added—were entrusted with the administration of the judicial machinery (“la justice”). Others were in fact assigned to the military administration (“la guerre”) and many others still to the management of King’s taxes and revenues (“la finance”) (Loyseau 1640a, Book 4, chap. 5). Finally, this list was to be completed, during the 17th century, by the addition of a further label—“la police”—under which jurists included the whole complex of social regulations which, in France as in other countries of Europe, was assuming growing importance as a consequence of the consolidation of the absolutist State.

It’s quite evident that the gamut of early modern public functions had enormously expanded with respect to the skeletal medieval list. This mainly came about by virtue of a ruthless international competition which, imposing a continuous increase of military expenditures on States, forced them to lift their taxation levels more and more and, consequently, to subject the entire economic and civil life to a stricter control, in view of boosting the taxable wealth.

This great expansion of State interests, which was to find its seal in the mercantilist doctrines of the full 17th century, perhaps constitutes the greatest institutional novelty of the entire modern age. What has principally struck the historians of this period is the formation of a concept—that of “police”—which seems to closely anticipate that of today’s “administration.” In fact, while throughout the Middle Ages, the word “politia” had simply been the Latin equivalent of the Greek “politeia,” and thus indicated the State’s fundamental organisation or form of government, with the end of 16th century it begins to be used to connote a new type of public activity: One no longer aimed at the defence of the law, but rather “at the care and preservation of the inhabitants of a city and at their public good,” as remarked by the French jurist Jean Bacquet (1520–1595; Bacquet 1744, 416). As of this moment, “police,” “policia,” “Policey” become terms of everyday use in the institutional vocabularies of various European languages, where they evoke the right-duty of the sovereign “to produce a well-ordered territorial and city community” (Oestreich 1989, 215; Heidenheimer 1986; Schulze 1988; Napoli 2003; Stolleis 1996). The corporate society is indeed by now perceived as a scarcely disciplined space and hence, needful of the continuous regulation of the king. This king, therefore, is no longer only judge, but also “shepherd” and “tutor” of his subjects. Sovereignty has become “gouvernementalisée” (Foucault 1994); and the *Roi berger* is now attending to many purposes, relating to his subjects’ safety and prosperity, which had had very little importance for the medieval monarch, entirely focused on the defence of the law. “Police” rules clearly reflect the State’s increased attention for the concrete dimension of living. Without modifying the foundations of the legal system, these new norms summon everyone to observe his own natural duties through a series of minute prescriptions, aiming at the preservation of the “gute Ordnung” and the “public good.” Changeable and fluctuating by nature (“the business of the Police consists in affairs which arise every instant, and are commonly of a trifling nature,” noted Montesquieu (Montesquieu 1914, Book 26, chap. 24), the “droit de police” becomes, little by little, one of the most typical features of the European institutional landscape. Its importance is well certified by the growing space that it obtains in the sphere of legal literature. For Loyseau, who wrote as we know in the early 17th century, all the “police matters” could be easily classified into three sectors—food administration, trades and roads—which he dispensed with in a few pages (Loyseau 1640b, 90). One century later, towards the end of the reign of Louis XIV, Nicolas Delamare (1639–1723) published a monumental *Traité de la Police*, where the sectors had become eleven (religion; morality; health; food administration; public safety; roads; sciences and liberal arts; commerce, manufactures and mechanical arts; household servants; labourers; the poor: Delamare 1729, vol. I, 4). Loyseau’s elementary system was thus replaced by a far more attentive description, that shows the extent to which the French monarchy had been able



to expand its control over social life. Even more significant is the coeval German literature, whose approach to the study of the police (especially thanks to the contribution of Johann Heinrich Gottlob von Justi, 1717–1771) aims at founding a new, specific doctrine about the use of power (Unruh 1983; Stolleis 1988, 366–86; Schiera 1992). Made up of a variety of different disciplines (economy, law, statistics, demography) and deeply influenced by late mercantilism, this *Policeywissenschaft* is conceived as a global science of the common happiness, whose main purposes are the increase of population, the development of agriculture and manufacturing, the improvement of public instruction and so on. The reference to the “common good” here takes on unmistakable eudemonistic tones and open up new horizons to the prince’s activity. Furthermore, the development of “police” requires that the “Government should know the strength of everything” (Sonnenfels 1787, 23) and thus presupposes a complete “knowledge of the State” (Justi 1782, 9). Statistics, cartography and land registries are now pointed out as the normal tools of the State’s servants. And the “police of well-being” (*Wohlfahrtpolicey*) seems to be able to embrace everything: from the family order to the prevention of natural disasters, from the government of the economy to the discipline of faith.

In short, the State, which in the previous centuries had been only entrusted with safeguarding justice, now begins to appear as an instrument of social development. Nevertheless, it is quite obvious that this old regime “police” is still very far from the executive “administration” of nowadays. Although aimed at procuring the “public good” of the community as a whole, it certainly does not consist in offering services or in producing utility for the benefit of the subjects. In its very essence, the “police” is a form of *discipline*. It does not aspire to create new social roles or to cancel the old ones, but only to better regulate those which already exist; and this by prohibiting or imposing certain behaviours, on threat of established sanctions. As a consequence, the implementation of a “police” regulation did not imply a set of procedures truly different from those required to enforce any other civil or criminal rule. All in all, it was still a matter of verifying a possible wrongdoing and applying a sanction. This is why, in the perception of our 17th and 18th century jurists, the heart of every State apparatus continued to be made up of judges. Appointed “to be defenders of the laws”—as written by Jean Domat (1625–1696), the most important French jurist of the age of Louis XIV—“to impose their yolk on those who do not voluntarily subject themselves to them, and to maintain the observance of what the laws order,” they were again the only ones to shoulder the task of defending “the public peace, which constitutes the purpose of the temporal police” (Domat 1756, vol. II, 145). For a long time, “justice,” “finance” and “police” were not actually perceived as different public functions, but simply as three distinct fields in which the same type of authority was exerted, and once again on a jurisdictional basis.



#### 6.4. The Seventeenth-Eighteenth Century: The Formation of Commissarial Bureaucracies

The long-term persistence of this image of the civil government as a judicial machinery is not as odd as it may appear today. Indeed, it is worth remembering that the early modern administrative apparatus was all “autocephalous,” as Max Weber said, that is, amply independent from the sovereign. Even though in theory appointed by the king, the typical old regime public officials were scarcely responsible towards their master. When they didn’t consider their office as a personal property, they certainly looked at it as a sort of privilege reserved to the members of their own rank or order. It’s not surprising to ascertain, therefore, that these old bureaucrats professed a veritable cult for the historical and customary law, in which they found the natural basis of their independence, and that they were thus inclined to act far more as impartial judicial magistrates than as executive officers.

It was precisely the scarce attitude of the old magistrates to perform the sovereign’s will which drove the rulers of many European States to sidestep, as much as possible, these bothersome collaborators, transferring part of their functions to “court commissars,” fiduciaries chosen by the king from within his immediate *entourage* and revocable at any time (Hintze 1980a and 1980b; Armstrong 1973). In some cases, experiments of this type aborted in the bud, quelled by violent reactions from society (such was the case in the England of the Stuarts, where the monarchy’s attempt to create a series of extraordinary jurisdictions, alternative to those of common law, was one of the elements that triggered the civil war of 1642). In other situations, the resort to extraordinary commissars remained a sporadically used *ploy* that was incapable of encroaching upon the system’s baseline. Elsewhere, however, this practise wound up producing a veritable stable apparatus, alternative to the older one. Such was the case in France where, since the mid 17th century, the monarch had begun to use the module of the revocable *commission* in order to create a pyramid of agents exclusively dependent on him and his Council (Antoine 1982; Mousnier 1990–1992, vol. 2, 484ff.). Though various decades later and with strongly diversified outcomes, something similar was done in various European States, such as, for example, in Prussia, the little Piedmont, Castilla and the Spanish new-world colonies, as well as in several regions of the Hapsburg Empire.

Following in the tracks of Alexis de Tocqueville (Tocqueville 1969), in this new government machine, many historians have seen the first nucleus of the modern administration, intended as the administration of functionaries, organised according to an almost military hierarchy. Leaving the management of justice between private parties to the old magistrates, the new “commissars” advocated for themselves the handling of many matters of public interest, which were now to be solved no longer on the basis of law and procedural forms, but simply according to the instructions of the king and his ministers. This trans-

formation was then to spawn a new form of State, which French historiography usually calls “monarchie administrative” and German legal historians defines as “Polizeistaat.” According to such an interpretation, the “Polizeistaat” was by now a totally different type of State from the “Justizstaat” of medieval origin, in that it was characterised not only by the great quantity of police norms, of which we spoke earlier, but also by a clear separation between justice and administration, and even an embryonic distinction between private law and public law—the former applied by judges through trials and sentences, the latter by administrative agents through simple executive acts (e.g. Mayer 1924, vol. 1, 24–5). In short, the “Police State” of the 18th century already revealed the structure of a contemporary administrative State.

This reading is not false at all, but it can easily result in a too “modern” picture of the old regime administrations and governments. Indeed, the task of an eighteenth-century monarch still consisted everywhere in regulating the life of a corporative society that was amply self-sufficient with respect to the State. At least until the French Revolution, therefore, to administer did not mean to directly attend to the needs of consociates, but only to give a more or less coherent direction to the many self-governing bodies which formed the basis of the state building. Moreover, the apparent separation between justice and administration found in several of these States was never the product of a prior theoretical distinction, but the result of mere political balances. What urged sovereigns was to keep under control some crucial matters, such as the collection of certain taxes, military justice or the provisionment of the army. Having attained these goals, they often had neither the strength nor the interest to further curb the sphere of attribution of the old magistrates. In France, for example, up to the end of the old regime, the principal producers of police regulations continued to be the *Parlements*, namely the twelve supreme courts of law of the Kingdom (Payen 1997 and 1999); while many taxes were still collected under the control of the *Cours des Aides*, which were fiscal courts of medieval origin. On the other hand, the king’s “commissars” were not always conceived as truly executive officials. To remain in the ambit of the French experience, here the king’s intendants, who represented the sovereign in each province of the State, were formally considered as the instruments of the monarch’s personal justice (or of the “justice retenue,” as jurists used to say). More than “to administrate,” they were charged with informing and illuminating the king in the exercise of this age-old sovereign’s prerogative, which permitted him, when necessary, to supersede any judge of the kingdom (Hinrichs 1982; Mannoni 1994, 9–35). And even when the term “administration” began to be used with a certain frequency to indicate the bureaucratic machine made up of royal commissars (Antoine 1987; Mestre 1985, 165–7), the powers of this apparatus continued to be harshly contested under the profile of constitutional legitimacy. The great law courts, in fact, never accepted that a parallel and competitive power to their own could exist. Especially as of the 1760s, taking

advantage of the financial difficulties of the Bourbon monarchy, they unleashed a harsh attack against bureaucratic absolutism and its hegemonic claims. The basic thesis of the *Parlements* was that the customary constitution of the kingdom reserved the power to dispose of the lives and properties of the subjects to the sole judicial authority. According to the Courts, such a power was extraneous not only to the “administrateurs,” but also to the king himself who in an absolute state could make the law, but not execute it alone. In his *L'esprit des loix* published in 1748, Montesquieu—leader of the *parlementaire* opposition against Louis XV—indeed asserted that the only authority the title of executive power attributed to the monarch was that of dealing with “things dependent on the law of nations,” (namely, international affairs). In a monarchical State, the king promulgates laws, “makes peace or war, sends or receives embassies, establishes the public security, and provides against invasions” (Montesquieu 1914, Book 11, chap. 6); but any time he lays claim to personally judging one of his subjects, or having him judged by his immediate agents or—even worse—of depriving him of a right without trial, he becomes a despot, similar to those who govern oriental countries. “Justice retenue” was substantially a constitutional abuse; and “administration” had no other authority on subjects than that of handing them over to the courts of justice, when they had violated a law. According to this interpretation of the “loix fondamentales du Royaume,” France was thus brought nearer to England where, as of 1688, the monarch had been prohibited from exercising his own jurisdiction and where the legal execution of the law was thus entirely entrusted to the judicial authority. The king and his collaborators, of course, didn't at all agree with this doctrine, but at the same time they failed in founding the administrative power on a new, more convincing theoretical basis than the truly archaic one of “justice retenue.” The French monarchy was an institution founded on tradition and could only legitimate itself by resorting to languages inherited from the past, like those of the jurisdictional State. Also for this reason, perhaps, the Crown could not cope with the last great revolt of the judiciary, which in 1788 finally succeeded in obtaining the recall of the *États généraux* and thus brought absolutism to an end.

### 6.5. The Language of the Revolution

In short, the balance of our summary shows that while the eighteenth-century institutional experiments prefigure several features of today's administrative States, they continued to be set within a heavily dated conceptual horizon. In reality, the true foundation of the modern administration, as it was later to be conceived in the majority of European countries, was the work of the French Revolution; and it was once again the Revolution that assured the administration the strong constitutional acknowledgement which it had not succeeded in finding throughout the entire course of the previous century.

This affirmation may seem somewhat paradoxical. It is in fact well known that the revolutionaries of 1789 wanted everything except to preserve the centralised State that the French monarchy had constructed with so much effort. These new leaders were mainly men from the provinces who, with the old judicial magistracies, shared the same hostility towards the executive bureaucracies and their continuous interference in the life of society. One of the first concerns of the *Assemblée Constituante* was therefore to dismantle all the royal commissarial apparatus and to drastically reduce the king's executive powers. But at the same time, along with the bureaucratic State, the Assembly also swept away the much more ancient stratum of sub-governmental administrations which, for centuries, had formed the fundamental framework of the whole social life. Whether they were provincial or city administrations, guilds, village communities, religious institutions or even the same very powerful companies of magistrates that had brought absolutism to its knees, they were all wiped out in name of a new sense of equality and institutional uniformity. The old society of bodies left its place to a new society of perfectly interchangeable individuals. Obviously, this great change, whose sudden character left many of its own artificers amazed, did not occur by chance. The almost instantaneous collapse of the *régime féodal*, as it was then termed, in reality had been prepared by the long and silent work of the absolutist administrative machine, which had eroded the old corporative institutions from the inside, leaving only a fragile face standing. At the same time, the debate of the Enlightenment had laid the basis of a different image of the State, no longer conceived as a grouping of manifold corporations, but as a homogeneous institution (suffice it to recall that in 1775 Dupont de Nemours had already proposed to wipe out all the old internal administrative and jurisdictional boundaries, and to substitute them with a network of perfectly uniform districts on a geometrical basis: Rosanvallon 1988). On the basis of these suggestions, the members of the *Constituante* carried out the great simplification that the monarchy had already begun: up to the point of leaving nothing between the State and the individual but "an enormous and empty space," as Tocqueville was later to observe. Now, it is precisely within this empty space that the revolutionaries placed their new "Administration générale de l'État": a great unitary administrative machine, founded on a uniform territorial settlement and entrusted with satisfying all the social demands that in the old order had been met by the corporate bodies (Ozouf 1988; Legendre 1992, 115–43). Municipalities, districts, cantons, departments: Each of these new, purely conventional circumscriptions, created in 1789, was no more than a "section of the same whole," a little gear in a single, complex device. And this device, in turn, became responsible for supplying all the services required by a modern individualistic society (from education to the road network, from health to welfare to the maintenance of public order). The long season of the State-regulator had come to an end, and thus began the season of the State-adminis-

trator in the proper sense, of the State intended as a producer of social utilities, and as the direct manager of public interests.

Of course, in the initial projects of the men of the Revolution, this new administration was supposed to be neither bureaucratic nor authoritarian. Elective and collective from top to bottom, and therefore impersonated by common citizens, it was supposed to constitute the inverse of the old, heavy bureaucratic State. “The State is one,” the revolutionaries said; but they did not imagine State unity in terms of apparatus and offices. On the contrary, the new society of free citizens that the Revolution had created was supposed to be able to govern itself alone on every level—from the village to the province, from the city to the nation (Moreau and Verpeaux 1992). Nonetheless, in the course of a few years, it became evident that this scheme had no possibility of succeeding. To postulate a unitary administration, entrusted with uniformly executing the same law within the same boundaries, and then leave such a task to a multitude of assemblies elected on a local basis, constituted an insurmountable contradiction. All the more so, given that the new society of individuals that the men of ‘89 had imagined reconciled and regenerated thanks to the simple announcement of freedom, quite soon revealed itself to be frighteningly divided, unstable and conflictual. The corporative structures that for centuries had supported society had collapsed; but no strong sense of national belonging, no true consciousness of the general interest had taken their place. As of the final phase of the Revolution, in reality, it became clear that a feeling of this type was unlikely to be born spontaneously. It could only be formed by the State by means of a diffused administrative work, which would re-establish the entire collective mentality, gradually conforming it to the values of modernity.

Napoleon’s seizure of power indeed marks this surge of awareness. The coup d’état of 18 Brumaire, year VIII, which ended the Revolution, was something much more than an authoritarian turning-point. At the moment, it was acknowledged that the administration should not at all be diluted in society but instead cleanly separated from it, and provided with strong powers of intervention. Only in this way could it have truly built the nation of citizens that the Revolution had only glimpsed. “Administrer doit être le fait d’un seul.” With these famous words, which today sound almost banal, in 1800 State councillor Pierre-Louis Roederer summarised the profoundly new philosophy that inspired the Napoleonic administrative project (Thuiller 1988). Administrative activity was to be entrusted to a single chain of command, formed by monocratic and professional functionaries—ministers, prefects, sub-prefects and mayors—clearly superordinate with respect to simple private citizens, and responsible only before their own hierarchical superiors. At a superficial glance, the result may seem to be the simple perfecting of the old scheme of the absolutist administration. But we can’t forget that the royal intendants and commissars of before, were placed within an extremely articulated institu-

tional world, which to a large extent saw to its own needs and opposed continuous resistance to the advance of State power. The new prefectural administration instead finds no other competitors around it, and concentrates on itself the entire responsibility of satisfying the collective needs.

Furthermore, the Napoleonic period also marked a decisive phase in the balance between justice and administration. Though fully realising that the time of the “State of justice” had by then declined, the revolutionaries in the beginning certainly did not want the administration to be able to evade the judgement of the Courts. Their model of demarcation between executive and judiciary was simple: judges should judge, and administrators, administer. Establishing by law, therefore, that “les juges ne pourront [...], troubler de quelque manière que ce soit, les opérations des corps administratifs” (as proclaimed by a famous text of 1790), they had simply sought to prevent magistrates from enacting regulations or apportioning taxes, as was instead habitual during the ancien régime (Troper 1974; Chevallier 1990). In the course of the years that followed, however, as the administration gradually became a fundamental piece of the State, it demanded immunity from judiciary control with increasing resolve. The disputes between the administration and citizens—it was said—could not be brought before judges because the latter would have been authorised to substitute their own interpretations of the law for those that the administrative functionaries had already given. Judicial power would always have had the last word in all matters, and the administration would never have been truly autonomous in its regard. Based on this argument, which in the course of the Napoleonic period became an undisputed juridical principal, all administrative cases were excluded from judiciary competence and reserved first to the administration itself, and then to special administrative judges who were in any event instituted within the executive power (the principal of these was the *Conseil d'État* which rose to great prestige in the following decades). As of the early nineteenth century, the public administration thus secured itself the privilege to declare, once and for all, the rights and obligations of citizens in its own regards (Chevallier 1970; Burdeau 1995; Bigot 2002). It thus witnessed the fulfilment of the old ambition of the absolute monarch to be the only judge of his functionaries and their actions. This success sanctioned the complete constitutional equalisation of the administrative and judiciary functions. The administration had become a perfectly autonomous power, and its acts packed the same force of “legal truth” as judges’ sentences.

## 6.6. The Invention of Administrative Law

In conclusion, at the fall of Napoleon, the administrative State had become a definitive acquisition, along with the Civil Code. This occurred not only in the French experience, but also for a large part of continental Europe, which by



then looked up to France as an unsurpassed model of state organisation. Nonetheless, at the onset of the 19th century, the central position that the administration had earned in fact, was not yet accompanied by a proper cultural acknowledgement. Neither the Enlightenment nor the Revolution itself (as we have just seen) had foreseen the extraordinary importance that the administrative apparatus were to assume in short time. The *philosophes* had imagined that individuals, freed from the fetters of old corporative society, would have been able to see to their own needs autonomously, through the simple use of natural reasoning. On the contrary, the new humanity that came out of the Revolution immediately showed that it did not possess this capability. As Tocqueville was to write later in *Democracy in America*, it now presented the spectacle of a world in which each man, being at the same time “independent and powerless,” “naturally turns his eyes to that imposing power which alone rises above the level of universal depression” (Tocqueville 1994, Book 2, sec. 4, chap. 3). Hence had derived the primacy of the administration that the Napoleonic period had sanctioned, but that, given the relatively unexpected manner in which it had matured, had not yet found a proper placement in the system of legal thought.

This placement was found thanks to the doctrinal invention of administrative law.

Unknown to the legal language of the ancien régime, this expression became part of everyday use as of the Restoration. Its success is tied to the development of a new specialised literature born in the early decades of the nineteenth century with an eminently practical intent: that of classifying the many administrative special laws produced in France from 1789 onward, and to comment the correlative case law (Fortsakis 1987; Burdeau 1995, 105–21). This was certainly not an exciting production under the conceptual profile. The only purpose of the authors we refer to (Portiez, Bonnin, Romagnosi, Cormenin, Macarel, De Gérando, Firmin Laferrière, Dufour, Serrigny ...) was to assist functionaries and lawyers in finding their way through the labyrinth of laws and sentences that had grown up, quite casually, parallel to the development of the new executive administration. Humble exegetes, they did not aim at founding any new legal system, but only at clarifying the meaning of the administrative laws in force, according to the interpretation commonly offered by the Courts and by the administration itself. And yet, it is precisely in their works that the “modern” representation of administration takes shape, which will remain at the basis of later continental doctrine almost up to the present day. Indeed, our writers completely abandon the legal image of the State as a judicial machinery that jurists had fundamentally maintained almost till the end of the 18th century. Not only do they quite accept the presence of the administration, they also tend to identify it with the very essence of the State, with its truly necessary and unfaltering part. “To administer is to act” and “to act without interruption,” we read in the books we are speaking of



(Portiez 1809, intr., 31). The administrative function “concerns every moment, because there is no instant in life in which the citizen does not have a relation with the State” (Bonnin 1808, 10). Administration is therefore “the vital action of government,” which “ceaselessly makes provisions for the general safety, the maintenance of law and order, and the fulfilment of all the other needs of society” (Macarel, 1844–1846, vol. 1, 1). This action can never fail, under penalty of the dissolution of the State itself. Indeed, “the State could not be conceived without [...] functionaries instituted to watch over everyone, in every locality, and responsible for joining the relations of everyone with the society as a whole” (Bonnin 1808, 16). On the contrary, justice that had for so long been identified with the heart of public power, now becomes for the citizen “something purely optional in most cases [...], a remedy he can very well not employ” (ibid., 109) and thus, for the State, a “purely prospective” activity (Lione 1850, 143). “To administer is everything, to judge, a simple part”; indeed, the purpose of justice is to act so that “the order instituted by the administration is not disrupted by the passions of men and private interests”: “Isn’t everything administration in the ambit of the State?” (Bonnin 1808, 16 and 113).

Among the many consequences of this sort of “conversion” of legal culture, we must briefly recall at least three. The first consists in the definitive placement of the administration within the sphere of executive power. As we have seen, the eighteenth-century theory of the separation of powers not only failed to foresee the existence of a true executive administration, but instead tended to exclude its legitimacy. Powers had to be separated precisely to prevent the monarch or the President from entering into direct contact with the citizen. According to Alexander Hamilton, for example, the typical competences of the executive consisted only in matters such as “the actual conduct of foreign negotiations, the preparatory plans of finance, the application and disbursement of the public moneys in conformity to the general appropriations of the legislature, the arrangement of the army and navy, the directions of the operations of war [...] and other matters of a like nature” (The Federalist, no. 72, March 19). Quite a different thing is instead the “enforcement of the law” according to the new French scholars of administration. A vast activity, it consists in providing for the demands of every individual from birth to death, which no government could perform without the help of a great apparatus of agents thoroughly spread over the entire territory. “Executive power” and “administrative power,” in our writers’ prose, thus almost become two synonymic expressions. Secondly, the administration is now presented (here too, overturning the bases of the eighteenth-century constitutional doctrine) as holder of a general imperative authority, to which it is naturally entitled by reason of the great responsibilities that it is summoned to discharge. “Administrative power”—notes Louis-Marie-Antoine Macarel (1790–1851)—“shares with legislative authority that the acts enacted by it, like the laws themselves, bear the

imprint of public supremacy and impose obedience” (Macarel 1844–1846, vol. 1, 13). State administration is, in fact, “invested with a natural authority to command, by virtue of which it prescribes, authorises or prohibits [...] and itself executes its own orders when they are not spontaneously observed by the subjects” (De Gérando 1842–1846, vol. 1, 31). While for Montesquieu, the purpose of the separation of powers was to prevent the king and his agents from enjoying a power of command independent from the judicial authority, the new nineteenth-century version of this same theory provided the exact opposite: Inasmuch as equated with the other two powers of the State, the administration, on its own, could now dispose of the rights of individuals. For this reason (and this is the third point), its acts are of a profoundly different nature from those of any private administration, as the sovereignty of the State is manifested in them. Our jurists substantially observe that public power is no longer expressed only through laws or sentences. These two older means of exercising authority are now flanked by a third, which takes the name of “acte administratif” by which the State can unilaterally assert its authority over the citizens in order to satisfy public interests. It is as though sovereignty had acquired a third dimension, in addition to the two that had always been listed in prior doctrine.

Most of all, however, administration is now conceived as a subject: as a great, unitary corporation which pursues its ends of public interest in the same manner that private citizens pursue their individual interests. This is certainly the most significant novelty with respect to the old doctrine in which administration was either a particular form of justice or a special type of regulatory function. And it is precisely this novelty that makes the existence of an “administrative law” conceivable. Equally distinct from private law, constitutional law and procedural law, the new “droit administratif” is precisely that special branch of law which concerns “the reciprocal obligations of the administration and the administered” (Macarel 1844–1846, vol. 1, 18), “the reciprocal rights and duties of the administration and of the citizens” (De Gérando, 1842–1846, vol. 1, ix). It is certainly different from private law, because the administration is the holder of powers, competences and privileges that can not belong to common citizens and that are not provided for by the *Code Civil*; but it is still a law that regulates a bilateral relationship, such as the one between two individuals. An enormous distance evidently separates this law from the old “droit de police,” which totally lacked this bilateral character and was identified only for its generic finality of “public good.”

Around the 1830s-1840s, the French experience has by now completely burnt its bridges with the old primacy of jurisdiction which, for many centuries, had characterised the functioning of European States. A new form of State, the administrative State, has firmly established itself both in institutional practise and in theoretical representations. A certainly less linear route is followed by other countries which, though influenced by the French-Napo-

leonic system, varyingly crossbreed it with their own autochthonous traditions (thus in Italy, French institutions often overlap an administrative system dating to eighteenth-century reforms; in Germany, the persistence of the *Policey* universe remains strong until the early decades of the nineteenth century; in Spain, the considerable novelty of the Constitution of Cadiz in 1812 covers the substantial continuity of the old setup of the sources of law and the old jurisdictional model of the exercise of public functions). It is nonetheless true that the entire European continent is by now becoming increasingly more oriented towards the executive management of power which found its most explicit point of reference in the Napoleonic State. The old representations of power are placed aside. New typological models are created, in turn destined to constitute the theoretical framework of the administrative regimes themselves.

And yet, part of the western world remained totally refractory to the success of this model. In England and the United States, in fact, the advent of an individualist society did not at all combine with either the cancellation of institutional pluralism or with the development of a centralised administrative State. The advance of the executive administration had here been definitively blocked by the defeat of the absolutist project in the course of the 17th century. The government of society therefore continued even later to be conducted in the old fashion, essentially by means of laws and sentences. As French jurist François Vivien (1799–1854) observed towards the middle of the century, while in order to realise his projects, the French legislator continuously relies on the administrative authorities, investing them with extensive discretionary powers, the English legislator instead addresses all his precepts directly at the citizens, in such a manner that they are the ones “to discharge most of the duties which, in France, are entrusted to the administration.” As it occurred in ancien régime systems, for the English legislator “in order to achieve his aim, it is sufficient to assign a penalty to the violation of his prescriptions and thereby affect he, who for negligence or bad faith, has failed to comply with them” (Vivien 1852, vol. 1, 18). The administration (to the degree in which it exists) thus sees itself limited to the responsibility of establishing wrongs and referring the offenders to the judicial authority. The countries of the British Isles therefore have neither “administrative power” in the technical sense, nor “administrative act,” nor “administrative law.” These expressions are radically ignored by legal doctrine, as are also the objects corresponding to them. Meanwhile, the principle of the separation of powers continues to be applied in its rigid eighteenth-century significance: Whereby only the judicial authority can limit, extinguish or modify the rights of individuals.

In short, at the beginning of the nineteenth century, England and France by now represent two totally antithetical models of management of the administrative space. The former has remained loyal to the foundations of the juris-

dictional State, which had constituted the common form of organisation of power in Europe for so long. The second has instead taken the process of simplification begun by continental absolutism and crowned by the Revolution to its extreme consequences, proclaiming the primacy of executive administration.

### 6.7. In Search of the “Rechtsstaat”<sup>2</sup>

Faced with this picture, it comes as no surprise that perhaps the most urgent issue that continental legal culture had to confront during the first half of the nineteenth century was to check, circumscribe and render socially tolerable, the enormous power that executive administrations had succeeded in arrogating to themselves through the evolution we have just described. It was by now no longer even conceivable to recover a plural order of human society in which the sovereign was only guardian and not artificer, in short to demolish the administrative State. It was instead essential to reconcile the “freedom of the State” with that of the citizen, to cite a widely used formula, making the primacy of the administration compatible with the respect for individual guarantees.

In the abstract, the goal of a natural convergence between sovereignty and rights might already seem acquired. For Kant, for example, it was sufficient to apply the doctrine of the separation of powers: “There are thus three distinct authorities (*potestas legislativa, executoria, iudiciaria*) by which a state (*civitas*) has its autonomy, that is, by which it forms and preserves itself in accordance with laws of freedom” (Kant 1996, vol. 1, 129). In the projections of philosophers, powers and freedom proceed hand-in-hand, the expression of an entirely modern binomial, which seems to contain in itself the guarantee of its results.

Importance is largely assumed by the new individualist universe which asserted itself with the revolutionary rupture of the late eighteenth century, thoroughly re-establishing the political order and that of the fundamental legal categories: sovereignty, law, freedom. In the early 19th century, the revolutionary culture of rights is by now behind us (Costa 2000). The importance of political freedom declines with the need to end the Revolution and assure stability to the principles of '89 (Rosanvallon 1990). The republican mythology of a government by the law, expression and result of the *volonté générale* of a nation of free and active citizens, fades into an authoritarian State that is unlikely to succeed in doing without a solid monarchical principle. The com-

<sup>2</sup> The German notion of “Rechtsstaat” may literally be described as “law-based State” or “State under law.” It corresponds to the English “Rule of Law” but with a special focus—particularly relevant in the 19th century—on the concepts of the State and public administration.

plete deployment of sovereignty realised by the revolutionary rift is not disputed. Not in the least. The Nation as bearer of sovereignty, however, loses the federative contours of a myriad of communities advancing towards the centre in a participatory crescendo. Revolutionary virtue is a distant recollection. Sovereignty almost entirely eventuates in a State authority lowered from above onto the consociates, whose will it axiomatically identifies itself with.

Furthermore, the liberal interpretation of the revolutionary phenomenon also urges redefining guarantees and instruments of defence with respect to authority. The dangerous drift of sovereignty, dramatically revealed by the Terror, has dissolved the predetermined harmony between sovereignty and rights (Costa 2002). The declarations of rights are no longer sufficient: "Positive guarantees are needed." The problem of freedom increasingly becomes more a problem of guarantee. "An authority is only legitimate within its limits," declares Benjamin Constant in 1815 (Constant 1837, 110).

The old representations of power are set aside. New typological models are created, in turn destined to form the framework of reference of the administrative regimes themselves. In order to check the manifestation of an authority that the eighteenth-century fracture and the ascendance of a new political voluntarism risk rendering insatiable, continental jurists create a new theoretical lemma, which was first rigorously German (Stolleis 1982), the *Rechtsstaat*, and then rapidly spread to all the principal continental experiences by means of literally equivalent expressions (*Stato di diritto*, *État de droit*, *Estado de derecho*). This typological model is capable of interpreting the new "laws of freedom," as well as the eclipse of the judicial regimes of law and the full deployment of sovereignty. The "Rechtsstaat" indeed summarises the individualist values and the new expectations for legal guarantee, but it also condenses an institutional layout that subtracts all creative potential of the legal system from justice and, in the new administrative power, sanctions the monopoly of realising public functions.

In German legal culture, from Kant to Mohl, from Stahl to Gerber, from Bähr to Gneist (see Stolleis 1992), and thence to the entire continental culture, the "Rechtsstaat" is therefore a profoundly different entity from the State of rights and privileges which, intrinsically limited by the common law of the land, delicately enveloped corporate society of the *ancien régime*.

At first glance, the most significant passage seems to be the one from the intrinsic diversity of old rights and old freedoms to an equal freedom, which is now preached as "men are born and remain free and equal in rights" (Declaration of the Rights of Man, 1789, art. 1). In reality, confirming that powers and freedom advance closely, side by side, an equally epoch-making passage is achieved in the field of sovereignty (Clavero 2007): The "Rechtsstaat" is not a spontaneous, natural order, pre-existent to power. The legal order is entirely a State order. Legislation, essential instrument of the power exhaustively targeted with check measures, is entrusted with the principal guarantee of rights.

The problem of limits is anything but new. What is new is the mediation between powers and freedom; the techniques of limiting authority are new. The guarantees invoked in the early 19th century are very different from the material and substantial ones, typical of the old order. Rights have abandoned their intrinsic inequality and historical particularism; they no longer pre-exist the State; they cohabit with sovereignty, a sovereignty impersonated by the centrality of legislation. Rights are identified in the law created by the legislative power, and this law becomes the principal guarantee of rights. A new formal value of conformity with the law—a principle of legality—begins to be advocated of public powers. From this moment onward, the prerequisite for every manifestation of authority is a legal source.

The theme of guarantees demands new institutional solutions: Even in the “*Rechtsstaat*,” justice and administration continue to confront each other, defend their own spaces of autonomy, and return to combine in new equilibria—the guarantees of rights are firstly judicial guarantees. And the administration can not be immune to them. On the contrary, as will be said on various occasions and in different national contexts throughout the course of the 19th century from Barthold Georg Niebuhr to Rudolf von Gneist to Silvio Spaventa, up to the American Woodrow Wilson: “Liberty depends incomparably more upon administration than upon constitution” (Wilson 1887). This is a significant affirmation. On one hand, it confirms that there will be no room, for the entire century, for guarantees with respect to the law: To overturn unconstitutional legislation is still a distant target. On the other hand, it reveals that where the construction of power is strongest and most incisive—as in the administrative universe—the necessity to provide efficient guarantees for rights is more perceivable and urgent. Judicial review of administrative action becomes the banner of the century: even in the administrative universe, power and freedom advance hand in hand.

It is precisely in this search for judicial review in the administration that the “*Rechtsstaat*” deploys most of its efforts for institutional modernisation. While the administrative regime is the regime of authority, administrative justice is its limit, the element that enables the radication of that power within a State that proclaims itself juridical. Administrative power presupposes the supremacy of the law: “There is no administration without execution” (Stein 1868, 47). Administrative justice is erected in guarantee of legality, of the administration’s conformity to the law. The principle of legality thus becomes the point of mediation between the acknowledged existence of an administrative power and the demands for guarantee of individual rights. This compromise, though, is anything but fixed once and for all. On one hand, the continental interpretation of the separation of powers urges for the new administrative judge to be firmly established within the administrative organisation, according to the French principle whereby “*juger l’administration c’est encore administrer*,” reaffirming that the administrative activity can not be subject to



the control of the ordinary Courts like any private subject. On the other hand, the demands for protection of individual rights, supported by Liberals, urge in the opposite direction, towards expanding the competences of ordinary Courts into the administrative field, with the administration being subjected to the same checks and the same protections offered by common law. The prevailance of one or the other thus produces very differentiated institutional declinations of administrative justice. Thus, the organisation of separate administrative Courts most rigorously circumscribes the possibilities of an ordinary Court to enter administrative action, to the point that the space indispensable for the needs of protection of individual rights must be constructed within the administration itself (the so-called model of the *contentieux administratif*, typical of early nineteenth-century France and pre-unified Italy). On the contrary, the judicial respect of civil rights preaches the universality of jurisdiction and the subjection of the administration to control by the jurisdiction of the ordinary tribunals (the so-called model of *unité de la juridiction*), not without forgetting, however, that the administration is authority and enjoys a sphere of freedom assured by law: administrative discretionary power. In the moment that it is concretely inserted into a certain institutional reality (as occurred in Belgium as of 1831 or in Italy as of 1865), the universality of jurisdiction thus gives way to the logic of *partage des compétences*, singling out a group of important cases—most of which concern freedom and individual property—to reserve to the ordinary Courts, and in any event reserving to the administration, ample immunity and exemption from the judge's supervision. In the continental model, the dialectic between justice and administration therefore occupies an important place throughout the 19th century, but travels on an already beaten path and along broadly compatible alternatives, which despite the diversity of techniques of defence, shares the by-now irreversible acknowledgement of the administration as a power.

On the level of the concrete enunciation of public functions, the course taken by the continent therefore presents several conspicuous particularities. Let's therefore attempt to focus on and measure them with respect to the English evolution, conscious of the fact that it is precisely with the early 19th century that the contraposition between civil law countries and common law countries acquires full significance.

Meanwhile, this contraposition does not exclude important convergences, especially on the level of typological models, where the effects of the shared individualist universe are stronger. There is no doubt that beneath the marked national individualities, the diverse declensions of liberal constitutionalism reveal important common matrices.

In England, too, in the course of the 19th century, legal science builds its own legal system as *Rule of Law*, driven by objectives of delimiting powers analogous to those of the continent and employing a lexeme not too distant from "Rechtsstaat." Both the "Rechtsstaat" and the Rule of Law indeed inter-



rogate themselves as to compatibility between sovereignty and rights, and seek legal guarantees for individual rights; they both take part in the general spread of a markedly individualistic political anthropology; they acknowledge a general presumption of freedom, as well as the primacy of individual property. At the same time, both the "Rechtsstaat" and the Rule of Law acknowledge a definite primacy of the legislation: in the first case, the expression of the sovereignty of the State; in the second case, of "Parliamentary Sovereignty," "the sovereign and uncontrollable authority" of Parliament, already clear to Blackstone. Also not dissimilar is prudence towards what, especially after the failures of Jacobinism, appears to be a dangerous democratic drift; while there is still a strong and widespread resistance to press beyond the acquired sphere of civil rights towards the still unknown border of social rights. The acknowledged principal of legal equality is still a great distance away from the generalisation of political rights and totally refractory to the objectives of substantial equality.

Strong divergences remain, however, on the level of the functions and the concrete declension of the juridical order of state powers. Equivalences come to a halt on this level. "Rechtsstaat" and Rule of Law remain reciprocally untranslatable lexemes, the sign of a circulation which, in one direction or the other, stop on the shores of the Channel. The "Rechtsstaat" on the continent is not only a State that has made room for the legislation in the system of law. It is a State that institutes and rationalises social issues and for this reason, decidedly legislative, entrusted with the absolute centrality of the codes: The very codification that progressively prevails from France to Italy, from Austria to Spain, from Switzerland to Germany, which strengthens the identity of legislation with the law. On the continent, all "common law of the land" disappears, whether produced outside the state or outside legislative power; jurisprudence ceases to be a source of law; the creative interpretation of the common lawyer is replaced by a cold neutralisation of the judge's function.

The "Rechtsstaat" is also a markedly administrative State, as is accurately revealed by a very fortunate axiom in continental legal science, which absorbs and sediments the revolutionary-Napoleonic turning-point: "One can conceive of a despot who governs without laws and without judges, but a State without an administration would be anarchy" (Jellinek 1914, 612). Centrality of the administration means that the administration is a subject, impersonates the State itself, and expresses the concrete nature and continuity of the State's sovereignty. It does so on the level of organisation by means of an administrative government of the periphery which, thanks to thorough administrative centralism and by using commissarial modules, enables the uniform guidance of a thoroughly equal surface. It does so on the level of functions, where the regime of the *acte administratif* asserts itself, and in a system of administrative justice that is special with respect to the uniqueness of the jurisdictional function.

On the other side of the Channel, though, no constituent upheaval made a new administrative space emerge, singling out an inedited *administration générale de l'Etat*. For most of the 19th century, the Rule of Law confirms itself as a purely and typically judicial regime; an expression of a juridical order in which the omnipotence of parliament, though formally acknowledged, is forced to compromise with the substantial intangibility of the “common law of the land,” and in which the execution of the law is still essentially the duty of the jurisdictional function. Administrative authorities distinct from the legislative and the judiciary, and capable of affecting the rights of citizens, find difficulty emerging. Here, where legislative power never expresses all-engaging claims at identifying legislation and law—judge-made law and parliamentary law indeed continue to coexist pacifically—justice is confirmed as a decisive formant of the system of law, maintaining its own traditional role. It is no coincidence that only in the British milieu will the Courts of common law succeed in monopolizing (at least well into the twentieth century) the forms of judicial defence before the public power, stemming the assertion of the administrative regime and preserving the unity of jurisdiction. Finally, on the organisational level, the greater weight of Local government, by reason of the number of functionaries, duties, and financial autonomy (Wright 1996), along with a persistent non-bureaucratic declension of self-government, drastically mark the limits of the dimensions and activity of the central administration, and hamper the bureaucratization of the civil service.

This explains the widespread picture, from John Stuart Mill to Walter Bagehot, that classifies the British system as a non-bureaucratic order, and bureaucracy as a typically continental creature. Even in the late 19th century, when the gap between the continental administrative regime and the persistent Anglo-American judicial regime was to be considerably downsized—as we shall see—jurists themselves reaffirmed their contraposition of models. In 1885, in Victorian Oxford, Albert Venn Dicey printed his *Introduction to the Law of the Constitution* where he expressly conjugates the characters of the British constitution and the three founding principles of the Rule of Law—“the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power” which excludes “the existence of arbitrariness, of prerogative, or even of wide discretionary authority on the part of the government”; “universal subjection of all classes to one law administered by the ordinary courts”; and finally, its being “the consequence of the rights of individuals” (Dicey 1959, chap. 4)—with the negation of any *droit administratif* on British soil (Dicey 1959, chap. 12). Rule of Law and judicial regime of law, in his eyes, continue to coexist pacifically. So it is that historian Friedrich William Maitland, introducing the work of Otto von Gierke to the British public in 1900, reaffirms that the British extraneousness to the idea of “Rechtsstaat” firstly depends on the absence of a process of administrative bureaucratisation of organisation and function (Maitland 1987).

In the same years on the continent, on the contrary, jurists unvaryingly conjugate the “Rechtsstaat” with the existence of a system of separate administrative judges, the by-now necessary crown of the administrative regime. In the most famous handbook of administrative law of Wilhelmine Germany, Otto Mayer could thus identify the “Rechtsstaat” precisely with the State of “a well-ordered administrative law” (Mayer 1924, vol. 1, 58).

### 6.8. Administrative Law and Science of Administration: Towards the Primacy of the Legal Method

In 1846, in his review of one of the first handbooks of French administrative law, Alexis de Tocqueville harshly criticised the jurists of the last years of the July Monarchy, guilty of supporting “the powerful hand of Napoleon” in an authoritarian sense (Tocqueville 1989).

In his view, jurists had shown themselves too attentive to the demands of power and much less of the guarantees of citizens. This harsh and even ungenerous anathema against the very first administrative science in France, however, did not invest administrative law as such. This new branch of law—and Tocqueville was well aware of this—could not be dismissed simply as the whim of jurists excessively deferential to power. The contingent debate and the analysis of the transformation processes underway therefore had to be kept separate. Projected into a long-term perspective, administrative law almost changed identity; it even had to be perceived as “une des formes de l’État nouveau du monde.” Precisely the form—as he had already pointed out in the final chapters of the second part of *Democracy in America*, which we already know—of “a new thing”: the rapid disclosure over “an innumerable multitude of men, alike and equal” of “an immense, protective power which is alone responsible for securing their enjoyment and watching over their fate”—a power which was “absolute, thoughtful of detail, orderly, provident, and gentle” (Tocqueville 1994, 692).

We are faced with one of the pages that best reveal the administration’s new, strategic centrality in the social equilibria manifested by the individualist wave. It is not an isolated page, though. Quite the contrary. From Alexis de Tocqueville to Lorenz von Stein and Max Weber, the 19th century was to continually interrogate itself on the administration, its bureaucratic apparatus, its legal order. At times, administrative literature will warn against the invasive and formidable character of this new power, voicing anti-bureaucratic resistances of various types. More often, it will entrust the very destinies of sovereignty to the powerful shoulders of the administration; up to the point of identifying the real power of a modern State in the “administration of everyday affairs.” Authority and guarantees, however—as we already know—advance parallel, in the “Rechtsstaat.” In the end, by now on the threshold of World War I, Weber, who had never spared criticism to the bureaucratic au-

thority, saw in “Monocratic Bureaucracy,” “the purest type of exercise of legal authority”: a “legal authority” capable of supporting, with stable, strict, intensive, and calculable administration,” and “formalistic impersonality,” “the capitalistic system” (Weber 1978, 217ff.).

The invention of administrative law thus took root in legislation, jurisprudence and legal science. Getting off to a great start all over the continent already as of the first decades of the 19th century and continuing uninterrupted for more than a century, its dogmatic construction interprets on the level of the juridical order and knowledge, precisely this parallel, definitive emersion of administrative power and of the legal guarantees that could ensure its “legal” exercise. This is a collective task that engages generations and generations of jurists, contributing to defining an essential pilaster of modernity itself and a characteristic feature of the “Rechtsstaat”: the state typology that Lorenz von Stein considered as characterised by the “constant and reciprocal action of constitution and administration,” in which precisely administrative law constitutes “the living law of the State” (Stein 1894, 710).

The old judicial culture of public authority is soon forgotten. The same must also be said of old police literature, though. That of France, suddenly archaised by the spread of revolutionary language, can not manage to cross the boundaries of the ancien régime. Though safeguarded by its own academic-scientific tradition and by a context without the constitutional fractures typical of French history, the German *Polizeiwissenschaft* experiences a profound internal transformation already as of the late 18th century. With the Austrian Joseph von Sonnenfels (1733–1817), it first begins to delimit the old *Policey*. Then, increasingly more from Carl Gottlieb Svarez (1746–1798), tutor of Frederick Wilhelm III of Prussia, to Robert von Mohl, it inserts the new individualist lexicon into the old corporative universe up to conjugating the *Police Science according to the Principles of the “Rechtsstaat”* (Mohl 1832). With the progressive affirmation of the legal method, after 1848, in Germany too, its traces were to become increasingly fainter, to the advantage of administrative law which, here too, becomes the principle vehicle for the realisation of the “Rechtsstaat.”

An institutional reality that precisely the 19th century made increasingly more alive, empirical and factual, the administration certainly could not be the exclusive prerogative of legal knowledge.

This is demonstrated by the great scientific project of Lorenz von Stein (1815–1890) to build a new science of administration (*Verwaltungslehre*), which was a veritable science of society (*Wissenschaft der Gesellschaft*). Stein is very far from the corporative equilibria and the exclusively regulatory dimension of the old police science. He has absorbed the categories of Hegel; he has entirely reconstituted the meanderings of the revolutionary fracture; he is one of the first, attentive observers of the Social Question, of the class struggle and of the Socialist movement. In his view, it is the duty of the administration, the

executive subject summoned to directly fulfil public functions, to form the essential instrument of a “working State” (*arbeitender Staat*), that intervenes in economic and social relations in order to solve historical inequalities, thus deactivating a growing and dangerous social conflict (Stein 1888, 45).

Lorenz von Stein, without a doubt, writes a fundamental chapter of a solidaristic trend increasingly more general and widespread in the second half of the 19th century, which—as we shall see—was to have significant reflections also on the development of the juridical forms of administrative activity and of State interventionism itself. He firstly impersonates, however, a scientific project that intends to realise and maintain a general discipline which is, at the same time, political and social, historical and sociological, juridical, economic, and capable of embracing, by means of a multiplicity of fields of knowledge, the entirety of public activities (Stein 1887). In this sense, Stein is truly the last exponent of a fundamentally unitary doctrine of the State (*Staatswissenschaft*) (Stolleis 1992, 391).

This is, nonetheless, a project without a future that, on the contrary, will be marked by a strong and profound disciplinary fragmentation. The non-legal roots of the science of administration will soon ebb, first towards political economy and statistics, and then towards nascent sociology. On the juridical side, the separation between the “trunk” and the “branches” of the fundamental disciplines of public law will favour administrative law becoming more autonomous, and limiting itself to acknowledging only very general premises in constitutional law. The convergence between “Rechtsstaat” and administrative law thus represents, for the work of jurists, a formidable support. The disciplines that purposed the study of “administrative bodies in the political sense,” from the *Verwaltungslehre* of Lorenz von Stein to the science of administration of Italian Carlo Francesco Ferraris, are reduced to an almost ancillary role. Increasingly more marginalised by journals and university publications, they will survive with difficulty in the culture of bureaucracy.

The possibility instead emerges, also in administrative law, for jurists to realise a “general part” on the Pandectist model, indication of the scientificity and disciplinary identity that have finally been reached: a possibility that, to a large extent, depends precisely on the distance that begins to come between it and the empirical elements of the administrative activity and the intrinsic changeability of political influences.

The claim for disciplinary autonomy goes hand in hand with the final conquest of administration’s special rule. The arrival at the system and the elaboration of concepts and institutions that claim general validity are realised by means of new processes of cultural reception and, within the continental model, they intensify the diffusion of identical dogmatic constructs, especially between France of the Third Republic, Wilhelmine Germany, and liberal Italy.

In the final decades of the 19th century, administrative law all across the continent builds its own dogmatics and its own problematics; a method and an

object of a specifically public law nature. It becomes the fundamental and privileged normative language of the public apparatus. And this language is founded on features and principles that are totally specular to those of private law: supremacy, unilateralism, limited liability. The *acte administratif* (in German *Verwaltungsakt*)—perfectly antithetical to the contract of private law dogmatics—constitutes the central axis, orienting a system that, precisely because it is prominently public law in nature, accentuates the “specialty” of its rules with respect to the law of private parties (Mannori and Sordi 2001, 343ff.).

This point of arrival is very evident in what is perhaps the most significant handbook of all nineteenth-century administrative law: the *Deutsches Verwaltungsrecht* by Alsatian jurist Otto Mayer in 1895. Few works like Mayer’s indeed present an all-around picture of the nineteenth-century model: Typological models; historicity and evolution of state typologies; coordination of juridical institutes into a system, are all present with the persuasive and convincing strength of a true “general part” (*allgemeiner Teil*) that, from the acquired centrality of the *acte administratif*, draws considerable systematic and constructive potentials. Administrative law is built like the law of command of the State, of an administration authority, the exclusive interpreter of the collective interests, summoned with its decision to establish “what law in a concrete case is” (Mayer 1924). Even in Mayer and coeval German legal science, there is certainly no lack of interrogatives as to which spheres of application, administrative law could conquer: Whether it should limit itself to the juridical construction of the strictly imperative authority, or it should duplicate private-law dogmatics, assuming as its own, also those institutes of a patrimonial nature—contracts, goods, property, liability—each time redesigning the public-law peculiarities. The debate was to remain open even in the years that followed, due to the throng of transformations, the impetuous growth of public functions, and the growing complications of the apparatus’ organisations and functions. At least until the end of World War I, it never cast doubt on the authority won by Mayer with his masterpiece and the strength of a juridical portrayal, almost entirely exemplified on the imperative order of public authority.

In Italy too, the role of legal science in fulfilling the parabola of public law was decisive; suffice it to consider the role performed by Santi Romano and his *Principii di diritto amministrativo* of 1901 (Romano 1901).

Less decisive was instead the influence of legal science in elaborating the French administrative model. The conquest of the administration’s special rules in this case unfolded slowly and progressively, starting from the solid basis of departure already established in the Napoleonic period in the first years of the 19th century. Decisive in this case was to be the continuous work of the *Conseil d’État*. The progressive shift of the border in favour of administrative law will emerge on the jurisprudential course and this will not fail to redesign, in the sphere of public law—suffice it to consider, in particular, the *recours*



*pour excès de pouvoir*, the most formidable of the magisterial inventions of the administrative judge—the guarantees abandoned in common law, with the broadening of the public-private dichotomy. The *Traité de la juridiction administrative et des recours contentieux* by Edouard Laferrière, the great systematic work born in the 1880s at the *Conseil d'État* and on the basis of its decisions, will represent its most representative symbol (Laferrière 1896).

Also in France, “the time of the cathedrals” arrived towards the end of the century (Burdeau 1995, 323ff.), with the great works of synthesis born in university halls and that by now consolidated the academic prestige of jurists of administrative law. Administrative law strengthened its disciplinary autonomy, and became the discipline called to regulate the organisation and powers of administrative bodies (*personnes administratives*). In this case too, the reflection of jurists – outstanding was the *Précis de droit administrative et de droit public* by Maurice Hauriou of 1892—exalted the administration as subject, its tendential identity with the State, the capability to translate its own declaration of will into *décision exécutoire*, also confirming the chronological identity of the stages of the continental model in the centrality of the *acte administratif* (Hauriou 1921).

The demands and objectives of the social administration that the science of administration had evoked several times could not, at this time, however, be neglected even by jurists, enveloped in the purity of their dogmatic systems: Throughout Europe, new spheres of administrative intervention were by now taking shape.

### 6.9. The Slow Emergence of Administrative Law in England

The centrality assumed by the administrative dimension on the late nineteenth-century institutional panorama, in fact depends to a large extent on the impending transformation of the state typology itself, fruit of a veritable explosion of public tasks. The outburst of the Social Question and the necessity to respond to the needs of industrialisation with concrete answers, throughout Europe lead to the assumption of new public responsibilities with consequent transformations of the apparatus and their forms of organisation and activity. A material group of social activity, of growing complexity and importance, broadens: education, hygiene, health, water, gas, later electricity, transports, urban territory planning, social insurance, welfare, relief, discipline of work (of children, women), industrial legislation (mines, railways, merchant navy).

The affects are also felt by the universe of common law, which precisely as of this moment begins to set out along its own administrative path, though with marked personalities, discovering new techniques of government, different from the traditional judicial execution.

At the urge of individual social and economic problems, many of these tasks were assumed in England in a fragmentary and occasional manner as of



the early Victorian Age, in the second half of the 1830s. In 1833 and 1844, the inspectorates on factories and mines are instituted; in 1834, the Poor Law Commission, destined to become the Poor Law Board in 1847; in 1846, the Railway Commission and then, in 1873, the Railway and Canal Commission; in 1848, the Board of Health, which was suppressed in 1854 but substantially reintroduced with a stronger profile in 1871 with the name of Local Government Board. And these, only to recall the most significant examples. Slowly, as of the end of the century, the “Boards” system which, for the first time, breaks the traditional judicial regime, acquires a greater organisational linearity and is absorbed into the ministerial structure. In parallel, the initial, prevalently inspectorial powers are progressively integrated, though always in open order, with other functions of injunction, adjudication, delegated legislation.

It is thus the Victorian Welfare State that, also in the English universe, presses towards administrative law. No constituent upheaval, no constitutional repudiation of the jurisdictional State, no global scheme under the banner of a clean separation between justice and administration, proper to the revolutionary-Napoleonic model, can be glimpsed on the other side of the Channel. The construction of administrative law gets underway in England without the political ruptures typical of French history: On the contrary, the regulative necessities proper to a nascent industrial society grappling with a heated Social Question, progressively reveal the archaic nature of a solely judicial government of society, and press towards a new “practical government.” Case by case, “learning by experience” (Mac Donagh 1958), a growing administrative legislation, from the regulation of work to railways, health, and public education, issued by Parliament or directly by the Executive (delegated legislation), flanks the traditional judicial apparatus with a broader network of administrative authorities having executive prerogatives and discretionary powers.

Woodrow Wilson, future American president during World War I, proclaims in 1887: “The functions of government are becoming every day more complex and difficult; they are also vastly multiplying in number.” This imposes also at Atlantic latitudes *The Study of Administration* (Wilson 1887). The same “subordinate government” that Maitland, who was holding a course on British constitutional history at Cambridge that same year, sees become “more and more important” in England as well (Maitland 1911, 500ff.).

With the social security legislation of the early 20th century—from the *Education Act* of 1902 to the *Old-age Pension Acts* of 1908 and 1911, the *National Insurance Acts* of 1911 and 1913—England too, to use Dicey’s chronology, had passed from *Benthamism or individualism* to the age of *collectivism*. The powers of the Government grow; administrative organisation becomes more complex; a stricter discipline of the civil service is imposed (Cassese 2000, 38).

On the other side of the Channel, too, administrative law therefore conquers a space at the expense of the judicial technique, which had till then ruled almost unchallenged. Driven by the demands for regulation and public

services required by a complex and increasingly more articulated society, and in a legal culture still marked in the early 20th century by Dicey's negationist interpretation and an unassailable primacy of the ordinary law Courts, it timidly begins to claim its own academic and scientific visibility. Moreover, amidst quite a few difficulties, considering that the inexistence of an administrative judge and "the generality or universality of the rules of private laws" continue to label rules as "a series of unfortunate exceptions" (Mitchell 1965), preventing a full acknowledgment of the administration's special rule and all systematic development on the continental model. In 1915, however, Dicey himself must by now acknowledge that *The Development of Administrative Law in England* is by now a reality, following the conspicuous transfer of authority, in favour of the central government departments, with the launching of social security legislation (Dicey 1915).

By the end of World War I, the continental model and the common law model, which throughout the course of the 19th century had remained rigorously alternative, are a good deal less; while the English and American administrations can no longer call themselves "common law" administrations. Jurists themselves are beginning to voice an out-and-out administrative law. Consider the English group at the London School of Economics directed by William Beveridge, from Harold Laski to William Robson, up to Ivor Jennings; or consider the first American specialists in administrative law, from the excessively pro-continental-European Richard Goodnow to Ernst Freund, up to Bruce Wyman.

In systems still deeply unitary and monistic, refractory to thoroughly assimilating the "continental distinction" (Allison 1996) between public law and private law, totally hostile to the subjectivist and unitary use of the concept of administration, the juridical study of administrative facts makes its way: A new branch of law takes shape, called to underline, even in the scientific depiction, the features of special rules that the administrative authorities were wearily conquering.

### 6.10. The Discovery of *Service Public*

Up until the last decades of the century, even on the continent, a project of unitary and coherent social politics could not be glimpsed. In the course of the 80s, Germany takes on the role of forerunner and introduces an organic intervention of social reform, opening the season of social legislation signed Bismarck, and the radication of an early system of social security. It was followed by France and Italy that, between the end of the century and World War I, promulgate legislative disciplines of industrial accidents and prepare the first provisions for disability and old-age.

Solidarity becomes a public task and, for the citizen of a society that is turning towards rapid industrialisation, it takes on the semblance of an *État provi-*

*dence*, which sets itself concrete objectives of managing the entire society. And that's not all, for the first time, these tasks do not resolve in only an increase of the functions of vigilance and defence, but are also translated into a veritable *gestion administrative*, as a pioneering work by Maurice Hauriou of 1899 was titled (Hauriou 1899). Well beyond the till-now elementary picture of the "services" of a relief nature supplied by communities and bodies, the satisfaction of the growing social needs by now unfolds through the public sector of services no longer only juridical, but also economic and social, and directly supplied by the administrative apparatus expressly delegated to this task. Alongside the administration that, employing authoritative modules, exercises the traditional functions of order—object of the practically exclusive attention of jurists, as we have seen—a fully new administration appears, an administration that provides "the vast cooperative company of public services" (Hauriou 1899, 5).

Juridical activity, typical manifestation of sovereignty, is flanked by a social activity which, though deprived of the usual imperative characteristics, is still perceived as a State's projection and public power's growing capability for social intervention. The "working State," already glimpsed by Lorenz von Stein and administration science, is becoming tangible also on the continent. The administration does not "produce" only acts; it has become the material supplier of goods and services in the first person. These can be relief and welfare activities destined to certain categories of subjects with specific needs. In certain cases, though—the case of the economic and industrial activities of communes—the recipient is the indistinct mass of the city's inhabitants, such as the first collective network services for gas or electricity, for the management of which, the administration assumes veritable entrepreneurial activities, economically not dissimilar from those practised by normal private operators.

The institutional transformations are still contained. The growing weight of social tasks, from health to relief, in France, Italy and, until the aforementioned national legislation of 1908–1911, also in England, will indeed concretely continue to be pushed out onto the outskirts. For the moment, the central administration will not undergo great organisational changes, and will instead principally stop at strengthening the network of state controls, which the centre exercises on the local bodies and on the social formations.

Thus, though the late 19th century already witnesses the onset of the interventionist cycle that, following a course of steady increase of public expenditures and a progressive complication of the state machinery, will traverse the two World Wars without solutions of continuity, the relationships between the State and the economy are not yet marked by the direct entrance of the public sector inside the productive economic system. Late nineteenth-century industrialism is still limited, for the most part, to public services of an evident local utility (network services, tramlines etc.), while in sectors of national importance, such as post and telegraph services, telephone and railways, it is the very technique of production that requires a public presence.

Astride the two centuries and a good deal before their colleagues of the other European countries, French jurists construct an early theoretical field capable of recording the transformations underway. They are the first to proclaim that the administrative universe in the late 19th century can no longer be circumscribed to the *puissance publique* alone, to the traditional imperative manifestations of sovereignty, on the basis of which the dogmatic system of administrative law had till then been built.

That universe must by now open up to a new dimension, to the *service public*, those regularly functioning public services in which the State increasingly more often is rendered visible and materialises. Till-now unknown “social duties” guarantee an inedited legitimation to governors, whose principal function becomes that of “giving satisfaction to the mass of elementary needs” (Duguit 1913). Against the backdrop of a by-now ineluctable and unrelenting growth of public activities, the social administration becomes the fundamental component of a new state typology, of a “social Rechtsstaat” (Weyr 1908, 577) that, through the administration, takes upon itself the demands and objectives of social solidarism.

The fulcrum of public power swings from sovereignty to service: This, in particular, will be the most important theoretical result of the realistic and socio-centric approach of Léon Duguit, the French jurist who in the years straddling World War I offers a true representation of general theory of the new concept of *service public* (Duguit 1927). And yet, the unitarity of the administrative regime is not in question. The organisation and functioning of public services meld into a monolithic regime of public law: including the strategic employment relations that the fear of public trade unions subtracts from the ordinary industrial relations. In this “administrative management,” where new and old public bodies pursue an inedited “administrative job” and realise collective utilities, administrative law, too, finds a further demonstration of its own centrality and of the specialty of its own juridical regime, as the French School of public service was to invariably recall from Léon Duguit to Gaston Jèze, up to quite a few epigones of the second half of the 20th century.

Administrative law is truly confirmed as a pillar of modernity, ready to embrace “repressive law” and “co-operative law” (Durkheim 1997, 101), sovereignty and public service; capable of covering with the cloak of public law built for the imperative administration, even the new dimension of services’ provision.

### 6.11. Development and Decline of State Interventionism

Few juridical texts like the Weimar constitution of 1919 can offer the sense of the entity of the transformations that invest all Europe after World War I. Social rights and “life of the economy” become part of the constituent project (see Stolleis 1999, 80ff.). Economic democracy and objectives of substantial

equality complicate the picture of the consolidated rights of the individualist and liberal tradition, and make nineteenth-century solidarism appear suddenly archaic and paternalistic. Public interest invests private law and labour law; private-law orders, still based on the figure of the owner-individual, undergo a rapid and sudden commercialization with a growing attention on enterprise, production, economic organisation. Sectors of the system in direct contact with the programmatic objectives and the needs for transformation of society, acquire disciplinary autonomy: the public law of economy; taxation law; labour law and social law.

The State's entrance into the economy is a generalised phenomenon in the Western reality, determined by the pull of the war economy and by the problems of its reconversion; by the technological revolution; by the push of the social conflict rekindled by the appearance, with the Russian Revolution, of a concrete alternative to the capitalistic organisation; and finally by the continuation of phenomena of financial instability that will grow vortical with the world crisis of 1929. The liberal strategy that devolved the regulation of the economy to society and its rigid internal mechanisms of discipline (Hespanha 2004), is replaced by the great season of public interventionism and the State-regulated economy. The "public hand" registers a rapid expansion to the sectors of energy, chemistry, mines, the financial and credit system. New instruments to manage the economy are discovered and utilised: interventions on the discipline of labour, salaries, prices; grants; industrial bailouts.

Across the Channel, too, an inventory of public tasks taken in 1918 by a board of inquiry on the administration, reveals a breadth of objectives considered unthinkable only a short time before: "managing the national economy, imposing and regulating taxation, arranging funds to meet day-to-day demands of public services, managing and controlling the national debt, currency, banking and the like and to prescribe the manner in which public accounts are to be kept" (Haldane Committee Machinery of Government, 1918). The definitive emersion in England of a fully modern administration dates to this precise moment. Anticipated by the experiences of the war cabinet, a true administrative revolution invests the civil service and realises a strong centralised system of government. In 1926, a small volume by John Maynard Keynes with an emblematic title, *The End of Laissez Faire* (Keynes 1926), traces the lines and contours of a new economic politics which, in the years to come and without a solution of continuity almost up to the final decades of the 20th century, will mark the true spirit of the time. At the same time, Harold Laski defines the State as "public service corporation" whose activity unfolds in function of the economic and social democracy (Laski 1950, 69–70).

The nineteenth-century models are swept away: The boundaries between public and private cloud over. Up to this moment drastically separated, state and economy begin to get confused. State and market interact with each other even more. The extension of public tasks is overwhelming, inserted in the in-

terventionist cycle that began as of the 1880s, but no longer unfolds along the guidelines of a progressive expansion of the administrative regime, still imagined only a few decades before: The monopoly of function is flanked by activities without imperative and functional connotations, conducted in competition with private subjects. The activities attributable to the public sector are no longer only activities definable along the parameters belonging to sovereignty and the administrative specialty; they are no longer exclusively activities “brought into being *only* by the State.” They are activities “brought into being *also* by the State” (Kelsen 1929, 23); they renounce the functional statutes. The till-now rigorously public-law world of *service public* begins to pose delicate problems of distinction with respect to private enterprise, and tends to share with it the merely economic meaning of a service of general interest. Already at the end of the first world conflict, “the true administrative State” is no longer identified in the State with an administrative regime, whose will is preferably expressed in the form of the *acte administratif*, according to the classical formulas of Otto Mayer, Maurice Hauriou, Santi Romano. According to the definition of Hans Kelsen, founder of the School of Vienna and among the most acute interpreters of the transformations underway, it is on the contrary, “the State that goes into action,” and its organs are entrusted with “the direct attainment of the community aims”: the State of direct administration and distributive justice (Kelsen 1929, 23).

The growing number of cases in which social relations are affected by public interest therefore does not correspond to an equal development of the administrative regime. The direct administration State certainly projects onto society, the strong intrusive claims that support it: Suffice it to consider the spread of the economic, town-planning and sector plans, that with changing fortunes, inaugurated the season of “manoeuvred economy,” which in the 1930s and with significant convergences, embraces totalitarian regimes and liberal regimes. And yet, that same State is inevitably led to contract the features of specialty of its own statutes of action: In a manner opposite to the nineteenth-century dynamics, the growth of the public sector, the very organisation of a government of the economy, associate the development of forms of indirect intervention with increasingly more marked forms of direct intervention which espouse the very instruments of the economy. For the first time, the expansion of public is not resolved only in extending the confines of administrative law and the relative order’s space of specialty. The State that descends directly into the economic arena is forced to set in the organisational typologies and statutes proper to common law. Here begins the public administration’s “flight towards private law”: The centrality of the provision among the forms of administrative action is shaken and the contract reacquires an importance which seemed lost. The State becomes an active and influential factor of the entire economy; it becomes an enterprise, a business corporation; from a political body, it becomes an economic body. In parallel, the adminis-



trative regime begins to lose its unitarity. The dimensional growth of the establishment, still contained in the late 19th century, literally explodes all over Europe in the years after World War I; functions multiply up to the point of embracing veritable tasks of social mediation; the legal forms of the administrative activity pluralize; a growing complexity invests the organisational structure which, from its scanty, simple, unitary and centralized organisation of the eighteenth-century models, now experiences a progressive process of disaggregation: The State after World War I is already a multi-organisational State. At precisely this moment, the composite character that still distinguishes contemporary administrations begins to take shape: The unitarity of the nineteenth-century system is replaced by the plural, often protean character, which will become typical of all twentieth-century administration.

Still prisoners of the nineteenth-century administrative models, jurists delayed to offer a coherent depiction of the transformations underway. Until after World War II, monotonous interpretations of totally public-law coinage, resisted; embarrassed or disdainful silences prevailed toward the novelties that seemed simply to be the fruit of transitory economic politics. Anticipated by several clear depictions that emerged in German legal science in the late 1930s, at the height of the Nazi regime—one name over all is that of Ernst Forsthoff, a jurist who grew up in the school of Carl Schmitt but was destined to play an important role also in legal science after the war—the awareness of the evanescence of a unitary criterion capable of founding a solely public-law synthesis of the administration and of its administrative regime, matures only in the course of the 1950s, from France to Italy, to Germany. The administration definitively loses the unitary aspect impressed on it by the revolutionary-Napoleonic season; it reveals its two-faced aspect. The “authoritative administration” (*Eingriffsverwaltung*), intended to operate, according to a functional model, in the logic of the relationship between authority and freedom, is definitively flanked by an administration that provides public services (*Leistungsverwaltung*) (Forsthoff 1938), a direct administration without monopolistic functions, pluralist, fragmented and set on an uncertain boundary between state and economy, no longer necessarily operating with public-law acts, and ready to be reabsorbed into the course of private law.

With the post World War II period, in the far-sighted invention of a new European politics of coexistence between the different states, this progressive recording of the transformations underway becomes the diffused awareness (from William Beveridge to Jean Monnet, from Ludwig Erhard to Ezio Vanoni) of the shared character of the social and production problems of reconstruction, and of the objectives of *social insurance* (Beveridge 1969) and of *full employment in a free society* (Beveridge 1960). From the English *Social Service State* to the German *Social Market Economy* (*Soziale Marktwirtschaft*), both with a great receptiveness to the competitive models unknown to the rest of Europe (Gerber 1998), to the *État modernisateur et aménageur* of France of the Fourth



and Fifth Republic, up to the entrepreneur State of the Italian attempts at economic planning, interventionism returns to enunciate the spirit of the time. So begins the long season of the government of the economy and of public enterprises, destined in many European countries to continue up to the final decades of the 20th century. This will be a truly European season, still today the object of strongly contrasting interpretations: Now seen as a founding element of the European social model and as an original attempt to remedy, in an inedited economic constitution (*Wirtschaftsverfassung*), where political consideration is imposed over economic consideration, the unresolved tension between democracy and economy; and then, on the contrary, along the line of Friedrich August von Hayek, assumed as a self-evident example of the “mirage of social justice” (Hayek 1976) and of the consequent, inefficient government overload.

The difference of institutional solutions compared with the American course, however, appears evident. Here, not even in the season of Roosevelt's New Deal, paced by the new objective of “Freedom from Want,” does interventionism acquire the totally European signs of the entrepreneur State and of a “working State,” through the direct management of its own administrative apparatus. With the exception of the important, but isolated case of the *Tennessee Valley Authority (TVA)*, instituted in 1933 in the forms of a public corporation to regulate the regime of water and produce electric energy, the interventions remain faithful to the model of regulation. There is an expansion in number and powers—no longer limited to adjudication and judicial review, but also embracing delegated legislation—of the regulatory authorities (“Agencies”) operating on the market and with economic dealers. Improvements and added strength are attributed to what, since the creation of the *Interstate Commerce Commission* in 1887, has been the American response to the problems of economic regulation, to the fight against unfair discriminations and the guarantee of competition, to the affirmation of universal service in the field of public utilities, to controlling prices and even settling social conflicts (such is the case of a typical and contested creature of Roosevelt, the *National Recovery Administration, NRA*). Precisely under the pressure of demands for the Agencies' respect of civil rights, and against their power of supremacy over goods and people, the *Administrative Procedure Act (APA)* was born in 1946, building the fundamental nucleus of administrative law of overseas itself.

Only recently has his picture begun to change. The contraction of the public sphere and the onset of the season of the Post-Welfare State, that came into sight in Europe, starting from Britain at the end of the 1970s and soon spreading to the entire European Union, with the affirmation of a new economic constitution “in accordance with the principle of an open market economy with free competition” (Treaty establishing the European Community, art. 4), has brought out inedited convergences, with the spread of American models of economic regulation, which occurred perfectly parallel to the contraction of the forms of direct public intervention.

In the past decades in the United States, the Agencies were object of “de-regulation” interventions, and then instead of “Regulatory reform,” within a pressing dialectic between market failures and Government failures. On the contrary, the Agencies have made their appearance in Europe at the end of the parabola of public interventionism, following the assertion of policies to privatise public property and liberalise economic services of general interest. At the moment that the “public hand” sees its manoeuvring space in the economy reduced, alternative forms of regulating the economic factors are introduced in Europe: and exactly the same forms matured in the United States, on the basis of a clear judicial matrix, in the very years in which on the European continent, at the end of the 19th century, the long season of the *État providence* was announced.

The growing circularity of management models of public authority—consider also the recent European fortune of consumer law, competition law, environmental law or, on another level, the positions of New Public Management—again reconciles traditions, such as the continental tradition and the common law tradition, which after the divarication of the late 18th century have again returned to present quite a few elements of convergence. At the same time, old forms like the judicial and regulative ones, supplanted or marginalised first by the revolutionary rupture and then by the assertion of interventionism, strategically return to the centre of the forms of action of public powers.

Continental administrative law narrows its radius of application, at the same time rediscovering a judicial and procedural basis. The same world of public services gives up pieces of direct administration to the new functions of a regulative type. On the opposite side, administrative law, which had at length sought its legitimation within the universe of common law, finally found it precisely in the sphere in which the regulative power is translated into a veritable legal supremacy, standing as candidate for the role of the specifically procedural control of the correct exercise of the related powers.

On yet another front, the explosion of economic globalisation focuses the attention of jurists on the existing supranational Regulatory bodies and on the still extremely fragmentary answers to the instances of global problems. The especially American attention to the progressive emersion of a “Global administrative law,” to a large extent imitated from the American experience and regulative lexicon, is opening a new and must vaster field of comparison.

## Chapter 7

# CONSTITUTIONALISM

by Maurizio Fioravanti

### 7.1. Foreword

Constitutionalism is a stream of thought which, since its very origins, has pursued concrete political aims consisting essentially in the limitation of public powers and the development of spheres of autonomy guaranteed by law. Its rise belongs wholly to the modern era, although its strategies include problems that can be traced back to earlier periods and which rest on issues addressed in ancient and medieval times. More precisely, constitutionalism arose and gained credence during the formation of the *modern European State*. If we consider the modern European State as a complex historical figure, then two aspects have to be taken into account: on one side, the State as an embodiment of the principle of sovereignty and as the sphere in which the concentration of public power is concretely implemented in a territorial area, and on the other, the sphere in which constitutionalism comes into play, namely the sphere of plurality, limits, guarantees and also participation. Accordingly, constitutionalism can be said to have come into being together with the modern State itself, with the aim of controlling, limiting and submitting to rules those public powers that had begun to occupy a central position in the various lands from the fourteenth century onwards. In other words, what characterizes European constitutional history is the fact that the concentration of public powers in a given territorial area, the power to call men to arms, levy taxes and administer justice has since its very beginning been accompanied by the need to fix rules and limits, some of which have been set down in written form. In many cases the rules and limits have also been established through the tool of representative assemblies, *Parliaments*, or *Landtage*, or *Cortes*, or similar bodies.

This early form can be termed “constitutionalism of the origins,” which is already “constitutionalism” inasmuch as it was already oriented toward the fundamental aim of the limitation of power as a means of establishing guarantees. However, it was a stage in the history of constitutionalism that had not yet acquired awareness of a dimension that would later prove to be decisive, namely the *principle of equality*. Therefore its limits were not designed to protect individual rights attributed to subjects assumed to be equal to one another, as in the modern paradigm of natural law, but rather they aimed to protect certain aspects of freedom and independence that were essentially of a corporatist nature, centering around the guilds of a given city or of other territorial bodies. Such elements were rooted first and foremost in the historical background. Furthermore, the “constitution” that this form of constitu-

tionalism proposed rested on the presupposition of a structured and complex polity, composed of distinct bodies, and of a process of balancing and commensuration of distinct yet at the same time coexisting powers.

The principle of equality, which had been formulated merely on the theoretical plane of the natural law doctrines that developed in the mid seventeenth century, would only later burst onto the scene of constitutionalism, virtually on the eve of the French revolution. The emblematic date in this context is 1762, the date of publication of Rousseau's *Social Contract*. Thenceforth everything would change in the history of constitutionalism, in the sense that it would no longer be possible to depict the constitution merely as the *fundamental rule of a polity*, as the guarantor of its internal balance and of the proper commensuration of all the powers operating within such a body. In contrast to constitutionalism of the origins, which had prevailed up to the age of Montesquieu, the constitution would now begin to be considered as *an act*, as an expression *per se* of sovereignty, as the setting up of powers called upon—for instance in the case of the French revolution—to demolish the old regime, and consequently to construct a new society founded on the principle of equality itself.

As is known, the situation developed in a somewhat different manner in the case of the other revolution, the American revolution, which was not entrusted with the task of destroying any prior old regime and thus more clearly conserved the constitutionalism of checks and balances. Overall, however, revolutions represent a turning point in the history of constitutionalism: They result in the formulation of written constitutions that are the outcome of explicit constituent powers and which set up powers endowed with sovereignty. But the real difference on the historical plane, which distinguishes constitutionalism of the origins from constitutionalism of revolutions lies, once again, in the principle of equality. This principle sprang from modern natural law doctrines and was at times elaborated in more extreme versions, such as the line that can be traced from Hobbes to Rousseau, or in more moderate forms, such as the line leading from Locke to Kant. These different versions would later become the spring-board for different constitutional solutions, oriented in the former case towards underlining the guarantee enshrined in the general will and in the primacy of general and abstract law, and in the latter case towards developing moderate and balanced forms of government, or at least techniques of power limitation that drew inspiration from a fundamentally anti-despotic approach. Thus constitutionalism of revolutions was in itself complex and various. But the different solutions proposed should nevertheless be viewed as instruments, in other words as tools devised in order to achieve an objective, and this objective is shared by all the solutions: guaranteeing individual rights and achieving the principle of equality.

Constitutionalism of revolutions was, however, by no means the form of constitutionalism that would later come to dominate the scene in Europe in

subsequent centuries, and in particular during the liberal era. At the beginning of the nineteenth century a further transformation began to take shape, prompted precisely by a critique of constitutionalism of revolutions. A twofold range of criticisms was advanced. Firstly, revolutionary constitutionalism was accused of disproportionate reliance on the general will and of over-emphasizing that which is political, and indeed of placing excessive trust in the law itself as a necessary instrument for the guarantee of rights. In this perspective, while the new liberal constitutionalism neither denied the primary value of law nor operated concretely to bring about a genuine opposition between the constitution and the law, it did address the question of the foundation of individuals' spheres of independence, suggesting that such spheres should be more solidly founded. Thus in this first perspective, constitutionalism was concerned with the fundamental value of the *limit*. Here one finds the figures of Constant and de Tocqueville in France, but one should also bear in mind the extensive English debate on the *laws of the land* and the *rule of law*, which took as its starting point Burke's fierce criticism of the revolution.

However, there was also another critical approach, as mentioned above. In this second perspective, which at first began to take root more solidly in Germany with Hegel's profound reflections, the revolutionary excess that was most deeply feared was, in a sense, of an opposite nature: that of a revolution which, rather than expressing a political set-up which was too strong and threatening, had instead engendered a set-up that was too weak inasmuch as it was founded on the changeable will of individuals, on a continually renewable social contract. From this point of view, nineteenth-century constitutionalism tended to revive the quest for a strong principle of sovereignty, in order to assure greater stability for liberal society and its institutions. Thus the fundamental value underlying constitutionalism in this period was that of upholding the social and political *order*, from which all things derive, including rights, which can be truly safeguarded only under the laws of the sovereign State seen as representative of such order.

Let us now gather together the two aspects, which taken together characterize constitutionalism of the liberal age, i.e., constitutionalism of the nineteenth century Nation-States. This version of constitutionalism would prevail until the great disruption of the 1920s. As we have seen, it was built up by keeping at bay a twofold threat: that of uncontrolled dominion of the general will over society, but also that of equally uncontrolled reiteration of the social contract and constituent power. Constitutionalism of the liberal age pursued the aim of the limit and guarantees, but also of security and stability. This quest would take on different forms in the different national experiences, yet it could not but address both fronts. In this sense, it can be stated that in the second half of the nineteenth century there already existed in Europe a common constitutional culture, which in various different ways sought to ensure the coexistence of the guarantee of rights and the principle of political sover-

eighty: That is to say, it aimed to achieve a sufficiently steady point of balance—a guarantee of rights that would not call into question the principle of sovereignty, and vice-versa. Subsequently, the first signs of disruption of that balance marked the beginning of the decline of liberal age constitutionalism.

## 7.2. Constitutionalism of the Origins

In constitutionalism of the origins there is thus a constitution to be upheld and defended, but such a constitution in no way presupposes any sovereign power that represents the entire polity to which the constitution refers, nor is it called upon to guarantee rights to individuals according to the principle of equality. All these magnitudes, such as “sovereignty,” “individual rights,” “equality,” were unknown to the political and social context within which constitutionalism of the origins took shape. But if this is the case, then in what form can one represent the constitution of this historical era, that is to say, of the first centuries of the modern age, prior to the late eighteenth century revolutions?

I would argue that it can be represented first and foremost with reference to a political and territorial space within which a complex of forces were at work. These included forces of feudal or corporatist origin, but the economic forces and the trades present within the city context also played a role. In a space of this kind, the various forces were held in equilibrium according to customary rules, which in some cases were also written down, and they were generally established by contracts with the feudal overlord, i.e., the figure who occupied a pre-eminent position in that given territory, in the space of that given city. The overall set of rules and the balance resulting from their interplay is the constitution. In this interpretation, the constitution stands firm and endures over time not by virtue of a principle of sovereignty that proclaims the constitution from on high, nor even on the basis of a democratic principle legitimating it from below, but rather through its capacity to effect and guarantee peace and through a reasonable balance among the forces present in the territory or the city, whereby such a balance also included recognition of their rights and freedoms.

Many of these “rights” and “freedoms” dated as far back as medieval times, and were manifested concretely as privileges involving places or certain social groups, while in other cases they were relatively new, having arisen in the context of the communes or city states. It is these “rights” and “freedoms” that formed the subject of constitutionalism of the origins. In order to recognize them, and to guarantee that they benefited from a sphere in which they could take effect, albeit within a common political existence, it was necessary for the government of the territory or of the city to assume a *temperate* or *moderate* form, which in the political and constitutional culture of the early modern age was conceived with reference to the great models of antiquity: the *mikté politéia* of the Greeks, and the *res publica* of the Romans.



Valuable testimony of this conception comes from Niccolò Machiavelli (1469–1527), above all in his *Discourses on the First Decade of Titus Livius*, composed between 1513 and 1519. It is here that a first fundamental principle of constitutionalism can be found, contained in the Machiavellian concept of “civil equality” (“*civile equalità*”) (Machiavelli 1950, I, chaps. 2 and 55). Machiavelli’s “equality” derives from the *aequabilitas* that can be found in Cicero (Cicero, *De re publica*, I, XLV), and has nothing to do with the principle of equality that would subsequently gain credence on the basis of natural law. For “equality” was not a principle that held among individuals: Rather, it characterized the manner of governing the forces that operated within a territory or a city, assuring each of these a fair and commensurate space of its own. Thus interpreted, “equality” averted the risk they might confront one another threateningly and jeopardize the integrity and stability of the *res publica*, of their common political existence. Governing according to “equality” thus signified governing with moderation, ensuring that the interest in coexisting prevailed over the temptation to assert one’s own demands unilaterally.

Governing with moderation, according to the principle of “equality,” was thus conducive to peace and concord. It was functional to the affirmation and maintenance of a territorial or city-based constitution, which could vouchsafe appropriate spheres of action matching the relative strengths of the different forces concretely operating within the given context. In addition, a principle of moderation was also necessary to assure security and stability: Thus alongside *aequabilitas* the concept of *firmitudo* also took shape, as an intrinsic quality of forms of moderate government. These were, in effect, mixed forms and as such were capable of averting the frequent and sudden crises which are typical of simple forms of government, the latter being predisposed to undergo degeneration into their contrary. Thus an oligarchic regime ridden with corruption may slide into tyranny, while tyranny may lurch to the opposite extreme of the government of the masses, and so forth, with further reactions and back-lashes leading yet again to a further contrary, according to a cyclical trend that Machiavelli one more took over from the classical models. Thus as early as these first centuries of the modern age, there arose a constitution built on the two fundamental principles of *aequabilitas* and *firmitudo*, both traceable to the dimension of the “fundamental law,” that is to say, of the law that stably recognizes the spheres of power of the subjects concretely acting on the historical plane.

Machiavelli’s thought provided the impetus for an approach we could define as republican constitutionalism, which was to gain considerable esteem, above all in the Anglo-American world.<sup>1</sup> Suffice it to recall the reflections of James Harrington (1611–1677), one century later, and his major work dating

<sup>1</sup> Further on, in the next section, attention will focus on the presence of this republican constitutionalism in the American revolution.



from 1856, *The Commonwealth of Oceana* (Harrington 1992). In Harrington's ideal republic there are fundamental laws, which taken together, and by virtue of their interaction, determine the social and institutional equilibrium. These are the agrarian law, which limits the value of the land each person can own, thereby making it easier for larger numbers of individuals to become owners, and the electoral law, which differentiates the senate, reserved to owners of landed property and large estates, from the lower house formed by the assembly of the people, in which all owners can be present, which the sole exclusion of servants, the destitute and beggars. Harrington's intention was thus to propose the ideal model of a moderate republic, founded on an extensive middle class, and endowed with a mixed government within which both the aristocratic and the democratic component can be granted a sphere of action.

Harrington's conception, mid-way through the seventeenth century, i.e., already well into the modern age, thus showed how deeply ingrained and how strongly felt were the references to the ancient models of the *miktè politéia* and the Roman *res publica*, even in this period. The modes of thought of the time still viewed a mixed government as the ideal government, and the mixed constitution as the constitution par excellence. In fact, the mixed constitution was the constitutional ideal that predominated in Europe right up to the middle of the eighteenth century, when the new principle of equality began to take centre stage and constitutionalism underwent a major transformation, swinging towards revolutions. But it is by no means irrelevant to note that prior to that time, throughout the first part of the modern age, the dominant constitutional culture in Europe was that of the mixed constitution. That constitutional form, in England but also in France, and in the lands of Germany as well, was entrusted with the task of moderating the monarchy and making in into a *potestas temperata*, empowered with exerting the highest powers of government but at the same time acting as the expression of a complex and differentiated political community which was not to be rendered uniform from on high.

Here one cannot fail to make reference to the *English constitutional model*, which precisely in this period was constructing its own identity that would later, in the eighteenth century, become the necessary framework of reference throughout Europe. Springing from solid medieval roots, which can be found in the 1215 *Magna Charta* and in the works of Henry Bracton, who between 1250 and 1259 gathered together and ordered the laws and customs of the Kingdom of England (Bracton, *De legibus et consuetudinibus*), there developed an awareness of the *dualistic character* of the constitutional system: on the one hand the *gubernaculum*, within which the sovereign exerted his prerogative, which certainly included military affairs and the power to appoint public officials, and on the other the *iurisdictio*, whereby the sovereign operated in parliament, according to the principle of the *King in Parliament*, to enact laws and to regulate by joint agreement the decisive power to levy taxes.

By the middle of the sixteenth century, the above model had become codified. An exemplary instance of the model can be found in the work of Thomas Smith (1513–1577), in his *De Republica Anglorum*, composed in 1565 but not published until 1583.<sup>2</sup> This work emphasized the existence of two strong images of sovereignty within the English constitutional model: that traditionally contained in the royal prerogative, but additionally, the form of sovereignty present in parliament, parliament being understood as the institutional seat where the entire kingdom in all its complexity is represented, by the king himself, according to the principle of the *King in Parliament*, by the *Lords* and by the *Commons* as an expression of the rural and city communities. Moreover, there was increasing perception that parliament itself was the representation to be considered as predominant, precisely on account of its greater intrinsic capacity to represent the infinite social and local ramifications of which the kingdom was composed.

The age of Thomas Smith, however, was already approaching the era of *constitutional conflict* that would affect England during the following century. What characterized the conflict was its continuous reference to the constitutional model handed down by tradition, and at the heart of the debate stood the concept of the *ancient constitution*. On one side, the king was accused of subverting the constitution with his neo-absolutist demands, for example by attempting to levy taxes without the consent of parliament. But what is most significant is that the controversy moved in the opposite direction as well. Thus in the summer of 1642, when the English king was called upon to respond to the celebrated nineteen propositions addressed to him by parliament—which included the request for parliamentary participation in the power of appointment—he replied that the propositions were unacceptable because they encroached detrimentally on the *ancient constitution*, which reserved to the king the power of governing, within the dualistic framework embodied in the traditional English constitutional model.<sup>3</sup>

In the heat of the constitutional conflict, there was thus a revival of the idea that the “constitution” is in effect a historical heritage, intrinsically rational precisely because its foundation resides in history, having taken shape over the centuries through an action of judicious composition of the forces and institutions, which have thereby reached an ideal relation of balance. Once again on the basis of the classical models, and of the constitution handed down from

<sup>2</sup> Earlier than Smith, it is worth mentioning at least the figure of J. Fortescue (*De Laudibus legum Angliae*, chap. XIII), on the famous definition of England as a *dominium politicum et regale*, which sets parliament alongside the monarchy, parliament being seen as the “political” representation of the existence of the kingdom.

<sup>3</sup> On account of its exemplary character, as an act of accusation against the king, it is interesting to note the parliamentary speech by James Withelocke pronounced on 29 June 1610. Withelocke’s speech, as well as the King’s answer to the nineteen propositions, to which reference is made in the text, are contained in Kenyon 1969.

the forebears, of the *pátrios politéia*, the constitution is considered as a *prius*, which contains within itself the reason and the measure of coexistence. Diverging from the constitution means straying from the main path that has been laid out, allowing the opportunity for unilateral points of view to prevail that contrast with its mixed character and thus with its *aequabilitas*. And this means embarking on uncertain paths or unstable solutions, thereby also relinquishing *firmitudo*, that other great virtue of the constitution.

In England, the great idea of the historical constitution also had a more specifically legal-normative meaning. This can be perceived in the illustrious figure of Edward Coke (1552–1634), through his steadfast defence of the *ancient common laws and customs of the realm*, which taken together are none other than the fundamental law, in other words the constitution itself (Coke 1826 and 1979). Entrusting judges with the safeguarding of these laws, and granting judges, if necessary, the power to circumscribe the normative force of the laws enacted by parliament itself—should parliament be intent on subverting such laws and customs—certainly implies affirming a “higher” law, but not in the sense of the modern supremacy of the constitution and of the resulting judicial test of constitutionality. Rather, what is defended is a set of laws and customs, pacts and agreements, which as a whole represent the *common law* and in this sense precede the law of parliament. Thus Coke’s approach remains within the framework of constitutionalism of the origins, with its affirmation and safeguarding of the historically grounded constitution.

But the most important aspect is that this constitutionalism was to remain vividly alive throughout the modern age, or at least until the middle of the eighteenth century. It was to gain credence considerably beyond the confines of England, in the heart of continental Europe, with the function of limiting and opposing political absolutism. Here the focus is evidently on France at the time of the wars of religion.

Turning now to France, the role of one particular strand of reflection gradually became more evident, namely that of protestant religious thought. Such was the case of François Hotman (1524–1590), with his *Franco-Gallia*, a work published in 1573 (cf. Hotman 1972, especially chaps. XIX and XXV). In this author’s thought, the temperate and moderate character of the monarchy was clearly linked to the existence, in France as well, of an “ancient” constitution in which the *utilitas rei publicae* was conducted by the king in the presence of the assembly of the Estates-General. Once again, the “ancient” constitution was a mixed constitution, because it provided for the king to be flanked by additional figures who played an essential role, namely the magistrates, the magistrates, whether by virtue of noble descent or by election, together with the even more extensive role of the consent and representation of the entire polity. These are well known models in the framework of constitutionalism of the origins. But the protestant root, operating in the context of the wars of religion, introduced a new note. It was that of the *original pact*,

through which the people had entrusted the exercise of power to the king. It now became particularly clear, in this form of constitutionalism, that such power could always be reclaimed if the clauses of the pact were to be violated by the king, for instance if he were to seek to usher in a form of non moderate government that would lead to tyranny. Thus in these authors the idea began to gain ground that the people exist *before* the king, and could therefore exist even *without* him.

Obviously, we are not dealing here with seditious or treasonable thought. As testified by an important pamphlet of the time, the *Vindiciae contra Tyrannos*, published in 1579 (by Stephanus Junius Brutus—but the authorship of the work is still uncertain), and deriving from the same Huguenot political and cultural environment, active and direct resistance by the people is only a limit case, whereas individual resistance is explicitly forbidden. The people as a body was still far from being considered as a set of individuals, or unitarily as a “nation,” and was instead still regarded as a set of circles, cities, orders or provinces: Legitimate resistance to the king was exerted by the officials and the magistrates representing these different groups. Following the ancient models, it was the aristocratic component that defended the constitution against the overweening power of the monarchic component. And by defending the constitution, the aristocratic component effectively defended the people, seen as a body having its own order of a historical-natural character, not of artificial origin.

The same strand of thought, with analogous characters, can also be found outside of France that was racked by the wars of religion. The reference here is in particular to the *Politica methodice digesta* by Johannes Althusius (1557–1638), published for the first time in 1603 (cf. Althusius 1603, in particular chaps. V, IX, XVIII, XIX, and XXXVIII). In Althusius one finds the same concept of the people as in the *Vindiciae* and in the French protestant authors. There is but one people, albeit composed of distinct parts, orders and territories, which remain distinct even within one and the same people. A clearer picture thus emerges of what the *fundamental law* concretely signifies for constitutionalism of the origins. It is that which Althusius calls the *universalis consociatio*, namely the pact horizontally binding the different groupings—corporative, city-based, territorial—in such a manner that they are peacefully contained within a single people. Herein lies the foundation of the *res publica* itself, and thus its fundamental law. But the latter, in turn, is not representable as a norm in the modern sense, endowed with sufficient generality and abstractness. Rather it is the set of pacts and agreements that hold the polity together, attributing to each of its parts commensurate rights and duties, and thereby also limiting the power of the king. The “constitution” is not a norm applied to the polity at the behest of a specific power, because in its essence it is none other than the polity itself, in the most basic and characterizing aspect of the community concept.

One might now enquire: When did this constitutionalism begin to be superseded? It is evident that another route, opposed to the form of constitutionalism described so far, was envisaged as a possible means to overcome crisis situations such as the constitutional conflict in England, or the wars of religion in France. Instead of invoking the ancient mixed constitution and calling for its restoration, this alternative route invoked a strong power, to which powers of sovereignty could be attributed with no further hesitation.

Such was the case in France with Jean Bodin (1529–1596), the author of *Les six livres de la République*, published for the first time in Paris in 1576 (cf. Bodin 1977, in particular: I, chaps. 8, 9, and 10; II, chaps. 1, 2, and 7; III, chap. 7; IV, chap 6; VI, chap. 6). Naturally, Bodin lived in the context of his own historical era, and therefore, the form of government he proposed was likewise mixed and moderate, with the presence of the *États Généraux*, the Estates-General. Yet this form of government took shape, and was entirely played out, on the plane of the art of politics. Although the political framework was still dominated by the medieval tradition and consequently drew its inspiration from criteria of prudence and balance, and was also aware of its own limits, the great novelty was the fact that all this was now simply *gouvernement*, in the sense of a mere organization of decision-making powers and procedures, no longer characterizing the essence of the *état*, i.e., the political regime. For the latter was now set on a different and new plane, which may be considered as superior, a plane in which a mixed form is no longer possible. This, in a word, is the plane of *sovereignty*. Thus in Bodin's framework it is no longer possible to say that France has a mixed and temperate monarchic constitution: Rather, it is henceforth necessary to say that France has a monarchy, which governs in a mixed and temperate manner. And therefore, France has a political regime which in its "essence," prior to considerations concerning its structure in a given form of government, is monarchic because sovereign powers are monarchic. Bodin lists the sovereign powers: the power to give and repeal the law, to declare war and make peace, to decide in the last resort on controversies among subjects, to appoint magistrates, and finally the power, albeit controversial, to levy taxes.

Bodin's work contains the beginning, although still in embryonic form, of a new phase in the history of constitutionalism. Seen in perspective, from that time on a gradual redefinition of constitutionalism began to emerge, in an era that would increasingly be characterized by the principle of sovereignty Bodin had been the first to express, a principle unknown to the medieval world but also to the early centuries of the modern age. However, this shift in attitude should not be mistaken for a sudden demise of constitutionalism of the origins. On the contrary, vivid awareness of that version of constitutionalism, albeit blended with new elements, would continue almost up to the mid-eighteenth century, i.e., up to the threshold of the Revolution.

An emblematic illustration, from this point of view, is that of Montesquieu (1689–1755), above all with his celebrated *Esprit des Loïs*, published in 1748. This work reveals a clear understanding of the dimension of modern political freedom, and of its significance as freedom granted to individuals by a common positively established system of law, but it equally clearly highlights the crucial connection between the safeguarding of rights and a *moderate form of government*, in an approach that unquestionably still owes much to the tradition of constitutionalism of the origins. Thus in Montesquieu's reconstruction the safeguarding of rights is not linked to the intrinsic characters of the law, to its generality and abstractness, and in this sense his scheme differs from what would subsequently become the general will of the Revolution. Rather, it can be traced to the fact the legal system is the result of a prudent and moderate will, which has created an anti-despotic system of attribution of powers whose inspiration is based on the great criterion of balance.

As is known, Montesquieu envisioned an ideal constitution as a means of accomplishing this goal, a constitution which would be very close to that of the traditional English system. However, the threat of despotism that risked undermining not only the constitution but also the balance of powers the constitution guarantees could, in his view, stem from two directions: from the monarchy, but also from an excess characterized by the opposite tendency, of a democratic type. This occurs, he argues, when the people resolve to suppress the Senate, which is the necessary aristocratic component of the legislative arm, or to reduce the executive—which must remain monarchic—to a mere projection of the legislative arm dominated by the representatives of the sovereign people. Montesquieu's reconstruction is of crucial importance because it closely ties constitutionalism, seen as the logical and historical opposite of despotism, to a form of government that necessarily involves not only two houses, one of which has an aristocratic base, but also an executive presided over by the monarch, who generally held the power of veto over the legislative arm. This notwithstanding, and although this form of constitutionalism was already strongly oriented towards a modern interpretation of the safeguarding of rights, it was less strongly linked to a firm and wide-ranging assertion of the principle of equality: Indeed, it was distrustful of extreme versions of equality, since these could lead to an excess of a democratic type, in other words to a form of despotism that alters the balance of powers (cf. Montesquieu 1963, II, 4; VIII, 2 ; XI, 4 and 6, for the most significant places in relation to the problems here addressed).

Among other figures holding similar views, William Blackstone, whose work *Commentaries on the Laws of England* was published between 1765 and 1769, deserves mention (cf. Blackstone 1979, Introduction, sec. 2; and I, chaps. 1, 2 and 8). It may at first seem surprising to find a voice like that of Blackstone associated with the moderate form of government, for Blackstone had notoriously made statements, in this very work, concerning the sover-



eignty of the English parliament, which he openly defined as absolute and incontestable. But in actual fact the parliament whose sovereignty was proclaimed was still that of the traditional English constitution, of the King in Parliament, the same interpretation as found in the work of Montesquieu. Asserting the sovereignty of such a form of parliament thus implied asserting that the tradition on which it rested was an indispensable precondition for safeguarding the rights of individuals, in this case of English subjects. And above all, it implied opposing the new democratic trend, which was emerging in England as well through the new role of the parties, the electoral body and parliamentary majorities. Were this trend to prevail, Blackstone contended, the traditional balance of powers would ultimately be destroyed, in particular the separation between legislative and executive power, because the element that would become predominant would be a political authority, namely that of the majority and the prime minister. Such an authority would encompass within itself the prerogatives of both powers, from the power to enact laws, to that of governing, administering resources, choosing men and providing for the country's needs.

Therefore, almost towards the end of the eighteenth century, and on the brink of the revolutions, constitutionalism still remained firmly anchored to the models of constitutionalism of the origins, and in particular to the ideal of the moderate or temperate form of government. And what is even more remarkable is that this background still made itself felt although constitutionalism had by now freed itself from the old medieval framework of bodies and classes, and even though it had thus adopted an orientation tending towards the modern safeguarding of individual rights. It was by virtue of this background that constitutionalism, as clearly emerges from the work of Montesquieu and of Blackstone himself, operated not only against the overweening excesses of the traditional powers, such as the power of the monarch, but also against the new tendencies of a democratic leaning which, as in England, sought to found the government on the power of the majority, in its turn rooted in popular consensus. It was imperative for this tendency towards what Montesquieu called "extreme" equality to be countered by constitutionalism, in the name of the more ancient ideals of moderation and balance. At the beginning of the revolutions, constitutionalism and democracy were no allies.

### **7.3. Constitutionalism of Revolutions**

In actual fact, there was also an extreme equality even at the origins of the modern age. It was, however, extraneous to the developmental path of constitutionalism we have followed so far. It bore no relation to the images of the limitation of power and the balance of powers, which drew their origin from ancient and medieval times. On the contrary, it was founded on a clear-cut dividing line between all that world of yore, and a world regarded as entirely



new, where a multiplicity of powers was basically supplanted by a single fully sovereign power which by now found itself facing—at the opposite pole—nothing other than individuals abstractly considered, that is to say, radically equal to one other. This manner of interpreting the modern age contrasted so sharply with political and social reality that it necessarily had to be conceived in abstract terms, through the great artifice of the state of nature.

The true master in this operation was certainly Thomas Hobbes (1588–1679). His major work, *Leviathan*, was published in 1651, just after the dramatic events of 1649: the beheading of the king, the abolition of the House of Lords, the collapse of the traditional mixed constitution (cf. Hobbes 1991, chaps. 16, 17, 21, and 26). Hobbes re-read the history of that constitution in the opposite direction from those who had long extolled its virtues. Far from containing a plural and composite order profoundly embedded in the history of the kingdom, the old constitution harboured the germ of the dissolution of all orders, precisely as was taking place with the civil war. And that germ resided precisely in the mixed character of the constitution, which allowed scope for manoeuvres by factions, and made it impossible to reach a clear-cut decision in favour of the *Commonwealth*, the State.

Therefore it was necessary, he argued, to refound the political order, and with it the constitution as well. But in order to do so, it would hardly be wise to start out again from the concrete reality of political subjects, classes, cities, territories, for such subjects would certainly restore the logic based on entering into pacts, which Hobbes considered to be destructive. Instead, it was necessary to start out from the state of nature, and thus from individuals considered in an abstract sense, and therefore fully equal to one another. But equality, in the state of nature, is none other than the claim by each individual, and therefore by everyone, to be granted access to everything. Hence, it is once again a path that leads to civil war, loss of the very perspective of political order. Such individuals therefore have rationally chosen to relinquish the state of nature, and to recognize a sovereign, whom they have authorized to express a binding authority over them. From that moment on, through the great artifice of representation, they are no longer a multitude of individuals, but a set-up in which an order has finally been established, that is to say, a people. And they have also recovered a fragment of the original total equality, which now consists in the equal submission of all subjects to the same authority, the same sovereign power. The latter is far more than the main power that stands at the centre of the constitution, as it still was even for Bodin: Now, it is instead the necessary presupposition for the very existence of the constitution, because without recognition by the sovereign no political order would have taken shape, and therefore there would have been no attribution of rights to individuals, which means, in the last resort, no constitution.

Now, if we take constitutionalism to mean that which was outlined in the previous section, namely the quest for a certain balance among powers, and

also the exercise albeit moderate, of a certain right to resistance against the sovereign who has become a tyrant, then it has to be concluded that Hobbes has set us outside the confines of constitutionalism: In fact, for Hobbes the balance of powers is none other than the condition of a political and social system that is incapable of making decisions, and is therefore doomed to dissolution, while the right to resistance is none other than sedition, the attempt by a particular will to attack the sovereign, whereas the latter has come to represent generality and thus the hope of order and of peaceful enjoyment of rights.

But looking at the question from a different perspective, it can also be seen that Hobbes leads us to the origin of another form of constitutionalism, which was destined to exert considerable influence over at least one of the two late eighteenth century revolutions, the French revolution. It was a version of constitutionalism that was unknown to the centuries prior to the seventeenth century, and which started out from the assertion of the equality of individuals in the state of nature. Eventually, following a strand of thought already present in Hobbes, this led to the assertion of the equal submission of such individuals to one and the same sovereign. With this approach, constitutionalism was interested not so much in balances and limits as in coherence with the will of the sovereign. Thus the task of constitutionalism became almost exclusively that of preserving the "general" character of the sovereign's will, in such a manner that no particular will would be awarded priority, and that the rights of all subjects and of each individual would be guaranteed within the constitution on a plane of perfect equality.

It is by interesting to re-read in this light the 1789 Declaration of Rights that inaugurated the French revolution. For it contains statements on the form of equality that derives from the natural foundation of rights, seen as a birth-right, but also, and perhaps above all, on the equality that derives from the force of the law, in the sense that all individuals are equally subject to the same law taken as the expression of the principle of sovereignty, which in the framework of the revolution now becomes the sovereignty of the nation. The very rights of individuals, asserted earlier in the Declaration as pre-existing and thus prior to the political authority, then become possible and concrete only insofar as the law provides for such rights. Indeed, the law, precisely by virtue of being the "general will," assumes characters of such force and authority as to render it difficult to contest on the legal plane. The point is that a will different from that of the law-maker, capable of opposing law-maker's own will, would, as Hobbes himself anticipated, create a system which would by no means be more balanced and capable of ensuring a more effective guarantee of rights. On the contrary, it would lead to intolerable confusion with regard to the attribution of sovereign powers.

But there is still a link missing in the argument that leads up to the revolution. If the mission of the law is to usher in the principle of equality, and if

this can be achieved through the “general” character of the law, how can one guarantee that the law-maker will not bow to the pressure of particular and personal wills? How can the “general” character be maintained over time? In a word, there arose a perception that it was necessary for the law-maker to be continually called upon to implement his mission, which was precisely that of generating equality. And the subject who issued this summons to the law-maker could not be other than the very entity which had in fact instituted the law-maker, that is to say, the sovereign people. This was the perspective that emerged most strikingly from the *Social Contract* outlined by Jean-Jacques Rousseau (1712–1778), published in April 1762 (cf. Rousseau 1973, I, chaps. 6, 7, and 8; II, chaps. 1, 2, 4, and 7; III, chaps. 1, 10, 13, and 15).

This, in a nutshell, is the democratic principle, which is totally absent in Hobbes’ reconstruction, where the “people,” completely identified with the sovereign, could in no way express an independent will of its own. On the plane of constitutional doctrine, Rousseau was certainly following in the footsteps of Hobbes, in the sense that both authors believed that the guarantee of rights should not be entrusted to the balance of powers but rather to the force of the general and abstract law. But Rousseau introduced a new element, namely that of mistrust of governing figures, and thus the fear that the law itself might once again be undermined by the corrosive force of particular wills. For this reason, it was necessary for the sovereign people to remain alert, and the people should permanently retain the power to review the terms and conditions of the constitutional pact, including the power to enact laws, a power which had been only partially delegated but certainly not surrendered. If faced with a power manifestly under the influence of particular interests, the people could and had the duty to reclaim direct exercise of the legislative function, in order to restore the reign of the general will. And when the sovereign people operated in this perspective, nothing could oppose its will. No “fundamental law,” no “constitution,” could be set in opposition to the sovereign people and the people’s intention to express the general will.

Constitutionalism of revolutions, starting from the natural law paradigm of equality among individuals, thus based its arguments not only on the dominion of general and abstract law, but also, in the Rousseauvian version, on an inexhaustible power of the people to enact laws and to take control of the constitution. The whole of the French revolution wrestled with these issues. On the one hand, attempts would be made to impose a strong political representation, with the related prohibition against the imperative mandate, considering every law demanded by the representatives of the nation to be an expression of the “general will.” But on the other hand, the revolutionary approach would fairly frequently be inclined to be concerned that the “general will” might itself begin to deteriorate as a result of strong representation, and that the people could run the risk of losing its original sovereignty, as was feared during the Jacobin tendency, which owed much of its outlook to the

model present in Rousseau. Consequently the revolution long oscillated between representative democracy and direct democracy, i.e., two trends that were opposed to each other but which shared an aversion to constitutionalism of the origins. In fact, neither the sovereign assembly of the representatives nor the sovereign people of Rousseau looked favourably on the concept of the counterbalancing force of other powers, or limitation by a fundamental law, a constitution. Hence the difficulty, within this model, of introducing any form of judicial review of the constitutionality of the law, or of achieving a stable balance among powers.

However, what we have outlined so far certainly does not make up the whole story of constitutionalism of revolutions. Even the French revolution moved within a broader and more complex range of issues than those identified so far. And alongside the French revolution, the American revolution, which drew on at least partly different streams of thought, must also be taken into consideration. That is to say, one should not make the mistake of tracing all forms of the constitutionalism of revolutions to the line which started out from Hobbes and from his radically oriented interpretation of the modern principle of equality, and which eventually led to Rousseau and the power of the sovereign people. For in actual fact, even at the origin of the aforesaid version of constitutionalism there existed different accounts of the principle of equality itself, which were significant in that they interpreted the principle in a less radical manner, although still within the modern paradigm of individual rights.

Here the fundamental work by John Locke (1632–1704) comes into play, especially his *Two Treatises of Government*, written during the 1680s and published in 1690 (Locke 1992). Like Hobbes, Locke based his arguments on the state of nature. But he had a notably different concept of the state of nature, which led to specific consequences for the constitutional model. Locke's state of nature was not a state of conflict resulting from the tendency of all individuals, acting on a plane of perfect equality, to engage in illimitable appropriation of goods. Rather, it was a condition in which each individual is already reasonably capable of recognizing another person's *property*, thereby limiting his own claims. The first step towards the construction of a social order is thus already accomplished within the state of nature. The political authority, which is instituted by the social contract, thus does not emerge as a means of establishing an order that would otherwise be non-existent, as was the case in Hobbes, but it aims instead to bring to perfection an order that exists prior to the political authority, and which already contains, at least in embryonic form, the properties and rights of individuals (*ibid.*, II, chap. IV, sec. 22; II, chap. VII, secs. 89–91). Herein lies the root of the other side of constitutionalism of revolutions, and of the French revolution itself, i.e., of the very revolution which proclaimed, in the second article of the 1789 Declaration, that precisely the "conservation" of natural rights was the true "end" of "political association."

But what exactly is meant by the perfecting of the state of nature? Locke gives an explanation in almost minute detail: presence of a law that represents the common measure of right and wrong in controversies among individuals, an unwavering and impartial judge in whom trust can always be placed for prompt enforcement of the law, and a further power, the executive power, which contains incontestably within itself the force necessary to ensure that sentences are carried out. As can clearly be seen, the political authority, which springs from the social contract, essentially has the task of achieving a peaceful resolution of controversies among individuals, and of maintaining and guaranteeing the security of their possessions, the exercise of their rights (*ibid.*, II, chap. IX, sec. 124).

Thus the legislative power, although proclaimed “supreme” by Locke himself, is *per se* limited, precisely because it did not arise for the specific purpose of generating rights, but merely as an end that would itself fulfil another end, namely that of bringing to perfection the safeguarding of rights, while presupposing their substantial pre-existence. In effect, the legislative power cannot arbitrarily dispose of the lives and possessions of individuals; neither can it deprive a man of part of his property without his consent, nor operate by means of arbitrary actions: Rather, it must enact definite and certain laws, and appoint equally dependable and recognized judges (*ibid.*, II, chap. XI, secs. 134–42).

Finally, from the point of view of the history of constitutionalism, the other great difference as compared to Hobbes resides in the fact that Locke by no means rejected the previous constitutionalist tradition. Instead he revitalized the great idea, which would later be further taken up again by Montesquieu, that the best form of government was the moderate and balanced version, opposed to all forms of despotism, all forms of absolute power, whether stemming from a king or an assembly. Thus the work of Locke, building on the earlier tradition, marked the first step towards the separation of powers, which was essentially interpreted as a prohibition against merging in a single subject the power to enact laws and the power to govern, administer resources, choose men, and provide for the needs of the collective community. Whoever is empowered to make laws cannot choose the men who will be entrusted with implementing them, and vice-versa; whoever has the responsibility for performing that choice, and also administers the resources, cannot at the same time be the law-maker. When a subject, whether king or assembly, seeks to combine the two powers, the legislative and executive power, then the spectre of despotic power may rear its ugly head. In a word, the constitution is thereby jeopardized, and with it the rights of individuals (*ibid.*, II, chap. XI, sec. 138; and II, chap. XIV).

As is known, this is a case Locke explicitly contemplated, portraying it as the dissolution of *government* resulting from overweening powers, which disrupts balance and ultimately ends up putting the rights of individuals at risk.

In such a situation, the people as a whole has no other option than the well-known “appeal to the heavens,” which in concrete terms is none other than directly reclaiming for itself the supreme power of establishing the form of the political system, in order to set up a new form that can once more act as a balanced guarantee of rights. However, this “appeal” has nothing to do with constituent power in the sense of the French revolution, or with the sovereignty of the people in the manner of Rousseau. For it cannot be represented as an act of the will embodying free determination of the form of government. On the contrary, in such a situation the people cannot do other than restore the form of government from which the previous system had deviated. Its historical mission is predetermined, because it can seek none other than a moderate and balanced form of government, moving towards ever greater perfection, less and less exposed to the temptation of the overweening exercise of powers, and ever more effective in the guarantee of rights (ibid., II, chap. XIII, sec. 149; II, chap. XIV, sec. 168; and II, chap. XIX).

Concrete identification of a form of government complying with such a mission is quite another matter. Obviously, there is a reference to the traditional English form of government, with its duality of *iurisdictio* and *gubernaculum*, although Locke, with his doctrine of individual rights, certainly was not content to rest at that particular historical type of constitutionalism. But this point would not be clearly elucidated until the following century, when the constitutionalist perspective inaugurated by Locke underwent further development in contact with enlightenment philosophy. Exemplary in this sense is the work of Immanuel Kant (1724–1804), a philosopher *par excellence*, but also a thinker capable of offering a highly significant contribution to the history of constitutional doctrine. By the time of Kant, the era of revolution was well under way, but Kantian constitutionalism presupposes Locke’s doctrines of natural rights and of the form of government, just as the Rousseauvian “general will,” which was likewise an essential component of the revolution, presupposed the principle of sovereignty that had been inaugurated earlier by Hobbes.

With a series of essays written and published between 1793 and 1797, Kant laid out the path of the *republican constitution*, which he believed to be the constitution of the future (Kant 1970a and 1970b; Kant 1922). Conformity to this type of constitution would become an intrinsic requirement for governments, through a process of constant and gradual reform. The republican constitution was above all a set of principles, which Kant sets out with consummate clarity. The first is the principle of freedom, which consists in the free pursuit of happiness by all individuals, as long as their pursuit does not enter into conflict with the equal freedom of others. Fully in line with the approach found in the celebrated fourth article of the 1789 Declaration of rights, Kant believed that the limit on exercise of the rights of freedom can be set only by the law, and can never be designed to prescribe an orientation or a goal that individuals themselves should strive to achieve. Rather, it should ex-



clusively have the aim of guaranteeing the same freedom to all individuals, almost with the function of a mere arbitrator among the free spheres of individuals. Thus in Kant one finds a point of arrival, a response, with regard to the quest that had been initiated by Lockean natural law: the need to identify a reliable and certain law, which can offer a stable guarantee of rights but without incorporating such rights in the law itself, thus constantly maintaining the awareness that rights themselves are pre-existent with respect to the law.

The same can be said of the second principle of Kant's republican constitution, i.e., of the principle of equality. Here too it is an equality that must be understood as equal submission of all individuals to the same law, but its meaning does not correspond to that found in Hobbes and Rousseau. In Kant there is no apology of the "general will," and his work only partially recalls the Hobbesian background according to which a disastrous return to the state of nature would ensue, were the force of the law to be in abeyance. The force of the law is indeed vigorously asserted, to the point that individuals have an almost absolute duty to obey the law, all legitimate right of resistance being excluded. Yet in the end what truly legitimates the force of the law is its function, which is that of guaranteeing to individuals that authorities different from the law, or any authority aiming to order, coerce, prevent, or prohibit men's actions for reasons of class, rank, or place, as was the case in societies of the ancient regime, will no longer be tolerated. Thus the law is an expression of the principle of sovereignty, but only insofar as it fulfils its historical mission, which is that of being an essential tool for the guarantee of rights.

Even more clear-cut is the difference with regard to the third principle stated by Kant, which is set on the plane of the form of government (*forma regiminis*). In the republican constitution, the form of government must be founded on the principle of separation of powers, starting from the separation between legislative and executive power, as noted earlier in Locke. Any form of State (*forma imperii*), whether monarchic, aristocratic or democratic, can take on despotic traits if it expresses within itself a sort of "supreme power," which combines the power of making laws with the power of government. In fact, in many respects Kant displays a conviction that within the democratic form there actually abides something that leads inexorably towards a despotic outcome. Thus in considering the French revolution, Kant necessarily held a twofold attitude. On one side, the revolution was an essential tool for achievement of the principles of freedom and equality that he himself fully endorsed. But on the other, that very revolution, especially during its Jacobin phase, exhibited precisely the case of a democracy that was incapable of endowing itself with a balanced constitution, and which thus generated despotism, by concentrating all powers, both legislative and governmental, in the assembly of representatives or of the sovereign people.

Here Kant takes up again the themes that had also been addressed earlier by Montesquieu. And building on the thought of Montesquieu, Kant firmly



maintained the opposition that set constitutionalism against despotism, even in cases when despotism springs from within the democratic political form on account of a radically-oriented interpretation of the principle of equality. He did not fail to note that in certain phases of the French revolution, once this principle had been legitimated through the effect of universal suffrage it had led to an absolute dominion of the representatives and mandataries of the sovereign people. This sheds light on the motivation that prompted Kant to argue in favour of a non universal vote, reserved to those who enjoy a measure of civic independence inasmuch as they are the holders of some form of property, since this substantially ensures that they are their own masters and are therefore capable of freely expressing their suffrage on the political plane. In Kant's approach, and in his constitutionalism, beyond these boundaries there lay an "extreme" equality that contradicted the principles of the republican constitution, and was doomed sooner or later to generate despotism, as the revolution itself revealed. But within these boundaries stood the higher reasonableness and moderation of property-owning individuals, who according to the Lockean frame of analysis had already shown themselves capable, even in the state of nature, of the fundamental act of recognition of *property*. These individuals were now explicitly entrusted with the construction of a political form that would be both moderate and balanced, in equal degrees, and would provide a bulwark against despotism.

Overall, then, the age of revolutions was characterized by a constitutionalism of the "general will," springing from the original Hobbesian background. This version of constitutionalism tended to entrust realization of the constitutional principles, and in particular the fundamental principle of equality, to strongly legitimated sovereign powers. Such powers can and must be endowed with all the authority necessary to impose the force of the law; however, the possibility that authority may assume the guise, as in the Rousseauvian vision, of direct and permanent exercise of popular sovereignty cannot be ruled out. But there was also a form of constitutionalism stemming from the Lockean background, which was far more moderate in its assertion of the principle of equality, above all with regard to the claim that equality should be extended from the civil field to that of the political set-up. In this framework of Lockean inspiration, the primary aspect was an aversion to all types of despotism, including despotism generated by the democratic principle and by the excess arising from the radical approach.

The constitutionalism of the French revolution grew out of a blend of these two forms of constitutionalism, but was nevertheless characterized by a preponderance of the first aspect, with a more marked tendency to entrust the assertion and guarantee of rights to the force of the law. This accorded with the powerful myth of general and abstract law, whether it be the law demanded by the assembly of the representatives of the people or of the nation, or alternatively the law that the people taken as a whole can claim for itself, by

demanding direct and permanent exercise of its own inalienable sovereignty. In this perspective, an emblematic figure of the French revolution is certainly that of Emmanuel-Joseph Sieyès (1748–1836), in whom all the above elements can be traced, inextricably intertwined. In Sieyès one finds the assertion of an original and insuppressible sovereignty of the nation, but also the value of political representation as the necessary starting point for the formation of the general will; additionally, his work also features a justification of non universal suffrage and, later, the search for tools to ensure guarantees as well as the limitation of established powers.

If one now turns to an examination of the other great revolution, namely the American revolution, it can immediately be noted that its constitutionalism was from the very start structured in a rather different manner. For the American revolution, unlike the French revolution, was not ushered in as a means to demolish a previous ancient regime with the force of the law, but on the contrary it aimed to limit the scope of a law—in concrete terms that of the English parliament—which was regarded as having overstepped the boundaries of its powers of action. The difference can be synthesized as follows: The French revolution arose to set up a new power, the American revolution to limit an existing power. This is an elementary fact: In absolute terms it marked the starting point, but it would eventually change the perspective forever.

Even the constituent power, which the Americans did exercise prior to detaching their country from the motherland and founding the federal State, had a different meaning compared to its interpretation in the French revolution. Certainly, it expressed the will of a subject, which was indeed the people, or the nation, albeit not in the sense of an inexhaustible sovereign power which in the Rousseauvian model could continually propose itself anew or could eventually merge with the “general will” expressed by the legislative assembly. Instead, it took on the sense of a power distinct from the ordinary legislative power, and it operated to the exclusive end of determining a supreme norm, set above the ordinary norm and therefore capable of limiting it. In a word, the American revolution, in contrast to the French revolution, forged a close link between constituent power and constitutional supremacy, and then bound the latter—thereby establishing an equally close bond—to the ideal of limited government.

This succession, namely constituent power—constitutional supremacy—limited government, can be found in the celebrated pages of the *Federalist*, written and published in 1788 with the aim of supporting the cause of ratification of the Federal Constitution. Its proponents were first and foremost Alexander Hamilton (1755–1804) and James Madison (1751–1836) (Hamilton, Madison, and Jay 2003). Hamilton, in particular, believed it was vital to create a strong federal national government, and he had no qualms in buttressing his arguments by appealing to the figure of the constituent power of the American people. But that figure was built up on a basic distinction that was formu-

lated by Madison, namely the distinction between a democratic and a republican regime. The latter was the type of regime the Americans were seeking to introduce, and it was also the regime favoured by Madison himself. In the new American situation, the republican regime already contained within itself the necessary option oriented in a democratic sense, because it was expressed in a constitution that was explicitly founded on the constituent power of the American people. But what the republican regime challenged, in the line of a tradition inaugurated in the modern age by Machiavelli on the basis of classical models, was the claim that the democratic system could assert its power unilaterally in disregard of the republican constitution, thereby giving rise to monistic governments, i.e., governments that tended to concentrate the principle of sovereignty in a single power, which, in this framework, could not be other than the legislative power, the power of the representatives or mandataries of the sovereign people (ibid., n. 22 and n. 10).

Accordingly, the *Federalist* argued in favour of a republican constitution that would be democratic insofar as its foundation was concerned, and moderate and balanced with regard to the structuring of the powers provided for by the constitution itself. This line diverged from the characteristics of a purely democratic constitution, and can help to explain some of the choices made by the American constituent figures: two houses, the presidential power of veto, the requirement of consensus by the Senate for the exercise of certain presidential powers. These decisions did not imply a deviation from the principle of the separation of powers, or the “interference” of one power in the affairs of the other, but were more specifically the search for a *balance of powers*, to be obtained precisely through the reciprocal influence of one power over the other, in such a manner as to ensure that all the powers were equally limited by the constitution, and that the overall result would be that of limited government (ibid., n. 47, 48, 51, and 63).

But a further point should be taken into consideration. It is clear that according to the American makers of the constitution there was indeed one power which should be feared above all others, namely the legislative power, for the very reason that the legislative power embodied the most significant prerogatives: that of making laws, and that of levying taxes. Therefore it was felt that the republican constitution should award priority to countering this legislative force, which could reveal a tendency towards absorbing the other two powers, the executive and the judiciary. The republican constitution should therefore continually alert the legislative power to the fact that the latter is not *the* power in which the people itself achieves expression, but merely *one* of the powers the people has set up by means of its constitution, and that the legislative power enjoys equal dignity with the other powers and is equally limited by the constitution itself (ibid., n. 71).

This was also the basis on which Hamilton, again in *Federalist*, argued for the power of judges to declare null and void any acts by the legislator held to

be contrary to the constitution. On closer inspection, this was a choice that followed almost inescapably from the approach embodied in the republican constitution, as it was designed to ensure that the law-makers would not, over time, end up mistaking their will with that of the fundamental law. Thus if judges declare a law that is contrary to the constitution to be null and void, they are by no means asserting their superiority over the legislative power: Rather, they are themselves instruments of the constitution, and they are expedient to the constitution inasmuch as they reassert the superiority of the fundamental law over ordinary laws, and the superiority of the original power of the sovereign people over the derivative power of the law-maker. In the last analysis, ensuring that actions conform to the constitution is indispensable in a republican constitution, not only as a protection of the rights of individuals and minorities, but also in order to prevent what is regarded as the strongest power, i.e., the legislative power, from aspiring to cover the entire space of the constitution, identifying itself with its prime foundation, the people itself (*ibid.*, n. 78).

Let us now take an overall view of the American revolution, seeking to set it within the history of constitutionalism. Seen in this general perspective, it can be represented as an original attempt to combine the European constitutionalist tradition with the novelty of popular sovereignty. The Americans considered the Europeans, and in particular the English, to be guilty of a veritable betrayal of that venerable European tradition, claiming they had strayed from the fundamental principle of the balance of powers and had moved towards forms that could hardly be defined otherwise than as parliamentary absolutism. In particular, in the American view the most recent phase of English constitutional history clearly revealed that in the absence of a written constitution solidly founded on the constituent power of the sovereign people, which would unequivocally set out the limits and scope of each power, constitutionalism had ended up translating into the mere search for balance within a parliament that was by now openly declared to be sovereign by the English themselves. In a nutshell, constitutionalism without democracy produced parliamentary absolutism. Thus in order to combat this form of absolutism, it was necessary, according to the founders of the American constitution, to combine the historical principle of the balance of powers with the great innovation of popular sovereignty, forging a bond between that which was “ancient,” in the sense of prior to English parliamentary absolutism, and that which was absolutely contemporary.

The two aspects came together in the ideal of the supremacy of the constitution, which on the one hand was functional to establishing the ancient balance of powers, but on the other would not even have existed with the concurrent sovereignty of the people. Against the parliamentary absolutism of the English, the supremacy of the constitution restored that which was ancient, but in the name of that which was absolutely new. And it likewise carried for-

ward the choice in favour of *limited government*, above all to counter the dreaded concentration of powers in the assembly of the representatives of the sovereign people. The democratic principle established the foundation of the constitution, which in turn established the foundation and limitation of all powers, including the legislative power. Therefore, there could be no *democracy without constitutionalism*, i.e., without a stable and shared framework of powers delimited by the constitution. Any democracy that sought to grow and develop outside of the framework of the constitution would end up once again assuming the form of an omnipotent power, and even though this might come about under the seductive guise of the sovereignty of the people, it would nevertheless be a form of omnipotence, and as such it should be combated, in the name of the principles of the supremacy of the constitution and of limited government.

#### 7.4. Constitutionalism of the Liberal Age

There is one point we have deliberately neglected so far in outlining constitutionalism of revolutions. This concerns the well-known problem of revision of the constitution, which effectively implies the power of the sovereign people that set up the constitution to proceed to its reform. Even the founders of the American constitution long wavered on this issue, uncertain between two apparently conflicting requirements: on the one hand, the desire not to subject the free will of the sovereign people to constraints, but on the other, the importance of not exposing the constitution—proclaimed as supreme—to a process of constant change that could be affected by purely momentary circumstances. That is to say, a “norm” that could be altered at any moment might seem anything but “supreme.” The same question posed even greater problems in the French revolution, on account of the presence of the Jacobin component, which claimed even more explicitly that the sovereign people was empowered to change its constitution at any time.

In addressing constitutionalism of the liberal age, there is a very specific motive for starting out from the question of revision of the constitution. The liberal age began to take shape in the wake of uncompromising criticism of the revolution, and this had repercussions on constitutional history as well. For if the revolution were conceived as a “factory” that manufactured constitutions, as an incessant constituent process producing one constitution after another, then it would paradoxically end up by demolishing none other than the “constitution” itself, reducing it to little more than the political solution of a given moment that would be valid only so long as that particular political balance from which it had sprung remained in effect.

An emblematic case of this state of affairs is offered by article 28 of the Jacobin declaration of rights, dating from 1793: “A people always has the right to review, reform, change its own constitution.” The term “always” in

this text signifies “at any moment,” thereby threatening to reduce the constitution to a mere expression of the—potentially fickle—will of the people. Now, the political and constitutional universe of the liberal age was designed to erect an edifice against this manner of interpreting the relation between sovereignty and constitution. It was a universe in which there prevailed the desire to bring the age of revolutions to an end, to open up an age of gradual progress, certainty of property and stability of political and institutional solutions.

A fundamental role in the opposition between the radical and voluntaristic aspects of the revolution was played by the traditional English constitutional model, indicated as the key element underpinning constitutionalism. This approach took its cue from the fundamental essay by Edmund Burke (1729–1797), *Reflections on the Revolution in France*, dating from 1790, and embarked on a new route by starting out from the significance of the concept of revolution (Burke 1989). While in France the revolution had been interpreted as the place wherein it became possible to create a constitution in the total absence of any previous pattern, in England quite the opposite stance had been embraced: A century earlier, at the time of the *Glorious Revolution*, the revolution had been carried out to preserve the *ancient constitution*, seen as the bulwark that upheld the rights and freedoms of the English.

This different approach to the constitution was paralleled by a different attitude to the constitution. In Burke and in the English model he championed, the constitution was the fruit of a commitment, or even a veritable contract among individuals, but in the sense of progressive consolidation of a balance among social interests rather than in the sense of an ideologically inspired project to be represented in a constituent assembly. The idea of consolidating the balance among interests was profoundly rooted in the history of the English political community, and was thus capable of safeguarding and concretely guaranteeing freedoms. In contrast, the constituent project of the French revolution involved an abstract proclamation of the rights of man, but it allowed those freedoms, and their guarantees, to slide into the field of political conflict, where they tended to become embroiled in the tumultuous succession of different majorities, each of which was theoretically perfectly capable of generating its own constitution (ibid., 71 and 81).

Accordingly, Burke criticized the French revolution on the plane of the constitution and the guarantee of rights. He regarded the French constituent assembly as amounting to a new form of despotism, in that it embodied the claim to illimitable power of establishing the framework of norms, extending over the entire space of civil relations. In opposition to this conception, Burke once again evoked the positive value of the English constitutional system, in which the legislative authority, although proclaimed as supreme, had always been characterized by the limit of the *security* and *property* of its those governed within the system, and had always refrained from invading the sphere



of civil relations in which the domain of experience had always furnished concrete solutions through free, reasoned and progressive settlement of the multiple interests that positively come into play within the space of society (ibid., 201ff.).

Thus the English constitutional model, through Burke, set itself the task of representing not only the overwhelmingly preferable model for the guarantee of rights, but also the model that provided the strongest safeguard for the value and stability of political obligation. Burke regarded this model as linked to the well-known ideal of a constitutional monarchy, in other words of a monarchy set within a balanced form of government, in which parliament and the judiciary both also played a role in decision-making. It was a model that had been achieved in England over time through a continual process of constitutional reform, which France had been unable to accomplish. On the contrary, France had allowed itself to plunge into the whirl of the revolution precisely on account of this inability to construct the path towards reform. France had thus ended up passing from one absolutism to another, from that of the monarch to that of the constituent assembly (ibid., 146ff. and 173ff.).

Burke's critique was particularly severe, although it by no means represented the entire liberal body of opinion. However, it did respond to a widespread and deeply felt need for stability and for the construction of moderate political and constitutional solutions, which would above all be limited as regards any claim to express the principle of sovereignty and to have more or less boundless power of establishing the rules.

Even in the land of revolution, i.e., in France itself, the beginning of the nineteenth century saw the first steps towards a similarly felt need for limited sovereignty. An exemplary figure of this new awareness is that of Benjamin Constant (1767–1830), who as early as the closing decades of the previous century led the way towards a rethinking of the revolution, reasserting its principles but criticizing it on the plane of the form of government and the institutional solutions. In his major work, *Principes de politique*, dated 1815, Constant put forward the prospect of limited sovereignty, starting out from a comprehensive re-elaboration of the concept of popular sovereignty (Constant 1957, 1063ff.). Such a concept was still admissible, but only as the foundation of the supremacy of the law over particular wills, and thus as a formula which could justify the primacy of general and abstract law that constituted the essential guarantee against privilege and unfair discrimination. But when the people oversteps this function and begins to act as an independent sovereign political subject potentially capable of constantly re-writing the rules of the system, then there is a need to reassert and make clear to the people itself the principle which holds that all sovereignty is limited, first and foremost by individual rights. For Constant such rights were embodied by individual freedom, freedom of opinion, free enjoyment of property, indeed the very guarantee against arbitrary power (ibid., 1069ff.).



At this point, a concrete question arises. If Constant viewed this as nothing short of “constitutional subject-matter,” and if his principles, such as the principle of equality, were genuine constitutional principles, can all this be set in opposition to the law-maker himself? Does this not open up a route towards actually checking whether laws conform to the constitution? The answer is negative, for a basic reason that concerns Constant’s constitutional culture and, more generally, the era in which he was writing. Constant certainly regarded the constitution as the supreme norm, but in his view this norm has an essentially political nature, since it is precisely in the constitution that the great pact between the monarchy and the nation is expressed. Thus all things, including the guarantee of rights, depend on the stability of this pact. Accordingly, liberals such as Constant devoted themselves first and foremost to perfecting the political machine and the form of government, and addressed relations between the legislative and the executive plane, seeking to devise institutional mechanisms capable of averting and preventing constitutional conflicts. A celebrated aspect in this regard is Constant’s quest for a neutral mediating power, which after 1814 was entrusted to the king himself. For this group of liberals the constitution was in effect the supreme norm that guaranteed all these balances and consequently also guaranteed a just and reasonable law, on which the guarantee of rights then depended. To be sure, these liberals did increasingly associate the constitution with rights and freedoms, but with a focus on the political programme; moreover, they were concerned with promoting greater maturity of society and public opinion rather than directing attention simply to the normative plane, and they placed relatively little emphasis on the idea that the constitution could be adduced as a guaranteeing norm that would act in the name of violated rights and could therefore be set in opposition to the law itself (*ibid.*, 1077ff.).

Yet on the other side of the Atlantic, in the United States, the practice of checking constitutionality was by now well established. This became clear to a young French magistrate, Alexis de Tocqueville (1805–1859), who upon his return from a period of study in the United States composed *Democratie en Amérique*, which was published in two volumes between 1835 and 1840. In this work he pointed specifically to the concept of *judicial review*, the widespread test of constitutionality, as one of the salient features of the young American democracy. But it was not a question of proposing such a system for Europe and for France: Rather, Tocqueville sought to show that an extensive development of the democratic system by no means necessarily overturned the traditional approach based on counterbalances. Therefore the underlying rationale could indeed be put forward for Europe as well, with regard to elective assemblies conceived as an expression of the democratic principle. Tocqueville never indicated the concrete mechanisms through which laws should be tested for their conformity to the constitution. But his work remains fundamental in signalling awareness of the threat of despotism that

seems to spring from the evolution of the democratic principle itself, with its irresistible tendency to concentrate powers and to set up ever more far-reaching bureaucracies alongside the elective assemblies, allowing the bureaucratic mechanisms to operate in minute detail on the entire social space and thus to exert their effect on individuals who are more and more isolated and enclosed within their own private sphere, increasingly deprived of any responsibility (Tocqueville 1951).

Faced with a political regime of this kind, constitutionalism was thus once again felt as a profound need, above all in the name of pluralism and of a structured vision of society, especially in a society evolving according to pathways of its own and enlivened by a renewed spirit of associationism. In this framework, Tocqueville gradually moved towards a critique of the French revolution itself, which in his view had taken up again and indeed completed the earlier action of levelling wrought by the monarchy: Certainly, this had been done with the intent of demolishing privilege, but it had ultimately led to an excessively simplified society, peopled only by individuals abstractly considered to be equal to one another and wanting in solid and independent fabric (Tocqueville 2004).

Tocqueville's constitutionalism and liberalism were subsequently confronted with socialism, which Tocqueville condemned, adducing the same motivation, namely that socialism was but a tool for forcible reduction of the plurality and complexity of society. His 1848 statement against the new Constitution which sanctioned not only universal suffrage, but above all the right to work, offers a celebrated example of his thought (Tocqueville 1990, 3). According to Tocqueville, in order to guarantee this right the final step had been taken on the hateful road of centralization and standardization of all things in a uniform pattern; moreover, this had turned the State into the largest, and perhaps the only, organizer of labour, thereby once again shackling the independent and resourceful energies of society. Thus here too constitutionalism displayed its most deep-rooted tendency, which had long prompted it to combat whatever tended to act as the "sole power," countering the sole power with the need for the limit, balance and plurality.

Constitutionalism thereby confirmed its difficult and problematic relation with democracy, especially when democracy advocates the principle of the greatest possible extension of rights, not just civil rights, but also political and social rights. This notwithstanding, constitutionalism remained within the context of revolution and the principle of equality, but it espoused moderate solutions that would allow for the possibility of social reform, and would encourage a gradual evolution of political rights as well as maintenance of a fairly extensive role of the monarchy. The constitutional Charters of the nineteenth century therefore pursued the goal of promoting the guarantee of rights but also the conservation, within this moderate line, of social and institutional balance, in particular with the respective monarchies.

This held true not only for countries such as Germany that had not undergone the revolutionary upheaval, but also for other countries such as Spain, whose constitutional Charter resulted instead from an explicit constituent power acting as a revolutionary impulse, as was the case in Cadiz in 1812. For in Spain as well, the predominant political and constitutional culture forestalled any unreserved endorsement of the individualistic and contractualistic model of the revolution. Thus in Spain a full-blown declaration of rights on the model of the revolutionary declarations was likewise set aside, and the rights of individuals gained recognition only by virtue of the fact that they belonged historically to the nation, which in the case of Spain was a catholic nation, and a monarchic nation as well, although such rights were now spelled out within a Charter that drastically limited the powers of the monarchy.

Turning now to Europe as a whole, it can be seen that nineteenth century constitutionalism repeatedly endeavoured, in various ways and proposing different solutions, to devise a “third path” that would steer a course between conservative historicism and revolutionary rationalism. The former could not be wholeheartedly embraced because nineteenth century constitutionalism did not wish to relinquish the principles of the revolution, but neither could revolutionary rationalism could be endorsed unreservedly because this would have led to the risk of unlimited extension of the revolutionary principles, above all the principle of equality. The “nation” of the liberal age thus had an intrinsically dual character: It was a nation of individuals, deriving from the revolution, yet it was also a nation in the historical sense and as such it imposed constraints and limits and called for prudence and balance, especially with regard to the monarchy, which was the main historical institution.

As is known, this second aspect assumed particular significance in Germany, where the monarchic principle retained its central role for a more prolonged period of time than was the case elsewhere. In effect, considerable attention began to focus on the monarchy as offering a strong response to the widely felt need to single out and consolidate a stable core of the post-revolutionary political experience, on the assumption that it could act as the expression of a sovereignty no longer swayed by the corrosive force of political struggle. Taken in this sense, sovereignty would succeed in rising above the direct influence of particular interests, and would, equally, be beyond the influence of the unlimited and permanent sovereignty of the people. Thus a nation would have a genuine constitution of its own once its Charter succeeded in providing an unswerving and stable statement of its principle of political unity, which cannot but be represented in the sovereign State: Therefore the constitution is a *statal* constitution, the constitution of the nation State.

This turning point, then, originated from Germany, and its greatest interpreter was certainly Georg Wilhelm Friedrich Hegel (1770–1831). As early as his very first political work, devoted to *The Constitution of Germany*, Hegel lamented that the Germans adopted the term “constitution” to refer to that which

was effectively the result of a series of contracts, pacts and acts of arbitration which had been achieved mainly through practice, and had often been ratified on the formal plane only through sentences issued by the courts. In other words, the Germans maintained a conception of the constitution that could be described as historically derived, in which private and public law were not kept clearly distinct and sometimes tended to merge, even in the exercise of important public functions such as the administration of justice and taxation, which in many cases still depended on contractual acts, in the sphere of private law. Thus what the Germans called “constitution” was actually the very element which prevented them from becoming a nation that would be politically capable of expressing itself in a sovereign State. Germany had a juridical constitution, but did not exist politically, because it lacked a statal constitution (Hegel 1923).

This may help to shed light on the reason why it was felt necessary for Germany to support the effort of the territorial Landgraves in Germany that were directed towards extending the sphere of authority of government officials at the expense of the self-government of the cities and the privileges of the noble families. It was also felt necessary to oppose all those who supported the “good law of ancient times” (*das alte gute Recht*), which in actual fact was the form of law that objectively stood in the way of the creation of a German State (Hegel 1990b). In the end, what this constitutional culture truly desired was the reassertion of the sovereign State, which could not be reduced to a mere contract among distinct parties or groups, since in the contractual framework the contract could always be rescinded.

In Hegel’s reconstruction, the force of the sovereign State was expressed in a multiplicity of directions: to bring ancient privileges back into the fold of unity, but also to dominate the new private interests; in no case could the State be conceived as a mere tool for the composition of social interests; or to impose discipline on the people, thus divesting the people of its quality of original sovereign subject, and on the people’s representatives, who are entrusted with the task of reinforcing the “sense of the State” in society, and even on the monarch himself, who expresses the general interest of the State at the highest level but who is ultimately likewise contained, together with his prerogatives, within the constitution<sup>4</sup>.

The message of the sovereign State was received in different ways, even within Germany itself. To some extent, above all in Prussia, there was a thrust towards eulogizing the role of the monarch, the bureaucracy, and the army, and this tendency eventually exceeded the confines of constitutionalism, thereby reducing the constitution—but equally, the representative assemblies themselves—to a decidedly accessory role. But in another sense, the sover-

<sup>4</sup> Hegel 1955, in particular secs. 273ff., for the constitutional figure of the monarch, secs. 298ff., for the role of political representation, secs. 287ff., for the role of governmental power and of the bureaucracy.

eignty of the State constituted the presupposition for the dissolution of all political sovereignty, of the people and its representatives, and also of the monarch himself, likewise reduced to the dimension of juridically regulated powers as provided for by the constitution of the State.

Taking this line of thought somewhat further, a rather sophisticated theoretical elaboration of public law began to be developed in the second half of the nineteenth century, working towards a view whereby all these powers were considered as “organs” of the State, the latter being effectively considered as a “person.” This was the ideal of the *Rechtsstaat*, the State under the Rule of Law, which received its fullest expression in the work of Georg Jellinek (1851–1911), a renowned German scholar of law active in the late nineteenth and early twentieth century. The constitutional culture that underpinned the *Rechtsstaat* condemned both Hobbes and Rousseau, inasmuch as they tended to legitimate political powers that were substantially devoid of formal and substantial limits. This political tradition of sovereignty had, Jellinek argued, affected even the French revolution itself, entrapping it in a blind alley, given that the demolition of the sovereignty of the monarch had given way to an equally absolute sovereignty, that of the people and its representatives. To counter this adverse trend it was thus all the more imperative to usher in the new sovereignty of the State and of its constitution, which consisted precisely in negation of any type of political sovereignty or of any principle aiming to impose itself unilaterally (Jellinek 1900, 1911, and 1964).

The same should hold true for rights, Jellinek believed. These should no longer be conceived as concessions by the sovereign, but neither should they be regarded as the object of declarations: For such declarations were basically political proclamations that left these rights for the assemblies to dispose of and manipulate as they pleased, no differently than at the time of the revolution. Instead, rights should be entrusted to the law of the State, regulated by the constitutional rules which guaranteed that the powers contributing to formation of the law would be limited powers, no longer powers acting as the expression of unilaterally dominating political principles.

As can be seen, the model of the sovereignty of the State built up within the German framework eventually led to an outcome of a constitutionalistic type, i.e. inspired by a principle of the limitation of power. But its influence was not limited to Germany, as similar solutions spread to other European countries, such as Italy, or even the France of the Third Republic. Exemplary in this sense are the figures of Vittorio Emanuele Orlando (1860–1952) in Italy, and Raimond Carré de Malberg (1861–1935) in France. These were illustrious scholars of law who in diverse ways and in different contexts examined the issue of the German constitutional doctrine. In effect, what had taken shape in Europe was a *European science of public law*, which championed the idea of the State under the Rule of Law, and with it the constitutionalistic principle of limited power.

But all this was achieved at a very high price. The relation between the State and the constitution was now so tight-meshed as to make it impossible to conceive of the State without the constitution, and vice-versa: By now the constitution existed simply because it had a State to express and regulate. Outside of the framework of the State the constitution wheeled in a void, and tended inexorably to be reduced to a mere political ideal. The days of Rousseau had been left far behind, but likewise the days of Kant and Constant, and of many other liberals from the first half of the century. The State under the Rule of Law thus provided a strong and plausible answer to the need for political stability that was deeply felt throughout Europe, and it also offered a legislative guarantee of rights, which many believed to be the strongest possible guarantee. But it did so on condition of making a drastic break with the past, by a total denial of the revolutionary origin of European public law and by explicitly presenting itself as a force operating against the democratic principle. It is no coincidence that in a celebrated passage from his *Elements of the Philosophy of Right*, Hegel made a clear-cut assertion that the constitution could no longer be “made” in the sense of being determined by the will of a subject, such as the people at the time of the revolution: The constitution was simply the fundamental order of civil coexistence, within which particular interests were not denied but composed in such a manner as to produce the supremacy of the universal, of the general interest, which by the second half of the century, beyond the age of Hegel, was now represented by the sovereign national State (Hegel 1955, sec. 273).

In these circumstances, the great idea of the supremacy of the constitution that had begun to gain credence in the age of revolutions tended to fade into the background in mid-nineteenth century Europe. The solidity of that idea began to wane, and was gradually absorbed by the dominating principle of the sovereignty of the State, seen as representing the very existence of the political order and consequently the constitution itself. On the positive plane, the European States had their respective constitutional Charters in force, but these Charters were almost entirely devoted to regulating the form of government. To be sure, they also stated the rights of individuals, the safeguarding of which was however entrusted to the law of the State, and the constitution could not be adduced as a higher norm in opposition to the law. Therefore the conditions for a *judicial review*, i.e., for a test of constitutionality, did not arise.

This was a character common to the entire European experience. Although the Third Republic in France, the Second *Reich* in Germany, or even the Giolittian era in Italy, were political regimes that did indeed differ considerably from one another, they nevertheless belonged to the same “historical type,” which was precisely that of the sovereign national State, the State under the Rule of Law founded on affirmation of the primacy of law but at the same time on denial of the constitution as a supreme norm that would be capable of invalidating norms of a lower level, including the law itself.



England, however, stood in a different position. England never endorsed the German doctrines of the sovereignty of the State, yet even for England this period between the nineteenth and twentieth century was the era of sovereignty. Faithful to the English tradition, this was a sovereignty of parliament, vigorously asserted in the *Introduction to the Study of the Law of the Constitution* by Albert Venn Dicey (1835–1922), which was published several times starting from 1885, and was highly successful (Dicey 1885, 7th ed. 1908, 8th ed. 1915, repr. 1926). It was this sovereignty that precluded the checking of constitutionality for England as well, and the underlying reasons for its exclusion were basically the same as in the other European States. In effect, it was believed that if a different authority were empowered to repeal, modify, or even determine the non-application of the law, this would once again open up debate on the existence of a subject superior to parliament, a subject that would be the author of a supreme norm superior to the law of parliament. In a word, calling into question the sovereignty of parliament, even if this were to be done by a constitutionality test, would sooner or later revive the issues of popular sovereignty, constituent power, and democracy. And this is precisely what England, like all other European countries, intended to avoid.

Obviously, it was not a question of unlimited sovereignty. The sovereign State of the Germans did not enjoy such a character, nor did the national assembly of the French. And it was certainly not a feature of the English parliament, whose sovereignty, as reconstructed by Dicey himself, was required to be respectful of the *rule of law*, of the guarantee of rights, particularly with regard to personal freedom and property, and more generally of the *law of the land*, i.e., of the law that the courts commonly and generally applied. But what characterized the whole of this European constitutional culture, above and beyond the national borders and the different institutional solutions, was the fact that *the constitution was incorporated and absorbed in the subject that was representative of the principle of sovereignty*: the State for the Germans, the assembly of representatives of the nation for the French, parliament for the English. In this manner, constitutionalism acted in the construction of the sovereign subject, basically on the plane of the form of government, by constitutionalizing the monarchies and by maintaining or introducing counterbalances, but it could no longer constitute a force acting from outside. All things considered, in the period under consideration the guarantee of rights, which in constitutionalism is the final outcome, rests almost exclusively on the reasonableness and moderation of the powers regulated by the constitution, but not directly on the constitution itself, which as such cannot exert opposition, in the name of such rights and of their safeguarding, to the will of those powers, or those parliaments. The latter, as the expression of the principle of sovereignty, must respect and safeguard rights, but on condition that these rights do not claim to be founded elsewhere, that they do not seek an independent foundation in the constitution, as this would create the conditions



for calling into question the primacy of the law as an expression of the very principle of sovereignty.

In conclusion, European constitutionalism at the beginning of the twentieth century seemed to have reached a point beyond which one could proceed no further. No-one aimed to cast doubt on the solidity of the national States with their parliaments, and there was general confidence that the laws of those parliaments would be effective in guaranteeing rights. But the dramatic events of the first half of the twentieth century, wars and totalitarianism, would soon compel all the players to embark on a fundamental rethinking of the foundations of the European constitutional model of the liberal age.

### 7.5. Conclusions: A Look at the Twentieth Century

The twentieth century embodies the genesis of democratic constitutions, starting from the first, the German Weimar constitution of 1919, which was followed by the decisive phase of the postwar constitutions, namely the French constitutions of 1946 and 1958, the Italian constitution of 1948, the German *Grundgesetz* of 1949, and eventually the Spanish post-Franco constitution of 1978. The democratic constitutions are a recent breakthrough, dating from the century that recently came to an end. In the previous centuries, democratic constitutions were linked to quite exceptional phases and events, such as the circumstances of 1848, but in general it was fairly difficult to conceive of, and actually bring about, a democratic constitution. The implausibility of a democratic constitution was no random circumstance, but rather the outcome of a long-standing historical tradition which decreed that “constitution” and “democracy” belonged to distinct and not infrequently opposing fields.

During the French revolution, when the democratic tendency had reached an extreme, in the Jacobin phase, the Constitution established in 1793 had endorsed the dominion of the sovereign people and its mandataries over the other powers and over the constitution itself. That revolutionary flare had shown to the whole of Europe that the greatest possible expansion of the democratic principle, of popular sovereignty and of the principle of equality went hand in hand with an eclipse of the supremacy of the fundamental norm, engulfing both the balance of powers and the constitution as limit and guarantee.

Even in England, despite the absence of a Jacobinism such had arisen in France, the two fields diverged. On the one hand, Burke criticized the democratic excesses of the revolution in the name of the *ancient constitution* of England. But on the other, Jeremy Bentham (1748–1832) proceeded in the opposite direction, against the age-old English tradition of mixed government and the balance of powers, arguing instead that the only possible and effective guarantee consisted in the democratic guarantee of the responsibility of rulers towards the electors and the duty of governments to provide for common util-

ity (Bentham 1977). Thus from a certain standpoint, constitutionalism perceived the expansion of the democratic principle as a deadly threat, yet from another perspective the very democratic principle itself viewed the persistence of constitutionalism as an obstacle that had been arbitrarily interpolated, and felt that constitutionalism imposed a series of constraints which could not be interpreted as genuine democratic powers accountable to the people or the nation.

The nineteenth century failed to improve relations between constitutionalism and democracy. Throughout the century, the constitutionalist ideals of the guarantee of rights and the balance of powers were nurtured within constitutional Charters that often retained substantial prerogatives of the monarch and the Upper House, and which established notably restricted electoral bodies, often defined on the basis of census criteria. And when, in the second half of the century, constitutionalism moved towards statal public law, the aversion to constituent power, revolutionary contractualism, and full expansion of the democratic principle not only persisted but indeed in some cases was reinforced. And this is a feature that forged a link, on the level of constitutional culture, between the sovereignty of the State dominating in Germany and the sovereignty of parliament, different though this may have been, and diverse in its manifestations, in England and France.

Accordingly, democratic constitutions are to be considered as the great innovation of the twentieth century. They now became possible, from the middle of the century onwards, because what they embodied was *constitutional democracy*, a substantially new historical type of democracy, which had been prefigured on the plane of fully accomplished implementation only in the special context of the American revolution. Constitutional democracy is founded on the overcoming of the ancient diffidence: Democracy accepts to be regulated within the constitution, while the constitution accepts its political origin, acknowledging that it stems from the will of the sovereign people.

It is important to clarify that as far as democracy is concerned, in the framework outlined above democracy is by no means precluded from having bold and ambitious goals. A democracy that works within the constitution is far from being a more modest version of democracy. Quite the contrary: From the Weimar model onwards, constitutional democracies were in most cases also social democracies, which considered labour, education and welfare as constitutionally protected types of good. The essential requirement is that independently of the scope of the objectives, the powers should be limited, and this holds for all powers, including those of direct derivation from the people. But to achieve this end, for the historical type of democracy under consideration here, what becomes absolutely essential is the *judicial review*, the assessment of constitutionality.

Moreover, looking at the second aspect, that of the origin of the constitution, the argument that a “political” constitution, set up at the behest of the

sovereign people, is a “weak” constitution because it is constantly revocable by the people itself, can no longer be maintained. A twentieth century democratic constitution is no longer a revolutionary constitution of Jacobin descent. On the contrary, precisely because the “political” constitution bears within itself certain fundamental features that were enshrined in it by the original constituent act, it is a rigid constitution in the sense that subsequent amendments, regulated by the constitution itself, cannot alter its fundamental principles, its essential core. The people, once a subject steering a threatening course towards continual change of the terms of the constitutional pact, becomes the foundation of the rigidity of the constitution.

Even with regard to ordinary law-making, constitutional democracy revived within European constitutional culture the grandiose idea of the supremacy of the constitution, revitalizing an idea that had been clearly envisioned only in the American revolution at the end of the eighteenth century. Here too, the fact that the constitution is established by a subject that goes beyond and is broader than parliament or the ordinary lawmaker becomes the best argument in favour of the supremacy of the constitution. That is to say, parliament cannot freely change the constitution, for the simple reason that parliament did not generate it, inasmuch as the constitution is grounded in a different and far wider original will. Indeed, the opposite is true: that parliament exists because that particular constitution provided for it, within those boundaries, with that particular normative power.

The constitutional democracy of the second half of the twentieth century is also, on account of its intrinsic historically given character, a pluralistic democracy, in the sense suggested by Hans Kelsen (1881–1973) as early as the first decades of the century (Kelsen 1923). In effect, if constitutional democracy has become possible, this has been achieved first and foremost by overcoming the revolutionary conception of the constituent power as a pre-constituted subject almost magically endowed with an original will, a will perfectly coherent within itself. Kelsen’s well-known critique of the State as a “person” in the previous tradition of public law thus also becomes a critique of the “people” and of the “nation,” which that tradition held to be perfectly formed and fully self-contained political subjects. The new approach thus opens up the possibility of portraying the exercise of constituent power as an open process, made of decisions and compromises among diverse subjects, political parties, social forces and interest groups. If this is the “people” that generates the constitution, then clearly there is now little sense in constantly appealing to its original “will.” For that “people” does not exist prior to the constitution, and this implies it can no longer be glorified as the “author” of the constitution. Instead, that “people” exists *through* the constitution that the constituent process has produced: The “people” is an outcome of the constituent process rather than its origin or its presupposition. For this reason, that people can live only within the constitution itself. Without this transition,

the historic reconciliation between constitutionalism and democracy would never have taken place, basically because constitutionalism would have continued to dread democracy, as it did at the time of the revolution.

Yet once again, the reverse of the coin cannot be disregarded. Democracy cannot be described as a beast that has now been tamed and has meekly entered into the fold of the constitution. Democracy consciously enters into the fold, and does so first and foremost because it believes that the democratic constitution offers a framework that will allow a revival and renewed expansion of the democratic principle, and above all of the principle of equality, with the universalization of political rights and the constitutionalization of social rights. Democracy opts for the constitutional route because the constitution itself has become democratic. Furthermore, even in the genesis of the constitution, pluralism cannot become relativism, because the constituent process is also made of decisions and choices in favour of certain values, and these constitute the essential characters of democracy. The democratic constitution is thus the focal point that embodies the social and political pluralism which profoundly shaped the twentieth century, but it is likewise the very place in which the process of the recomposition of pluralism is constantly being enacted, in the quest to reproduce a political form capable of containing it and representing it in a unitary manner. Thus democracy now comes into being only through the constitution, but the constitution itself cannot live without democracy if it hopes to avoid turning into a mere reproduction of the complexity of social relations.

Finally, the second half of the twentieth century was also the historical age in which the constitution took the first steps towards freeing itself from the statal form and the national plane that had forged its character throughout the post-revolutionary era, and in particular in the second half of the nineteenth and the first half of the twentieth century. Here we can only make a brief mention, in conclusion, of the on-going evolution of relations among European States, an evolution that seems to have gone beyond the traditional boundaries set by international law which regulated relations among sovereign States through the instrument of treaties. Today, European Community law is a form of law that imposes itself in certain subjects as a primary source and which under particular conditions produces the non-application of divergent national law, by means of the national judges themselves. The set of principles that thus take effect can, as a matter of fact, be considered as a sort of original core of a "constitution," situated on a plane that is no longer either national or even international, but rather supra-national. These developments are now taking place beyond the bounds of the categories that dominated European public law from the revolution onwards, in the era of statal public law. This has become possible because the subjects that are operating for construction of the supra-national system are no longer the sovereign national States of the first half of the past century, but rather the present-day constitu-

tional democracies. In other words, there is now a new and different constitutionalism, which, in contrast to the past, and precisely by virtue of its historically determined characters, has within itself a possible evolution in a supra-national sense. The process is under way, and no-one can predict whether our future will truly feature a legal system with a fully binding character situated on a supra-national plane: that is to say, a genuine constitution, springing from the relations among States but now situated beyond the latter. In short, *a constitution beyond the State*, as the final and original product of European constitutionalism.

## Chapter 8

# FROM JHERING TO RADBRUCH: ON THE LOGIC OF TRADITIONAL LEGAL CONCEPTS TO THE SOCIAL THEORIES OF LAW TO THE RENEWAL OF LEGAL IDEALISM

by Hasso Hofmann\*

### 8.1. Preface

At the outset of the second half of the 19th century, the German science of Pandects was in its prime. Its leading proponent was Georg Friedrich Puchta (1798–1846), who also led the Historical School of law together with Savigny, whose successor in Berlin he became in 1842. His theory of an autonomous “scientific law” opened new possibilities of developing law through dogmatic and conceptual constructions (*Begriffsjurisprudenz* or “jurisprudence of concepts”) by the judiciary and by jurisprudence. The work of his student Rudolf von Jhering (1818–1892), as multifaceted as it is inconsistent, stands for an epoch-making change in 19th century legal thought: from an autonomous construction of legal rules and institutes of law to an analysis of social reality, from the logical existence of legal concepts to the instrumental character of law in the service of individual and social interests, from the freedom of human will to the natural laws of causally determined reality, from an idealistic notion of law to its naturalistic explanation, from the ideal of justice to social eudaemonism, from the logical formalism of a “jurisprudence of concepts” to the legal sociology of the social “purposes of law,” from the ideal world of law to “life.”

Towards the end of the century, however, there is increasing resistance against the one-sided empirical view of law, and growing criticism of historicism and legal positivism. Neo-Hegelianism wishes to renew the overall view of legal life from the vantage point of cultural philosophy and teleology; on the other hand, the recourse to Kant provides a sharper methodological consciousness and necessitates a dualistic view of law, in accordance with the differentiation of what is and what should be, of reality and value. *Legal Philosophy* by Gustav Radbruch (1878–1949), which appeared just before the outbreak of World War I, reflects the new duality of legal thought that followed.

\* This chapter is translated by Alexa Nieschlag.



## 8.2. Rudolf von Jhering's Discovery of the Purpose in Law

### 8.2.1. *Life and Works*

Rudolf von Jhering, probably the most important German jurist of the 19th century, apart from Friedrich Carl von Savigny, with the greatest international influence, was born in 1818 in Aurich in East Frisia.<sup>1</sup> He was born to a family with a legal tradition dating back centuries. After studying in Heidelberg, Göttingen and Munich, he submitted his doctoral thesis in 1842 on a historical Romanistic topic, *Die Besitzfähigkeit der Erbschaft* (“The Question Whether Inheritances May Possess”) (Jhering 1879). Only a year later, he became a *Privatdozent* (lecturer). His first book—a collection of dogmatic works on common civil law—was published in 1844 (Jhering 1844). In its striving to permeate the concepts of sources as part of an intrinsic system, it shows the influence of Georg Friedrich Puchta (1798–1846), one of the most influential German scholars of pandects and the leading proponent of the Historical School of law apart from Savigny (cf. Stintzing and Landsberg 1880–1910, Div. 3/2, 438–61; Wilhelm 1958, 70ff.; Bohnert 1975; Haferkamp 2004). As early as 1845, Jhering was appointed professor in Basel, after which he taught at the universities of Rostock and Kiel. In 1852 he moved to Gießen, where he embarked upon his main works, an effort which soon bore first fruits. In 1868 he moved to Vienna, which he left after four years—with an Austrian hereditary title of nobility. He settled in the “quieter” city of Göttingen in order to pursue his “actual life’s work”: a forward-looking, realistic theory of law. He died there in 1892, famous and revered.

Jhering’s main works are (cf. Losano 1970): *Der Geist des römischen Rechts auf den Stufen seiner Entwicklung* (“The Spirit of Roman Law at the Various Stages of its Development”) (Part I 1852, 5th edition 1891; Part II, 1st Section 1854, 5th edition 1894; Part II, 2nd Section 1858, 5th edition 1898; Part III, 1st Section 1865, 5th edition 1906: cf. Jhering 1968) and *Der Zweck im Recht* (vol. I 1877, vol. II 1883: cf. Jhering 1923). (The English translation of the first volume was published in 1913 under the somewhat unfortunate title *Law as a Means to an End*. In the following, the author prefers to translate the term *Zweck* as “purpose.”) Both works remained unfinished. Of the multitude of his further publications, the most interesting from the point of view of legal theory are: *Unsere Aufgabe* (“Our Task”), 1857; *Der Kampf um’s Recht* (translated variously as *The Struggle for Law* or *The Battle for Right*), 1872 (cf. Jhering 1992a); *Vertrauliche Briefe eines Ungenannten an den Herausgeber der Preußischen (seit 1861: Deutschen) Gerichtszeitung* (“Confidential Letters of an Unnamed Writer to the Editor of the Prussian [since 1861: German] Court

<sup>1</sup> On life and works: Merkel 1893a; Stintzing and Landsberg 1880–1910, Div. 3/2; Wolf 1963, 622–68; Wieacker 1942, 1958, 197–212; Fikentscher 1976, 101–82; Behrends 1987.

Magazine”). Jhering published these satires again in 1884 in a book titled *Scherz und Ernst in der Jurisprudenz* (“Jest and Earnestness in Jurisprudence”: cf. Jhering 1924), expanding the collection by a number of essays, including the famous persiflage of *Begriffsjurisprudenz* (jurisprudence of concepts): *Im juristischen Begriffshimmel* (“In the Heaven of Legal Concepts”). Furthermore, two lectures Jhering delivered in Vienna, which were published posthumously, are of importance: *Ist die Jurisprudenz eine Wissenschaft?* (“Is Jurisprudence a Science?”), his first lecture in Vienna in 1868 (cf. Jhering 1998); *Über die Entstehung des Rechtsgefühls* (“On the Formation of the Sense of Justice”), 1884 (cf. Jhering 1965 and 1986).

*Der Geist des römischen Rechts* and a number of other works by Jhering were published since 1880 in French, and *Der Geist* was also translated to Italian and Spanish.<sup>2</sup> *Der Zweck im Recht*, on the other hand, found particular resonance in the Anglo-Saxon world: *Law as a Means to an End*, 1913 (a translation of only the first volume, based on the third and fourth edition dated 1905), reprinted in 1969. With over 50 translations, *Der Kampf ums Recht* is presumably the most widely-read scientific text of all times ever written by a German jurist.

### 8.2.2. “Constructive Jurisprudence” according to the “Method of Natural History”

For a young scholar of Roman law entering the scientific arena in 1842, the obvious route was to follow the traditions of the Historical School and pandectism, as established by Savigny and even more by Puchta. Thus, Jhering tried to identify abstract elements in legal history and to develop a unified theory of common law based on a systematic construction of concepts. Herein, Puchta was his guarantor. While he occasionally referred to the *dogmatist* Savigny, he increasingly criticized the *historian* Savigny. With such criticism begins his early main work on the spirit of Roman law, whose first volume is dedicated to Puchta. Jhering sharply criticized the contradiction between the belief that law arose from the spirit of the people and the practice of law as a science (Jhering 1968, I, 5, 3ff.; cf. also 18ff.). He positioned his “theory of development” against the spirit of the people and its emancipation. He claims that in three historical steps—which Jhering characteristically calls “systems”<sup>3</sup> and identifies as the original law of the epoch of kings, the national *ius strictum* of the Republic and the *ius gentium* of the universal and cosmopolitan imperial law—Roman law had overcome the “purely Roman” and “transient” elements and had allowed its “constituting spiritual factors” to emerge as general “higher principles of law” (Jhering 1968, I, 16, 83f.). Thus,

<sup>2</sup> Index of translations in Losano 1970, 281–94. Cfr. *infra* Section 8.2.7.3 and 8.3.1, as well as Gibert 1970; Jørgensen 1970; Schmidt 1970; Bonazzi 1977.

<sup>3</sup> On Jhering’s concept of system: cf. Coing 1969, 157ff., 162ff., 164.

the legal issue was not “Roman or Germanic,” but the question was one of law itself (cf. Wilhelm 1970, 228ff.). With this orientation towards a “natural school of law” (Jhering 1968, I, 23), Jhering turns his back on romanticism and consciously renews the fundamental question of natural law without reverting to the law of reason or to German idealism; for he gives no criteria for this general validity and formulates no principle or goal of this development. To him, unlike the Historical School, development does not mean organic growth from within or a striving for a particular goal; instead it means historical progress, driven by mental elements (“spirit”), towards the universal principles of our concept of justice: “What appears to us as natural and reasonable from the point of view of our times [is] the product of a long and laborious process” (Jhering 1968, I, 102, cf. 45). At the end of the first volume of his early work, Jhering gives grandiose national “egoism,” the “essence of the Roman spirit,” which instrumentalized law, as the reason for the development of Roman law in its first phase (ibid., 318ff., 328). The second part of the work turns to the republic in the first section, and lists as its “basic drives”: the law’s drive for autonomy, the drive for equality as well as the drive for power and freedom as the “desires of the Roman spirit.” Thereafter, he begins to examine “legal technique” as the means employed to realize those goals.

This topic is continued in the second section of the work’s second part, where it provides the framework for an almost 80-page digression on “technique,” i.e., the general method employed by jurists (Jhering 1968, II/2, 312–89). With this “chapter of genius” (Radbruch), Jhering expands what was a methodological sketch in the first volume (Jhering 1968, I, 37–41) to a theory, claiming general validity for it (Jhering 1968, II/2, 311f.). According to it, the first and foremost task of legal technique is “the quantitative and qualitative simplification of law,” achieved through the analysis of extant legal material, i.e., its reduction to its simple “basic components,” so to speak the “alphabet of law,” furthermore through the “logical concentration” of the material to certain principles, and finally its systematization. In this manner, the “legal material,” consisting of individual legal rules, is to be elevated to a “higher state of aggregation” (Jhering 1968, I, 37; II/2, 361). It is no coincidence that Jhering uses this description of a state of matter borrowed from the natural sciences. Even in Part 1, where the process of “logical concentration” is not described as a statement of principles or a definition of legal institutes or “legal bodies,” but rather as an extraction of “legal concepts,” the latter are characterized as a “precipitation of legal rules,” as the “precipitation of legal rules to legal concepts,” i.e., in quasi medical or chemical terms, as the deposit of a sediment (Jhering 1968, I, 37, 39). Thus, it is not surprising that Jhering calls the formation of a legal system the “ultimate consequence of the scientific method,” thereby colliding rather unfortunately with the successful theoretical models of science and technology of his time. After all, he views his “natural-historical” contemplation of law as a *Naturwissenschaft auf geistigem*

*Gebiet* (a “natural science in the realm of the intellect”) (Jhering 1968, II/2, 361, 396).

At the core of “structuring of legal material according to methods of natural history,” according to Jhering, is the “legal construction,” i.e., the logical and systematic ordering of terms, principles and institutions of law (Jhering 1968, II/2, 370ff.; cf. Wilhelm 1958, 112ff.; Hommes 1970; Ogorek 1986, 221 ff.). In the history of science, this concept of a “higher jurisprudence” (Jhering 1968, II/2, 358) found an especially strong and lasting echo. The reason lies in the theory that the combination of the various elements of law would lead to the possibility of “a self-propagation of law” (Jhering 1968, I, 40). Because of this generative power, Jhering calls the “system” a “source of new material that can never run dry” (Jhering 1968, II/2, 386). The first part of *The Spirit* had still illustrated this idea with a daring image: “Concepts are productive, they mate and create new concepts” (Jhering 1968, I, 40). In his programmatic introductory essay *Unsere Aufgabe* (“Our Task”) in the *Jahrbücher für die Dogmatik des heutigen römischen und deutschen Privatrechts* (“Annals of the Dogmatics of Today’s Roman and German Private Law”) (Jhering 1857)—this journal was founded and edited by Jhering together with Carl Friedrich von Gerber<sup>4</sup>, a proponent of German private law (and later constitutional law) equally committed to the idea of legal construction—Jhering presented a summary of his theory of the formation of legal concepts in three levels. First, he repeats the distinction between “lower jurisprudence,” which deals with the interpretation of legal rules, norms and principles in the traditional manner, and “higher jurisprudence,” which derives legal concepts by abstraction and makes them the object of constructions. Thus, they change shape and assume the form of “legal bodies,” “legal beings,” even “living creatures.” Thereafter, the task is to subject these legal bodies to an “examination in terms of natural history,” examining their origins, characteristics, metamorphoses, combinations and conflicts, and finally to establish a systematic order by classifying them. Accordingly, this order appears as the result of “natural-historic research” on the given material as well as an “artistic creation” due to a “legal sense of art.” To the unusually imaginative and musically sophisticated author, the processing of Roman and common law by jurisprudence signified the “creation of a world from purely intellectual matter” (Jhering 1857, 12).

But then, a break occurs: merely a few years later, he ridiculed his impractical “jurisprudence of concepts” in anonymous satirical letters to the “Prussian,” later “German Court Journal” (cf. Jhering 1924, 7, 80, 193, 338f., 347, 369ff.). In Part 3 of *The Spirit*, whose first (and only) section was published in 1865, Jhering distances himself decidedly from his former theory. He now

<sup>4</sup> On Carl Friedrich von Gerber (1823–1891) and his friendship and collaboration with Jhering cf. Stintzing and Landsberg 1880–1910, Div. 3/2, 778–88, 800–7, 825–33.

calls Puchta's "seductive influence" an "idolism of logic" and seeks to find the "ultimate sources of Roman legal concepts in psychological and practical, ethical and historic reasons," because "the conviction of the immediate logical existence of a concept has not given life to a single one of them" (Jhering 1968, III, 320, 325). To his friend, the pandectist Bernhard Windscheid<sup>5</sup>, he wrote: "In the face of the demands of life, no supposed logic of law can be maintained, and for practical purposes it makes absolutely no difference whether a lawyer is able to construct these demands or not" (Ehrenberg 1913, 176). It is obvious that the continuation and completion of the work, entailing the examination of the third level of development, the universalization of Roman law, using the logical constructions of the "natural-historical method" had thus become impossible. Therefore, Jhering's *Geist des römischen Rechts auf den verschiedenen Stufen seiner Entwicklung* remained unfinished. However, its first volumes were continuously reprinted.

### 8.2.3. *The Crisis—The Struggle for Right*

Obviously, the legal universe Jhering had embraced so far had been shattered. In 1865, he writes to Windscheid that he [has] "experienced a strange transformation of his entire intellectual views during the past 2–3 years" (*ibid.*, 176, 356). Later on, he even speaks of his "time of suffering," of a "time of a profoundly troubled soul." According to his own testimony (Jhering 1924, 338)<sup>6</sup>, the "change" was brought about by a concrete legal case which illustrated the discrepancy between dogmatic deduction and real-life legal practice. From then on, new leading lights flashed before him with increasing regularity: practicability, expedience, the requirements of legal relations, especially of the economy, interests, rights as "legally protected interests," the sense of justice, psychological motives, the law-giver's intentions, reality. Initially, a new theory of law did not emerge. Jhering's first lecture in Vienna on October 16, 1868 gives no indication of this shattering, and therefore bears no trace of any fundamental re-orientation. For that, however, the outer circumstances—it was the first lecture of a course on institutions—would hardly have been appropriate. In a clear allusion to the famous lecture given by the Berlin prosecutor Julius von Kirchmann on the worthlessness of jurisprudence as a science (1848), Jhering discussed the question, "Is Jurisprudence a Science?" (Jhering 1998).<sup>7</sup> The reasons for his positive answer remain within

<sup>5</sup> On Bernhard Windscheid (1817–1892), whose main work, the three-volume textbook on pandect law (1861–1870) enjoyed an impeccable reputation, especially among practitioners of law, cf. Wolf 1963, 591–621.

<sup>6</sup> On this famous Damascus experience on New Year's Eve 1859 see Behrends 1987, 252ff.

<sup>7</sup> About the reasons and circumstances of his move to Vienna and his return to Germany, cf. Hofmeister 1995, 9–30.

the framework of opinions voiced in *The Spirit*. The character of jurisprudence as a science, he claims here, is based on a “scientific consciousness in legal matters” incorporating the philosophy (i.e., for Jhering: ethics) of law, the history of law, as well as dogmatic reflection (Jhering 1998, 92).<sup>8</sup> At the end, Jhering calls the centerpiece, dogmatics, “the scientific description of all experiences and facts which include the current high and final point of our knowledge and experience of law, organized for practical use.” This indicates the greatest possible distance from what Jhering regarded as the greatest danger, worse than external dependence on ever-changing laws: the danger of becoming internally dependent on the “meager, dead letter of the law,” of turning into “an unfeeling part of the machinery of law, lacking all will” (Jhering 1998, 52ff.).

A totally different topic, “part of the psychology of law,” was the subject of the spirited lecture entitled *Der Kampf um's Recht* (“The Struggle for Right”) that Jhering delivered in a totally new tone four years later at the Legal Society of Vienna, as his farewell from that city (Jhering 1992a, V).<sup>9</sup> The author explicitly distances himself from his earlier opinions and quotes his definition of subjective rights as “legally protected interests” from the last volume of *The Spirit*.<sup>10</sup> As if it went without saying, the term “law” has now become a “practical” one, a “concept of purpose,” a concept of “power,” of “force” and not of logic. The basis for this is the idea that rights and law only exist, are only valid when they are realized, i.e., enforced against the resistance of injustice—and not just once and for all, but in an eternal process of waxing and waning: “The idea of law is an eternal process of becoming” (Jhering 1992a, 16). In it, the subjects of law, i.e., people and states as well as private individuals, struggle for their moral self-assertion. Therefore, the struggle for objective public law is the obligation of bodies of state and government, while the struggle for concrete subjective rights is the moral obligation of individuals towards themselves—“the obligation of moral self-preservation”—but at the same time, it is also an obligation towards the community (ibid., 51ff.). For in any morally challenging lawsuit, i.e., one not just pursued for monetary reasons, law itself is endangered. Law and jurisprudence of his time, however, had succumbed to “base materialism,” according to Jhering (ibid., 80ff.).

All this has very little to do with Darwin’s “struggle for life,” in spite of the obvious similarities between the titles *Der Kampf ums Recht* and *Der Kampf ums Dasein* (literally, “The Struggle for Life”), the latter being the title under which Darwin’s work *The Origin of Species* had become popular since its first

<sup>8</sup> This division of legal disciplines goes back to Gustav Hugo’s differentiation of the three aspects of law: the practical, the philosophical and the historical one: Hugo 1817, 32ff.

<sup>9</sup> About the legal and political situation in Austria in 1872 cf. Hofmeister 1995, 22ff. This clarifies that the lecture was also a declaration of solidarity with those applying the law.

<sup>10</sup> Jhering 1968, III, 44; Jhering 1992a, 44. The following characterizations: ibid., 7, 9, 17.



translation into German in 1860. The lecture offered no evolutionary theory of law, but gradually turned into a conservative sermon on decency and morals, culminating in demands for harsher treatment of debtors and criminals (ibid., 88, 94f.). One may interpret these theses as Darwinistic and naturalistic tendencies, but they are no more than the typical contemporary basic philosophy of life that was to find its most extreme expression in Nietzsche's *Der Wille zur Macht* ("The Will to Power"). If one still speaks of an evolutionary theory of law with regard to Jhering today, this hardly refers to *Der Kampf ums Recht*, but rather to texts written *after* Jhering's great "turnaround," which must be discussed first.

#### 8.2.4. *From Legal Formalism to Legal Naturalism*

Jhering's second main work, *Der Zweck im Recht* (vol. I, 1877; vol. II, 1883; cf. Jhering 1923) ("Law as a Means to an End" or rather "The Purpose in Law"), with which he sought to set his theory of law upon a new systematic basis, after his previous system—which had been based on the logic of legal concepts—had been shattered, takes recourse to the practical motives underlying all law (Jhering 1923, I, V) and thus marks an epochal turning-point in jurisprudence: from an autonomous construction of legal rules and institutes of law to an analysis of social reality, from the logical existence of legal concepts to the instrumental character of law in the service of individual and social interests, from the freedom of human will to the natural laws of causally determined reality, from an idealistic notion of law to its naturalistic explanation, from the ideal of justice to social eudaemonism, from the logical formalism of a "jurisprudence of concepts" to the legal sociology of the social "purposes of law," from the ideal world of law to "life."

In order to prove his central tenet "that *Zweck* [purpose] is the creator of all law, that there is no legal rule that does not owe its existence to a purpose, i.e., a practical motive," Jhering begins by establishing a "system of human purposes," divided into individual purposes and purposes of the community (society) (ibid., 43ff.). Still, after the manifestations of "egoistic self-assertion" have been dealt with, he does not go on to discuss genuine purposes of the community, but only describes how society and state "obligate the individual to collaborate in their realization" by utilizing individual egoism as an incitement to social behavior, specifically by using two "egoistic mainsprings of social movement," i.e., the "social mechanics" of wages and coercion. This is the point where the state as a coercive organization and law as its corresponding manifestation come into focus. With this, the 8th chapter on coercion, which alone takes up far more than half of the first volume, the work, whose conception had suffered from the beginning from the vagueness of the concept of the purpose, comes unhinged. Thus, the volume ends without having discussed the "ethical self-assertion of the individual," i.e., the second, non-egoistic



mainspring of social action, in a 9th chapter. The author promised to deliver this final chapter in the second volume. Seven years later, the second volume does feature a 9th chapter containing hundreds of pages, but fails to complete the promised *Theorie des Sittlichen* (“Theory of Morality”)—not to mention the previously announced chapters on duty, feeling, love and the definition of the terms interest and purpose (!), nor to mention the projected second part of the entire work, which was to apply all results of the examination to the field of law (*ibid.*, 46). The reason is the overabundance of preparatory sociological, philosophical, psychological and historical remarks on the “teleology of what is objectively ethical,” on ethics and customs all the way to manners, habits, etiquette, decency and politeness. The result, in Jhering’s own words: a “literary-historical unicum” (Jhering 1923, II, X)—a volume of more than 700 pages containing one single chapter, and even that unfinished, with which the entire work breaks off.

In this context, law and state appear almost exclusively in relation to social aspects, as institutions and means to control the actions and behavior of individuals. The elements of command and coercion stand out clearly here. The criterion of justice is reduced to the aspect of the social usefulness of legal equality: to avoid social conflict (Jhering 1923, I, 284 ff., 288; II, 9, 17). As regards content, i.e., its purpose, law is defined “as the form in which the state’s coercive power secures the conditions of life in society” (Jhering 1923, I, 345, 399; the following *ibid.*, 346, 352ff.). Whatever goes beyond the securing of life and its reproduction, work and the exchange of goods (“commerce”), appears as a “question of national and individual cultivation,” which presumably means: of cultural development. Jhering, “the German Bentham,”<sup>11</sup> emphasized this “social eudaemonism” even more strongly in the second volume, calling it the “purpose and driving force of the entire ethical world order,” just as “the comprehension of all of humanity [is] to be derived from one thought: assertion, advancement of life.” And Jhering confessed: “I live in the conviction that humanity is not constantly worsening, but continually improving.”

According to Jhering, regarding law as a form of ensuring survival, one must distinguish between coercion as the external element and legal norms as the internal element. Only coercion transforms social norms into law, and since the state holds the monopoly on coercion, it is the “only source of law” (Jhering 1923, I, 249; the following quotations *ibid.*, 257–63).<sup>12</sup> The inner, normative aspect of law is defined as an “abstract imperative for human behavior.” Inasmuch as legal norms and their purposes are directed towards private persons, this effect is only secondary and indirect. Viewed in “formal

<sup>11</sup> Drake 1913, XVII: “To American lawyers Jhering is known as the German Bentham.” The following quotations: Jhering 1923, II, 159, 153, 104.

<sup>12</sup> On the importance of state coercion: Gromitsaris 1989, 149ff.

legal” terms, “all legal imperatives without exception” are mainly addressed to the organs of state, which are “charged with the administration of coercion.” And therefore, only those norms are legal norms “whose coercive execution the state power has charged its organs with implementing.”<sup>13</sup> This, however, shall also apply to those provisions in private law which address a command to a private person neither formally nor with regard to their content, for example legal definitions or provisions concerning the age of consent etc., which, however, must be adhered to by the judiciary. This entire doctrine is known as *Imperativentheorie* (theory of imperatives). In the Anglo-American literature, John Austin is regarded as its founding father, while German-speaking authors are fond of pointing to Thomas Hobbes. Jhering himself quoted only and very generally Karl Binding’s *Normentheorie* (theory of norms), according to which penal laws are preceded by written or unwritten public-law commands. The former are addressed to everyone, while the latter only concern the prosecution authorities (Jhering 1923, I, 258ff.).<sup>14</sup> Max Ernst Mayer expressly takes up Jhering’s theory of imperatives when he differentiates between pre-existing basic “cultural norms” and legal norms as protective norms (Mayer 1903, 4f., 37f.; the following cf. Peter Landau 1993, 83). The “theory of imperatives” was widely known in Germany mainly because of the book *Rechtsnorm und subjektives Recht* (“Legal Norms and Subjective Law”) by August Thon, published in 1878, which says (on p. 8): “The entire body of law of a community is nothing but a complex of imperatives.” With this theory, historical jurisprudence cedes its claim to shaping law to the law-giver and judiciary.

### 8.2.5. *The Question of Legal Positivism*

The difference between these definitions of law could not be greater, it seems: in *The Spirit of Roman Law*, Jhering had based his considerations on the “leading opinion” at the time (1852) “that law was an objective organism of human freedom” (Jhering 1968, I, 25). 25 years later, *Law as a Means to an End* takes recourse to the definition of “statist legal positivism” (Dreier 1996, 231) that had been gaining currency in Germany since 1870, according to which law is the “epitome of all coercive norms applicable within a state,” and the “sole source” of law is the state (Jhering 1923, I, 249). With this change of opinion, did Jhering now subscribe to “the most blatant positivism” (thus K. W. Nörr after Dreier 1996, 231) or did he now represent a “classical legal positivism” (Olivecrona 1970)? Was he perhaps a positivist from the very beginning, inasmuch as he spoke on behalf of “positivism in jurispru-

<sup>13</sup> On Jhering’s ideas on the implementation of laws: Gromitsaris 1989, 128ff.

<sup>14</sup> Cf. Binding 1965, vol. 1, 134: “The necessary precondition of a penal law is a prohibition of the sanctioned action outside of criminal law, which must precede it.”

dence” (Wieacker 1967, 431)? The opinion that the late Jhering, at the very least, was a legal positivist, is widespread. Given the above-mentioned quotation from *Law as a Means to an End*, this is an obvious conclusion. Still, this evaluation is being questioned increasingly.<sup>15</sup>

A large part of these difficulties are of a terminological nature, resulting from the ambivalence of the term *Rechtspositivismus* (“legal positivism”). From a historical perspective, the following aspects can be distinguished<sup>16</sup>:

(1) In its original function, the term is a cipher for the independence of legal provisions vis-à-vis the order of nature. Unlike nature, which exists in and of itself and is unchangeable, law, which is set or created, is viewed as something artificial, constructed, as man’s work and therefore changeable in principle. It stands in contrast to what was to be called ontological natural law later by scientists. In this sense, Jhering already based the construction of his jurisprudential system neither on the rules of natural law nor on *a priori* rules of reason, but on the traditional legal rules of Roman law as something that is “positive” and “historical” and therefore subject to change. The Roman “alphabet” may have “resisted the influence of time and place despite all its positivity,” but it was still not *ratio scripta*, which the Middle Ages had wished to see in it (Jhering 1968, II/2, 348). If, however, law is positive in the sense of “artificially constructed”: Who constructs it, who generates it, who “gives” the law? Social customs, a sense of justice shared by the people, jurisprudence, courts, the state law-giver? Or a combination of these factors?

(2) This introduces a second aspect: legal positivism as a theory of legal sources (Landau 1993) in a prescriptive sense, but also understood sociologically as the genesis of law. In this dimension of the issue, Jhering’s work exhibits both a certain continuity in the social perspective on law as well as a change in the definition of the originator of law-“giving.” *The Spirit* already treated social and psychological reasons for the development of (Roman) law in a naturalistic fashion, speaking of its immanent impetus and finally of factual interests as the decisive motives of the genealogy of law. Thus, the *Zweck*, the purpose in law does not truly represent a new element. The new and revolutionary aspect is merely that it is to be elevated to become the central concept upon which the entire system is based. Another fundamental change is the assessment of the sense of justice. While its infraction still appears as the sole motor of the development of law in *The Struggle*, now *Law as a Means to an End* turns the sense of justice into a consequence, as a mere reflection of

<sup>15</sup> Cf. Dreier 1996, Behrends 1996, and Landau 2003. On the question of Jhering’s positivism also Pleister 1982, 1–12.

<sup>16</sup> The “classical” five-fold differentiation in Hart 1958, 601. Cf. also Hoerster 1989; Koller 1997, 144ff.; Auer 2007.

the actual development of legal rules. This will be discussed further in the following section. Most scientific attention, however, has always been devoted to Jhering's change of position regarding the question of who "gives" law, or more specifically: Who creates new law when needed on the basis of the legal material that has always been in existence. His first answer was *Begriffsjurisprudenz*, the "jurisprudence of concepts." It emphasizes the ability to create law inherent in the constructive work of scientific jurisprudence, and expressly declares it a source of law. With an overabundance of self-confidence, Jhering had introduced his series of almanacs in 1857 by declaring:

Fully formed jurisprudence never [has] to fear an absolute deficit in legal rules. [...] [T]he concern that the increase in commerce could bring something absolutely new, i.e. something that could not be subsumed under one of our existing concepts, even if it were ever so general—this concern is just as unfounded as the belief that in our day and age, animals might be discovered that could absolutely not be categorized within the zoological system of modern science. A jurisprudence that has existed for thousands of years has discovered the basic forms or basic types of the legal world, and all future movement will be contained within them [...], such a jurisprudence can no longer be embarrassed by history. (Jhering 1857, 16)

However, in his first lecture in Vienna (1868), Jhering did concede the first place in the development of law to the (legally trained) judges (many of whom were in the audience at the time). The connection drawn by the jurisprudence of concepts between the scientific production of laws on the basis of the traditional positive material with the claim that the legal order is without gaps and therefore excludes all non-legal, i.e., political, religious, moral and ethical elements, makes it reasonable to join Wieacker in calling this "jurisprudential positivism" (Wieacker 1967, 430ff., 458ff.).

(3) Following the trend towards *Gesetzespositivismus*, i.e., positivism of laws, during the last quarter of the 19th century, *Law as a Means to an End*, as mentioned above, considers the state to be the "only source of law" and the fact that the powers of the state can enforce these laws is the "characteristic distinguishing factor between the norms of law and the norms of custom and morality" (Jhering 1923, I, 253). This criterion is likely to suggest that the definition of law is indifferent towards the content of the legal norms. This opens the door to the third level of discussion, concerning the theory of norms. Indeed, the "theory of separation or neutrality"—the high point of the autonomization of law—prevalent today denies that there is a necessary conceptual connection between law and morality (including natural law, the law of reason, and justice) (instead of many, cf. Hoerster 1989, 11, 20ff.). From this it follows that law is defined in such a way that it may encompass any content whatsoever. Jhering did not concur in drawing this voluntaristic consequence from the positivism of laws. The idea that the law-giver should be bound only formally by rules of competency and procedure, but not be subject to any limits regarding content, meaning that he should be able to act ar-

bitrarily, was and remained totally alien to him (cf. Dreier 1996, 229). He certainly saw the law-giver in a creative role, but only within the framework of the reality of life as interpreted by causal laws, and thus invariably limited to certain goals from the beginning. To him, the continuity of law seemed to be based “upon the moral power of the national sense of justice” (Jhering 1923, I, 297). Jhering’s separation of law and morality and the emphasis he placed on the element of coercion are not designed to carry the autonomy of law to extremes; rather, they refer back to the differentiation between morality and legality first proposed by Kant (once again, cf. Dreier 1996).

(4) Because positivism of laws refers exclusively to the state’s system of coercion, the term legal positivism also points to the dimension of a theory of legitimization and validity of law. The question of how the inner bindingness of norms as legal norms is established has been answered variously throughout history. The scope of reasons ranges from a recourse to the authority of the legitimate sovereign or the state’s authority to pass laws and ensure justice, to the claim that laws embody reason and equality, albeit only through the guarantee of equality through the external, general form of the law, all the way to the acceptance of laws by those they bind. Jhering’s theory of “binding” law, however, ruptures the framework of legal positivism. The state’s authority may play a central role in characterizing law “as a *state mechanism* for realizing the *coercive norms* recognized by the *state power itself* as binding (i.e., including binding upon itself)” (Jhering 1923, I, 338). However, this does *not* imply foregoing a criterion of content, and thereby the differentiation between just and unjust law. For even if the absolute criteria of truth and immutability may not be useful in the assessment of law, which is always relative, the question of its rightness is. This “means the correlation of the *will*,” in this case the “content of the will” of the legal norm, with “what *should be*” (ibid., 341). And what should be is derived from the practical purpose of the legal norm. And as the reader will recall, the goal of law as a whole is “securing the conditions of life in society” (ibid., 345). This legal-sociological point of view of Jhering’s goes far beyond what legal positivism says about the legitimacy and validity of law.

#### 8.2.6. *An Evolutionary Theory of Law*

In view of the context just discussed, *Law as a Means to an End* contains passages that could be interpreted as an evolutionary theory of law. Law, as Jhering writes in the preface to the first volume of *Law as a Means to an End*, knows “only one source,” that being “the practical one of the purpose.” The “purpose-oriented law” as the “highest world-shaping principle” determines “the world of law” for all times as an “unchanging figure,” and therefore one legal purpose develops from another, just as “according to Darwin’s theory, one species develops from another.” However, Jhering believes that this hap-

pens in both cases without leaps: “Each preceding purpose creates the following, and from the sum of all the individual ones, the general ones are derived later through conscious or unconscious abstraction: ideas of law, legal opinions, the sense of justice.” Whereupon he writes the portentous sentence that it is the purpose and not the sense of justice that creates law, and that the sense of justice is a product of law. In the text itself, Jhering was somewhat more careful and wrote of a kind of “interdependency” (Jhering 1923, I, 299); however, he still considered his theory of the historical development of law to be a “full” confirmation of Darwin’s doctrine (*ibid.*, IX). The idea of evolution reappears once more in sharper profile in the third great Viennese lecture, *Über die Entstehung des Rechtsgefühls* (“On the Formation of a Sense of Justice”) (1884). Here, he elaborately refutes all varieties of the school of natural law, which holds that certain legal and ethical “truths” are inborn ideas or germinal predispositions of man, or at least the result of his ethical drive (Jhering 1986, 53). And in opposition to the Historical School, the “ultimate reason” is once again “the purpose.” After all, practical necessities of life in society control history, which is driven by a combination of the instinct of self-preservation and human intellect. Only on this basis is the sense of justice formed, and it transcends such practical expedience in its generalizations. Thus, the conscience’s content is also historically determined (*ibid.*, 18f., 22, 41, 50f.). Jhering considered the fact that the law of purpose realization was on par with the law of causality and led to the historical progress of morality without contradicting it as evidence of “God in history” (*ibid.*, 53; cf. also Rückert 2004, 140, 146).

If, however, it is true that the sense of justice, meaning convictions of what is right and ideals of justice, only arise on the basis of the law that exists factually in a society and serves the specific goals of this society, then it is possible that slavery, for example, finds its way into the legal convictions even of great philosophers. This makes the counterargument to such an evolutionary theory of law, i.e., that it is insufficiently critical, obvious (thus Luig 1996, 259ff.). However, this counterargument is not necessarily correct. After all, Jhering was inspired by an enlightened and theistic belief in progress. He also added the self-critical remark to the second edition of the third volume of *The Spirit* (Jhering 1968, II/2, fn. 506a) as early as 1869, that “above the mere formality of jurisprudential logic [...] the substantial idea of justice and morality stands as the higher and highest [ideal].” Therefore, the “most beautiful and sublime task” of science was to immerse itself in the realization of these ideas in the individual legal precepts and institutions. And in the fourth edition of 1883, he follows this with the sentence that his work on law as a means to an end was “dedicated to carrying out this task.” The sense of justice may serve as an instrument of critical differentiation if it becomes legally creative by feedback. Jhering elaborated this thought further in a late work, written in 1890 and published posthumously, on the “History of the Development of Roman



# Der Kampf

um's

# Recht.

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Von

**Dr. Rudolf von Jhering,**

Kgl. preuss. Geh. Justizrath und Professor an der Universität Göttingen.

*Motto: Im Kampfe sollst Du Dein Recht finden.*

Vierte Auflage.

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**Wien.**

Verlag der G. J. Manz'schen Buchhandlung.

1874.

Law” (Jhering 1894, 21ff.; cf. also Jhering 1986, 18f., 22f., 49ff.). The central argument is the possibility that the ideals of justice, arising from extant law by means of abstraction and reflection, gain an “advantage” over the legal situation. Thus, the sense of justice turns into a “pioneer of progress,” causing a “self-propulsion of law” and enabling a “self-critique of law.” Of course the sense of justice cannot create anything completely new, but only “turn half-truths into whole ones,” which also requires “practical social pressure.” The text says nothing about the genesis of these half-truths. Presumably, Jhering’s conviction—inherited from the Historical School—that Roman law embodies the spirit of law in a special way forms the backdrop of these considerations (Behrends 1986, 139).

The question whether this evolutionary theory of law<sup>17</sup> offers a strictly naturalistic, truly Darwinistic history of the descent of law (thus Wieacker 1973, 75f., 85ff.; similarly Pleister 1982, 358ff., 362ff., 372ff.) or rather a theory of cultural evolution (Behrends 1986, 126) has been discussed controversially. Seen as a whole, there are three elements that set Jhering’s theory apart from jurisprudential social Darwinism: the original influence the Historical School and the science of pandects had on him, which he never quite disowned; certain “remainders of idealistic legal thinking”—originated by Karl Christian Krause (1781–1832) (Landau 1985)—which he may have acquired by way of the philosophy of natural law (Landau 2003, 254) of Heinrich Ahrens (1808–1874) (Ahrens 1852; cf. Schröder 1985, Herzer 1993); and finally, his enlightened and theistic optimism regarding the progress of humanity (Behrends 1986, 106, 147, 174).

### 8.2.7. *Importance and Impact*

#### 8.2.7.1. Jhering as a Precursor

Jhering’s importance and his impact are contained in the motto under which he abandoned his first main work and the motto for his second: “Through Roman Law beyond Roman Law”; and “Purpose is the creator of all law.”

The motto of the early work formulates the legal-political goal of modernizing the obsolete rules of Roman law as they had been handed down (Jhering 1857, 30ff., 52). This was to happen by establishing a logic of legal forms and

<sup>17</sup> Helmut Schelsky has summed it up in a formula: “Das Jhering-Modell des sozialen Wandels durch Recht” (Schelsky 1972); cf. also Schelsky 1980, 147–86; Dreier 1996, 227f. According to this, the point of departure is the given historical reality of law (1), and this provides the basis for generalization through the formulation of principles (2). This in turn gives rise to new legal ideas, a new sense of justice; however, new law is only created from this basis when it is combined with social interests and powers which result in practical social pressure to enforce a new law (3). On the level thus attained, the process is repeated (4). Cf. also Behrends 1991.

independent and legally creative dogmatics, based on a specifically jurisprudential technique of thought. The logic of legal formulas and the method of legal thinking were of greater importance the more obsolete the content of the legal material became, and the more the new centralized institutions of law, the *Reichstag* (German Parliament) and *Reichsgericht* (Imperial Court), took the lead in the creation of new law. Jhering's contribution to this development was extraordinary, both in importance and impact. The numerous editions of the four volumes of *The Spirit* between 1852 and 1894 bear testimony of this success just as much as the success of Jhering's *Jahrbücher für die Dogmatik* ("Yearbooks for Dogmatics"), for which he wrote numerous articles himself. One of them deals with an invention that has become an integral part of the dogmatics of German civil law, namely pre-contractual liability due to *culpa in contrahendo* (Jhering 1861).<sup>18</sup> No other author of his time pursued and advanced the dogmatics, theory ("legal philosophy") and methodology ("legal technique") of private law, clad in the guise of the history of Roman law, with the same standard of development and at the level of reflection of the second half of the 19th century, with so much power of persuasion. In spite of his vehement criticism (and self-criticism) of the excesses of the "jurisprudence of concepts," Jhering strengthened the conviction that a certain amount of logical formalism is indispensable for the science of private law. At the same time, the search for basic legal structures gave strong impulses to comparative law (cf. Zweigert 1970; Zweigert and Kötz 1971). In all of these pursuits, the Roman law specialist Jhering demonstrates complete mastery of the material of legal history. With *The Spirit* he had established himself as a legal historian and legal theorist, and not merely in Germany. Translations into Italian and Spanish were published—but, "naturally," so to speak, not into English. Jhering's works were most widely read in France, where not only translations of *The Spirit* and *The Struggle for Right* as well as *Selected Works* in two volumes were published, but also Jhering's evolutionary theory of law. Twenty years after the German-French War, Raymond Blondel (Blondel 1892) wrote a lengthy obituary for Jhering *sur ce terrain neutre de la science* (on the neutral ground of science), full of respectful affection, calling him *un des hommes les plus éminents du XIXe siècle dans la science du droit* (one of the most eminent men of the 19th century in the science of law).

The motto of the second main work, which declared the purpose to be the source of all law, stands for his turn towards the real factors for the development of laws. With this "turn-about"—which was, however, not a total break and new beginning<sup>19</sup>—Jhering achieved an even broader, but also more dif-

<sup>18</sup> A collection of essays from the *Jahrbücher* was published between 1881 and 1886 in three volumes. Cf. Diederichsen 1996, 195ff.; Fikentscher and Himmelmann 1995.

<sup>19</sup> On the continuities in spite of the external break, cf. Rückert's interesting remarks (Rückert 2004 and 2005); Pleister 1982.

fuse effect. *The Purpose in Law* offered no cohesive realistic theory of law which could have been taken up, elaborated and developed further. Instead, it provided perspectives and impulses. This corresponded to Jhering's entire method of working. "He is more of an aphorist than a systematist, more of an empiricist than an abstract theorist; his intellectual tool is not so much the compelling order of thoughts, but the seminal idea" (Wieacker 1958, 201f.).<sup>20</sup> Without a historical profile and a systematic framework, his invocation of the reality of life behind law, his vague "vitalism" (cf. Wolf 1963, 651ff.) provided a medium for different concepts. Thus, all the newer legal-political directions and methodological views were able to use Jhering, the great "trailblazer," as a reference. Among those that must be mentioned here are chiefly the "Modern School of Criminal Law" and the different varieties of Sociological Jurisprudence.

#### 8.2.7.2. The Modern School of Criminal Law, the Free Law Movement and Jurisprudence of Interests

It was a student of Jhering's, Franz v. Liszt (1851–1919), who developed the concept of purpose for criminal law and the politics of criminal justice. As one of the co-founders and leaders of the *Modern*, i.e., sociological *School of Criminal Law*, whose founding manifesto, *Der Zweckgedanke im Strafrecht* ("The Purpose in Criminal Law") (1882) became widely known as the "Marburg program," he argued against the prevalent theories of criminal law, derived from Kant and Hegel, with the metaphysical justification they provided for the *Vergeltungsstrafe* (punishment for the sake of retaliation). Instead, the reasons for the perpetrator's actions were to be examined and punishment was to be viewed as a purposeful, i.e., socially useful reaction to the behavior of the perpetrator, which was seen as both socially incompatible but also socially conditioned (cf. in detail Naucke 1982). Liszt thereby became the "father" of the so-called *spezialpräventive Straftheorie* (theory of individually preventive criminal punishment), which takes into account the personality of the offender and the punishment's purpose of education and securing the criminal. This theory still affects many aspects of modern criminal law.

*Sociological* jurisprudence first appeared as a methodology of the development of law by judges. It was based on the criticism of jurisprudence of concepts and its dogmatic view that the legal order has no gaps, and emphasized the importance of court decisions in the development and creation of law. It became effective in and through two schools: the so-called *Freirechtsschule* (Free Law Movement) founded by Eugen Ehrlich (1862–1922), Hermann Kantorowicz (1877–1940) and Ernst Fuchs (1859–1929), as well as the Tübingen-based school of *Interessenjurisprudenz* (Jurisprudence of Interests)

<sup>20</sup> On the topic of purpose, similarly Wolf 1963, 650f.

surrounding Philipp Heck (1858–1943). The Free Law Movement, which took its name from Eugen Ehrlich's 1903 lecture in Vienna on *Freie Rechtsfindung und freie Rechtswissenschaft* ("Free finding of justice and free jurisprudence")<sup>21</sup>, and which—under the "dominating influence" of Jhering<sup>22</sup>—promoted the recourse to "living law" as it was actually practiced in order to resolve open questions, was willing to rely partially upon the creative power of judge personalities with a sociological orientation. Philipp Heck, on the other hand—in his speech as rector of the Tübingen University in 1912 on *Das Problem der Rechtsgewinnung* ("The Problem of Finding Law") (Heck 1912)<sup>23</sup>—recommended that judges wishing to close a legal gap should refer to the basic value judgments inherent and recognizable in the law, differentiating the interests at stake themselves, if necessary.

### 8.2.7.3. Sociological Jurisprudence (Roscoe Pound)

A close relative of the Jurisprudence of Interests is "Sociological Jurisprudence" as developed by Roscoe Pound (1870–1964), the great and influential and incredibly well-read US-American legal theorist and disseminator of European legal thought in the USA. His programmatic 1911 article *The Scope and Purpose of Sociological Jurisprudence* was followed in 1915 and 1916 by studies on the history of the concept of purpose in law. During this time, incidentally, the translation of Volume 1 of *The Purpose in Law* appeared under the title *Law as a Means to an End* (Boston 1913), based on the 4th edition of 1903. Pound presented the heart of his Sociological Jurisprudence, a theory of interests, in 1921 in two texts, one of which pays homage to Jhering, beginning with its title: *The Spirit of the Common Law* (Pound 1963; cf. also Friedmann 1960, 293ff.; Reich 1967, 29ff., 37ff.; Casper 1967, 13ff.). Pound considered the publication of the second volume of *The Purpose* in 1884 as the epochal turning-point in the development from the analysis of concepts to a modern, sociological school of legal thought, in the sense that jurisprudence opened itself up to the world of facts, even if the effect only began to be felt in America half a century later (Pound 1942, 126). German texts on the Jurisprudence of Interests were published in English translation only in 1948 (Fuller 1948). Jhering's influence on American legal thought, which used to

<sup>21</sup> Quoted according to the 1973 reprint (Ehrlich 1973). Cf. Wieacker 1967, 579ff.; Lombardi Vallauri 1971; Riebschläger 1968; Foulkes 1969.

<sup>22</sup> So Kantorowicz 1925, 39; he saw Gény's work as a "summary, an epistemologically underpinned textbook" (*ibid.*, 40). In the same vein Ross 1929, 185. Gény himself mainly pointed out Jhering's influence on his development in a 1911 letter to Kantorowicz (Kantorowicz 1925, 39). For further remarks, see also *infra* Section 8.3.1.1.

<sup>23</sup> This work, reprinted in 1932, was re-edited by Josef Esser and published together with two others ("Gesetzesauslegung und Interessenjurisprudenz" and "Begriffsbildung und Interessenjurisprudenz") by Roland Dubischar in 1968.

be greatly emphasized (Jenkins 1960, 169), is judged with more consideration today and seen in a more differentiated manner (cf. Summers 1996; Fikentscher 1973; see also Zweigert 1970, 248ff.). The fact that Pound was also influenced by Duguit and Géný, even though he may have been more critical of them originally than of Jhering, whose work he considered to be “of eternal scientific value” (Pound 1947, 114), brings us back to the history of European legal science.

### 8.3. Social Theories of Law (“Legal Naturalism”)

#### 8.3.1. *The Legal Theorists of the New “Scientific School” in France*

##### 8.3.1.1. François Géný

In view of the “natural” insufficiencies of abstract law-giving, the problem of how far the state’s law determines a court’s decision in any individual case, i.e., how far the judge may deduce his decision logically from the law, given his obligation to the law, caused a lively discussion in Germany that has never quite been resolved, beginning in the 1880s, i.e., ever since there was an imperial law-giver and a supreme court in the form of the *Reichsgericht* (Imperial Court), established in 1879. The initial spark came in the shape of a small book by a specialist in procedural law (!), Oskar Bülow (1837–1907), which combined two academic lectures and was published in 1885 under the title *Gesetz und Richteramt* (“Law and the Office of the Judge”) (Bülow 1972; on this subject, Ogorek 1986, 257ff.). In the tradition of the autonomous science of pandects, removed from the law, this had not been a topic of discussion previously. However, with the founding of the Empire, i.e., with the establishment of a central law-giving body and the transition towards *Gesetzespositivismus*, positivism of laws, conditions had changed fundamentally. This is the root of the critical Free Law Movement and its various branches, all the way to Carl Schmitt’s *Gesetz und Urteil* (Law and Judgment) from 1912<sup>24</sup> and the beginnings of Gustav Radbruch’s work (see *infra* Section 8.4.3.2).

In France, the insufficiency of the law for the concrete determination of justice was felt more and more acutely towards the end of the century, given the change in circumstances and dynamic social developments. However, French methodologists never attained the same freedom in the question of *Normenergänzung*, the supplementation of laws, as their German colleagues, because it was impossible for them to accept the power of the judge’s decision to amend and create law, for two reasons. On the one hand, this was a consequence of the cult of law established by the French Revolution, following Rousseau: *La loi est l’expression de la volonté générale* (The law is the expres-

<sup>24</sup> Cf. Hofmann 2002, 25ff.; review of the new edition of Schmitt’s book by Huber 1969.



sion of the general will) (Art. 6 of the *Déclaration des droits de l'homme et du citoyen* of 1789).<sup>25</sup> On the other hand, no less an authority than Montesquieu had decreed that the judges should have the role of the “law’s mouth-piece.” This led to the belief that the determining reasons for any individual legal decision had to be derived somehow from a complete, pre-existing legal order (cf. Ross 1929, 49). Characteristically, this view also dominates both the legal theory of Léon Duguit and that of François Gén $\acute{y}$ , to varying extents.

François Gén $\acute{y}$  (1861–1959), whose academic career took him from Algiers via Dijon to Nancy, where he held a chair for civil law from 1905 onwards, published a book of programmatic value and extraordinarily wide-spread effect in 1899: *Méthode d'interprétation et sources en droit privé positif* (“The Method of Interpretation and Sources of Positive Private Law”) (Gén $\acute{y}$  1919).<sup>26</sup> The preface was written by Raymond Salailles, then professor of civil law in Paris, a self-proclaimed student of Savigny’s who propagated a creative historical-sociological method of interpretation, based on the Historical School and observing the needs and rules of social life—*la methode nouvelle* (the new method) (upon this topic and the following, cf. Ross 1929, 45f., 48). However, Gén $\acute{y}$  placed a stronger emphasis on the idea of a pre-existing order, admittedly reflected only imperfectly in the framework of positive law, but nonetheless appearing in an empirically recognizable form there.

Gén $\acute{y}$  starts out with an analysis and critique of the logical-formal *Rechtsanwendungslehre*, the theory of the application of law, focused entirely upon the letter of the law. Faced with the gaps (even) in the *Code civil*, this theory had to result in an increasing estrangement between theory and practice. On the other hand, Gén $\acute{y}$  leads *le combat pour la méthode* (the struggle for method) as an attempt to systemize the various efforts to find additional sources of law—apart from the written statutes—for the development of law by the judiciary. Therefore, the centerpiece is a concept of law that is limited to the determining factors of the individual judicial decision—meant solely *à diriger les jugements humain* (to direct human judgments) (Gén $\acute{y}$  1919, vol. 2, 221). Gén $\acute{y}$ ’s classification of legal sources distinguishes two varieties: the formal, authoritarian, absolutely binding ones and the non-authoritarian ones, which might be labelled as directives for interpretation. The first authoritarian source of law—easily agreed upon—is the written law, or more specifically: the will of the law-giver. However, it remains mysterious how factual custom in the guise of customary law attains this same classification, since the inchoate number of people exercising customary law can hardly be defined as a commanding authority. Thus, the missing reasoning that might formally qualify customary law for this category is replaced with the argument that the

<sup>25</sup> Cf. Colleret 1962, 12ff., who speaks of the idolization of the law.

<sup>26</sup> On the following, Fikentscher 1975, 453–90; Mayda 1978; also Kayser 1991; Mayda 1991; Petit 1991.

content justifies it, due to social usefulness: The social requirements of security, stability and equality turn customary behavior into customary law, thereby also satisfying a deep human feeling and serving the balance of interests in a special way (ibid., vol. 1, 345f.).

In the third place, as non-authoritarian sources of law or directives of interpretation, Géný names authority, respectively tradition, and finally—in accordance with the Free Law Movement—“free scientific research” (*le libre recherche scientifique*) (ibid., vol. 2, 74ff.; English trans. in Géný 1963, 118ff.). *Tradition*, in this case, signifies legal theory and practice before the enactment of the *Code civil* (1804), while *autorité* signifies later doctrine and judiciary decisions. This terminology is slightly confusing, since the one thing that is *not* meant here is binding authority. When it comes to documents reflecting legal convictions that predate the codification, a binding authority cannot exist *eo ipso*. In the case of later documents, however, binding power cannot be assumed, because according to the principle of the division of power, the judiciary cannot be classified as a source of law and legal scholars lack the *authenticité* of law. Of course this once again provokes the question of the *authenticité* of factual customs. However, the problem of what Géný means by free scientific research as a subsidiary source of law is a more interesting topic. It is supposed to be the product of a science that begins by analyzing social circumstances, but then—ultimately—leads to the realms of faith of an idealistic natural law. The point of departure is the concept of the nature of things (*la nature des choses*). Analyzing them is to uncover the immanent structures of social life; in them, Géný believed to have found both the rules governing their order and their balance. Correspondingly, free scientific research was composed of two parts: the rational and ideal elements based on rationality and conscience on the one hand, and the “positive elements” on the other (Ross 1929, 62f.). The contemplation of the ideal elements results in a list of conventional principles, such as justice according to Aristotelian-Thomasian analysis, the dignity of the human person, the right to work, the abolition of slavery, the obligation to make compensation for damages caused culpably, and others. These legal principles lead to harmonious social conditions, according to Géný. Their “positive elements” may be found in the “given positive organizations” of a legal, political and economic nature.

### 8.3.1.2. Léon Duguit

The battle for a new method of judicial development of law was fought on the grounds of private law. However, it also occupied scholars of public law as theorists of law and state, such as Léon Duguit (1859–1928), who held a chair of constitutional law from 1892 onwards in Bordeaux (on the following Grimm 1973; also Fikentscher 1975, 496ff.). In his 1901 essay *L'Etat, le droit objectif et la loi positive* (“The State, Objective Rights and the Positive Law”),

which soon achieved fame, he may have defended the French dogma of the merely interpretatory role of the judiciary, but neither did he identify the law the judges were bound to exclusively as the formal laws. His reasoning, however, is much more radical. It is based on Comte's positivism, is also encouraged by Jhering and inspired by the evolutionism of Herbert Spencer (1820–1903) (cf. Gurvitch 1957, 116ff.). While Gény, just like the Free Law Movement and Social Jurisprudence, reacted to the social crisis of the liberal tradition of law and jurisprudence with a new method of finding justice in individual cases, and others, especially Menger and Gierke (who will be discussed shortly), demanded an adaptation of law through social norms, Duguit responded with a fundamental criticism of the traditional concepts of law and state. He is not satisfied with the re-establishment of the connection with reality, but demands a socialist law (*droit socialiste*) and jurists who work sociologically (*juriste sociologue*) (Duguit 1912, 1f., 7). The answer to the question of the “right” law is supposed to be derived immediately from reality, which is governed by the principle of solidarity. For him, of course, this “basic norm” is no more than a social fact: the factual interdependence of all those people whose existence depends upon one another (Duguit 1901, vol. 1, 23ff.; on the following *ibid.*, 82ff., 86ff., 98, 100). The normative consequence is that actions corresponding to solidarity are to be respected, interference is prohibited, and they deserve support. Different social situations, however, demand different variations of the principle. This is the result of an objective law that is free of judgments and mainly: independent of the sovereign state, i.e., independent of the will of the sovereign people: *supérieur à l'État lui-même*. At the same time, this objectivity is aimed against the egoism of individuals. Thus, factual solidarity is transformed into an ideal of a perfect society as a great workshop of collaboration (Duguit 1912, 157).

However, since there is obviously no *automatic* creation of law by reality, the population's sense of justice plays a key role; this *conscience juridique collective* is also the condition for the effectivity of the state's legal actions (cf. Grimm 1973, 45; on the following *ibid.*, 90ff.). From all this follows that science gains the competence in the development of law that the state loses. There are four tasks which jurisprudence must now fulfil: to observe the social facts that create law; to sharpen the consciousness of objective law; to support the law-giver in crafting the norms governing the executive; to delegitimize laws that fail to correspond to the prevalent legal consciousness.

### 8.3.1.3. Maurice Hauriou

In certain ways, Duguit was a rival of his friend Maurice Hauriou, who taught history from 1883 and administrative law since 1888 in Toulouse. For this leading theorist of French administrative law (Hauriou 1933), who nevertheless also wrote an overview of constitutional law (Hauriou 1929), became

most famous in a similar way due to his general theory of law and state: That is, due to his *theory of institutions* (Hauriou 1925).<sup>27</sup> This theory argues forcefully against German *Staatslehre* (doctrine of state) with their subjectivism, which attributes law to the will of legal entities, but also against the objectivism as propagated by sociologist Émile Durkheim (1858–1917) and Duguit, inasmuch as the latter sees legal norms as well as social and political organizations arise all too directly from social milieus. Hauriou sees legal bindingness as a condition created by a legal body such as the state, an association, a parliament or the church, as its expression of existence. The core of the institutions appear to be objectively existing ideas, which are realized as leading ideas (*idées directrices*) in social milieus through the organization of “power,” i.e., by divided competencies balancing each other out. To this is added a “representation” towards the outside and the mass of other members, a medium of the community’s manifestation in order to realize the leading idea. The secondary institutions *in rem*, such as property, are distinguished from the legal bodies through the lack of an autonomous objective individuality allowing them to be personified.

The details of this idiosyncratic mixture of sociological, corporate, Platonic, Thomasian and philosophy-of-life elements shall not be examined here. For Hauriou’s theory of institutions only found its mature form in 1925. Therefore, it falls outside the framework of our topic both in terms of chronology and content. If this legal philosophy is sketched here in its most rudimentary form, it is because Hauriou developed it over the course of decades in three phases, the beginnings of which took place around the turn of the century, demonstrating the questions and attempted answers typical for the time. Their keywords are: sociology before jurisprudence, the role of jurisprudence, objectivity or subjectivity of law, foundation (*fondation*) of law. Suffice it to recall the beginning of Hauriou’s examination of the “phenomena of institutions,” which was part of the examination of the structure of society, and can be found in his sociological work *La Science sociale traditionnelle* (“Traditional Sociology”), dated 1896. There, he calls the attaining of self-consciousness, the animation or the arrival at consciousness of a social organization, even its “redemption” “to institute (*instituer*)” or “Institution [...] *la rédemption de organisations sociales, que nous appellerons ‘phénomène de l’institution’*” (the redemption of organizations, which we will call ‘the phenomenon of institution’) (Hauriou 1896, 188). To Hauriou, this originally signified a social, not yet a legal problem.

<sup>27</sup> On this topic, with copious references, Fikentscher 1975, 506–41.

### 8.3.2. *Adolf Merkel's Allgemeine Rechtslehre (General Theory of Law) as a "Positivist Philosophy of Law"*

The Free Law Movement, Jurisprudence of Interests, the New School of Interpretation with its *combat pour la methode* and also *Sociological Jurisprudence* in its orientation towards case law, all of these are concerned with the true determining factors of court decisions—meaning, from a Continental European perspective, the relation between law and judge. Jhering had paved the way for realistic analyses of the problem, but had also posed the much larger question of a new general theoretical concept of law by his naturalistic break with traditional jurisprudence. The great systematic conceptions of objective idealism were no longer able to provide such orientation. History had rendered them obsolete. In a defiant preface to his own Hegelian *System der Rechtsphilosophie* (“System of Legal Philosophy”) of 1882, Adolf Lasson called it “old-fashioned.” Although he and Karl Christian Krause—the latter with a somewhat more wide-ranging effect—as well as the latter’s student Heinrich Ahrens and others tried to uphold the philosophical tradition, and Jhering was not untouched by this attempt either (see *supra* at the end of Section 8.2.6), the second half of the 19th century was widely experienced and viewed as a period without legal philosophy. Thus, it was only consequent that it was one of Jhering’s students who questioned the “future of legal philosophy” and programmatically demanded its transformation into a “general theory of law.” Thereby, Adolf Merkel (1836–1896), who had submitted his habilitation in 1862 in Gießen, gone to Vienna in 1872 and later to Straßburg, became the father, so to speak, of a “theory of law” in the stricter sense of the meaning which competed with “legal philosophy” in the traditional sense (cf. Brockmüller 1997, 238ff.).

The point of departure is Merkel’s postulation that the questions of “the real law, its factual basis and its inevitable effects” and of “the desired law and its ideal relations” be distinguished clearly (Merkel 1890, 89). With this dichotomy, Merkel’s revision of the article *Philosophische Einleitung in die Rechtswissenschaft* (“Philosophical Introduction to Jurisprudence”) in the 5th edition of Holtzendorff’s *Encyklopädie der Rechtswissenschaft* (“Encyclopedia of Jurisprudence”) of 1890 makes a clear break with the earlier version of this section. It had been written by Ahrens, a proponent of natural law, and could no longer compete with positivism (Herzer 1993, 131f.).<sup>28</sup> If Merkel says elsewhere that what should be follows from a judgment of what is, this is not an unexpected amalgamation of both areas in a “naturalistic fallacy,” but indicates the possibility that an analysis of given facts and their potential positive and

<sup>28</sup> Later, Merkel retitled this introduction *Grundlinien der positivistischen Rechtsphilosophie*: Merkel 1893b, 411. In greater detail, Merkel 1899. On the following Barth 1956, 124ff., 176ff., as well as the impressive Dornseifer 1979, 40ff., and Stier 2006, 81ff., 90ff.

negative developments allow the derivation of “ideal forms” as templates for the transformation of existing circumstances. The thought of such a feedback (albeit in mainly emotional terms) is familiar from Jhering (see *supra* Section 8.2.6; Jhering 1986 and 1894). Objective valuations, on the other hand, are not considered a possible object of scientific research by Merkel. Because of the unavoidable subjectivity of idealistic ethics and legal philosophy, he recommends “not examining the question of the law that is and should be valid *per se*.” The task of completing the existing positive law remains for legal philosophy as a “general theory of law.” This is to be achieved through the elucidation of what the various areas of law have in common and the “general rules of their development” (Merkel 1890, 90f.). Thus, opinions of what is just become the object of this scientific process inasmuch as they are part of the real factors of the development and effectivity of law, without regard to their objective value (*ibid.*, 20; the following *ibid.*, 20–5). The logical independence of these evaluations of justice is as untouched by this relativization as by the proof of their dependence upon dominant social interests. Furthermore, ideas of justice may attain “a certain level of resistance power against the interests arising in society,” so that a social analysis of the legal order shows a “mutual dependency.”

Thus, this analysis is based not upon the determination of the content of law, but upon the determination of its social functions. According to Merkel, law creates a social order of peace by drawing boundaries between the “competing elements of power” and through balancing mechanisms (*ibid.*, 5, 27). In this regard, he is able to agree with Jhering’s principle that purpose is the creator of law. However, he adds a critical remark resembling the argument made by Nietzsche against Jhering: for the most part, institutes of law are the result of long-term developments with different, even conflicting purposes. The purpose accepted at any given time may not have been the creator of the institute of law at all (*ibid.*, 14).<sup>29</sup> There are two other points, even more valid, in which Merkel’s theory of law is distinctly different from Jhering’s legal positivism.

The first one concerns the relation between law and the state (*ibid.*, 6). Both, he claims, were “created together” and “developed together.” In his opposition to the tradition of the Enlightenment’s theory of law, the linchpin of which is the contract, Merkel combines this statement, of dubious historic value, with the hypothesis that the oldest legal rules pertain to the relationship between ruler and those ruled over, and thus to the core of the state’s organization (and not, to speak with Kant, the “external Mine and Yours”). Furthermore, the state remains the “home” and the “foremost creator” of law. At the

<sup>29</sup> In his *Genealogy of Morals* (II 12), Nietzsche wrote: “The ‘purpose in law’ must be used at the very last for the developmental history of law: rather, for all kinds of history there is no more important sentence than this one, [...] that the cause for the creation of a thing and its ultimate usefulness, its factual use and its integration into a system of purposes are removed *toto coelo*.” Cf. Wieacker 1967, 565f.; Pleister 1982, 390ff.



same time, however, Merkel opposes the prevailing opinion, ultimately also shared by Jhering, that only the state is able to create law. Instead, “any community” which has the power to determine the relations between its members and their relations with the community, could create its own law. The fact that he cites the Catholic Church as an example shows the influence of Ernst Rudolf Bierling (1841–1919).<sup>30</sup>

The second related issue is the question of coercion as a constituting conceptual element of law (*ibid.*, 10ff.). Merkel vehemently defends the *Imperativtheorie* (theory of legal imperatives) and contradicts Jhering’s limiting of the circle of persons addressed by the legal imperatives: According to him, legal rules are not merely addressed to the state’s executive powers, as Jhering taught, but to “all those persons whose relations they regulate.” “Mechanical coercion” is indispensable in order to maintain the general legal order. However, he regards it as incorrect to characterize law as “the sum of the social norms of coercion.” To him, coercion only plays a subsidiary and minor role. It is overshadowed by the power that law attains as the epitome of “valid” rules from the “expectation of voluntary compliance” arising from the moral ideas prevalent among the population.

Regarding the general rules of the development of law, Merkel searches for them because given the widespread economic, social and political changes, the continuity of the legal order of peace as well as the connection between traditions and all the innovations are at stake. In addition, Merkel believes that the rules of the process underlying the development of law itself provide the yardstick for its evaluation.<sup>31</sup> A theory of the development of law oriented towards the social sciences must primarily aim to capture in their entirety all the forward-moving and insistently traditional elements of the struggle of diverging powers. This struggle is the motor of development. It is the reason for the elevation and enrichment of life and the continuous multiplication of its forms. In the competition for material subsistence, life is forced into an upward motion like a *Wettersäule*, i.e., storm clouds forced to rise by a collision of winds. Merkel defines the role of science in this process as an active and enlightening one, in contradiction to Savigny’s conservative historicism on the one hand and the materialistic emphasis on metamorphosis by the evolutionists on the other.<sup>32</sup> For example, imagination and constructive reason could

<sup>30</sup> Cf. Bierling 1871, 443; 1876, 286ff. Cf. also Hofmann 1977, 45ff., 77; lately Bahlmann 1995, 30ff., 47ff. With his *Kritik der juristischen Grundbegriffe* (“Critique of Basic Legal Terms”: Bierling 1877–1883), and his *Juristische Prinzipienlehre* (“Theory of Legal Principles”: Bierling 1894) Bierling himself is part of the history of the development of a general theory of law. Cf. Brockmüller 1997, 249ff.

<sup>31</sup> The following quoted according to Merkel 1898, 2, 4ff., 10ff., 89f. Cf. in detail Stier 2006, 84ff.

<sup>32</sup> Regarding this and the following Merkel 1899, 318ff.; in more detail Dornseifer 1979, 29f., 32ff., 76f., and in great detail Stier 2006, 90ff.

create a kind of counter-world from suppressed needs. And the norms and forms of this ideal world could then again become the benchmark and criteria for the real world. Of course Merkel was aware that no absolute and generally valid criteria could be arrived at in this way. However, he claimed that at least it made a neutral evaluation possible—in the face of conflicting interests—although this can obviously differ from generation to generation. The conviction of the objective recognizability of developmental tendencies, and thus a kind of belief in progress, remains the basic foundation. This alone makes it plausible that for Merkel, what should be (however relative it may be) follows from the judgment upon what is.

### 8.3.3. *Jurisprudence in the Class Society—Anton Menger's "Jurists' Socialism"*

The naturalistic view of law as a product of society and its postulate that the judge's process of finding law must take social circumstances into account were general and abstract, and thus they had *de facto* remained part of the traditional liberal, individualistic ideas of social life. Jhering's breakthrough towards the purpose in law had not transcended the boundaries of the civic, competitive society either: "Competition is the social self-government of egoism" (Jhering 1923, I, 104). The dangers of unbridled individualism only appeared in Jhering's writings as dark insinuations. Legal practice, in particular, remained fixated on conflict resolution within the system because of scientific positivism and the bindingness of laws, especially as the positivistic weakening of legal ethics also reduces the chance of social problems being taken into account in the finding of legal solutions (cf. Willrodt 1975, 82). In addition, the public's interest was focused on the economic boom (cf. Wehler 1995, vol. 3, 66ff.). It has rightfully been pointed out that during the 19th century, "the developed legal concepts that ensured the functioning of production and distribution, of credit and cash flow, completely overshadowed the social aspects" (Krause 1970, 314). Wilhelm Arnold, a *Germanist* or expert on history of German law, wrote with great pride in 1865 "that the technique of jurisprudence has kept pace with that of machines and factories" (Arnold 1865, XVII; cf. Kroeschell 1975). In contrast, Anton Menger's historical achievement is to have focused on the workers' question, meaning the very concrete misery of the industrial proletariat during the second half of the 19th century, as the center of social philosophy, thereby criticizing the unreflected assumptions of liberal legal traditions. In keeping with his point of view, he developed jurisprudence into a scientific form of social politics. Thus, he became one of the most outstanding proponents of *Juristensozialismus*, i.e. "jurists' socialism."<sup>33</sup>

<sup>33</sup> Cf. Reich 1974–1975 as well as Orrù 1974–1975. Cf. also Caroni 1974–1975 and the obituary by Neukamp 1906.

Anton Menger (von Wolfensgrün) (1848–1906), born in Maniów/Galicia, studied not only law in Cracow and Vienna, but also philosophy, history and mathematics. He was appointed professor of Austrian civil procedural law in 1877 in Vienna, where he was elected rector in 1895. In his three main works, he combined dogmatic discussion with legal-political demands. Thus, in 1886 he formulated the “economic basic rights of socialism,” i.e., the right to existence, to work and to the entire fruit of one’s labor: *Das Recht auf den vollen Arbeitsertrag in geschichtlicher Darstellung* (“A Historical Examination of the Right to the Entire Fruit of One’s Labor”). In a harsh critique of the new German civil code (*Bürgerliches Gesetzbuch* or BGB), he demanded a fundamental reform of civil law through social corrections: *Das bürgerliche Recht und die besitzlosen Volksklassen* (“Civil Law and the Unpropertied Classes”), dated 1890 (Menger 1908).<sup>34</sup> And in his *Neue Staatslehre* (“New Doctrine of State”) of 1903, he aimed for a “popular workers’ state” and for overcoming the division between public and private law, whereby the entire body of private law would become administrative law.

In the central area of jurisprudential methodological discussion of his time, which focused on the relation between law and judge, Menger criticized the central dogma of the legal order’s completeness as a hindrance for social progress. According to him, the resulting obligation of the judge to systematically bridge the gaps created by missing legislation by drawing analogies led to the continuance of obsolete social conditions.<sup>35</sup> This was all the worse because the BGB had major legislative shortcomings in those areas where existential issues of the “unpropertied classes” were concerned. From this situation, two legal-political demands arose: On the one hand, socially problematic areas of life needed to be regulated especially carefully and extensively by law. And on the other hand, analogy should be banned in general, allowing the judge to decide a case according to considerations of expedience in the event of a gap in the law, as Art. 1 of the Swiss civil code stipulates. However, Menger did not believe in rapid social progress, even with these measures. After all, almost all judges came “almost exclusively from the propertied and educated classes of the population” and were trained in the spirit of scientific positivism. Thus, he places his hope in future jurists, trained according to the principles of a “social jurisprudence.”

Menger further laid out his ideas of such a jurisprudential science in his Rector’s Speech of 1895 in Vienna, entitled *Über die sozialen Aufgaben der Rechtswissenschaft* (“On the Social Duties of Jurisprudence”). Menger adopts the tripartite division of jurisprudence—legal dogmatics, legal history and legal philosophy—which goes back to Gustav Hugo and was handed down by

<sup>34</sup> Persuasive anti-criticism in Rückert 2003, 758; cf. also Hofer 2001, 134ff.

<sup>35</sup> This and the following quoted according to Menger 1908, 24ff., 29; on this, cf. also Willrodt 1975, 84f.

Jhering (cfr. *supra* Section 8.2.3, fn. 8), varying it to arrive at a triad of dogmatics, legal history and “legislative-political jurisprudence” (Menger 1895, 5f.; cf. Willrodt 1975, 85ff.; Kästner 1974, 146ff.).

According to Menger, dogmatic jurisprudence has the conventional task of collecting the applicable laws, to categorize them as part of a scientific system, “removing gaps and contradictions in the process and generally giving the applicable legal matter the most appropriate shape for its application” (Menger 1895, 4; the following *ibid.*, 6). In this regard, a certain measure of constructive activity must be conceded to it, which no law-giver can ban, just as little as “a certain level of creative activity” when applying the law “to the new phenomena of life.” Since Menger, however, does not expect any social progress to result from this, given the circumstances, but places his hope in progressive legislation, he wants to keep this level of activity as low as possible, emphasizing the dependence of those applying the law upon the law-giver, and also is a strict proponent of the subjective method of interpretation. With regard to the social broadening of the law’s application through the jurisprudence of interests and the objective theory of interpretation, however, this proved to be a dead end. To Menger, on the other hand, the question “which meaning the authors of the law [...] attach to the individual regulations of a body of law” was at the forefront of his dogmatic work. This reduction of the dogmatic working process—to encompass only the interpretation of certain legal texts—was made possible by the increasing volume of codified legal material. “From a purely scientific standpoint,” however, Menger finds this reduction very unsatisfying.

What seems “far more satisfying” to him from a scientific point of view is the field of historical jurisprudence. It is up to this field to determine the origin of individual legal norms and institutes, and to trace their development up to the present. Its goal is the same as that of dogmatics: a scientific systematization of the current law (*ibid.*, 14, 16ff.).

However, Menger sees the main duty of jurisprudence in “legislative and political jurisprudence,” providing the law-giver with criteria for the necessary further development of the law, as required by social changes (*ibid.*, 29). Its tool is the comparison of the “traditional legal material with the circumstances of present times” (*ibid.*, 20; the following *ibid.*, 21f.). To Menger, the yardstick for assessing development is not an ideal of justice, but the empirical and sociological determination of congruence or incongruence between legal order and social situation, between law and the existing social power structure of the time. Therefore, the core of legislative-political jurisprudence is “social jurisprudence.” It observes the “waxing and waning of power structures” and therefrom draws conclusions as to what changes of law will be necessary with regard to the shifting balance of power between the various classes of the civic society. This requires the ascertainment of facts “through the examination of the history of state, law and culture of each country” in addition

to “the statistic investigations into the social situation [...] which modern, cultured states [...] conduct [...] increasingly” (ibid., 24, also for the following quotation; cf. also ibid., 16f., 19). Even more important, even “the first prerequisite of every truly scientific activity,” however, is renouncing one’s belief in authority. As Descartes already taught, “no scientific opinion may be taken on sole authority of its author: Each, without exception, [must] be subjected to doubt and critical examination.” By opening itself in this interdisciplinary manner within the universities, social science with its core subject, social jurisprudence, might become the “unifying bond” for the increasingly specialized sciences, a role philosophy occupied until about 1850. The social question and social jurisprudence marked “an area of thought occupying all minds,” able to encompass “the most important practical questions of human existence,” just as formerly philosophy had (ibid., 26–9; the following quotation ibid., 34).

With the goal of “making state and society habitable for all classes of the population,” Menger aims for a transition of jurisprudence towards scientific social policy. Through a continuous equalization and balancing of the tensions caused by the shifting of the social power structure, it is to prevent the “social catastrophes” of revolutionary eruptions by taking on “the role of arbitrator between the various classes of civic society” to a certain degree (ibid., 22): This idea especially shows just how strongly Menger is still influenced by the idea of an autonomous jurisprudence, in spite of his critical distance. On the whole, it also shows how much his social ethos permeates the supposedly objective sociological statements. His descriptions of social circumstances always bear an *a priori* connotation of “disgrace” and “misery.”

The contemporary echo that Menger’s writings found was considerable. Eugen Ehrlich, member of the Free Law Movement, was impressed by them. In 1904, *Das Recht auf den vollen Arbeitsertrag* and *Das bürgerliche Recht und die besitzlosen Volksklassen* appeared in their respective third editions and his *Neue Staatslehre* of 1903 in its second edition; his Rector’s Speech was edited one more time in 1905. His works were published in English, French, Spanish, Italian, Russian, Czech and Polish translations. However, they did not achieve a sweeping or lasting effect. His legal and social theories were not acceptable to the middle classes, but ultimately neither to the social democrats. He scared the former by his radical break with tradition and his socialistic ideology of class struggle, and while he offered the latter a wide range of reformist legal theory, it lacked an economic perspective and was no more than a vague utopia of evolutionary transition towards a socialist society (cf. Menger 1903, 303ff., 305ff.; on this topic, Kästner 1974, 185ff.; Willrodt 1975, 220ff.; also Neukamp 1906, 151).

### 8.3.4. *Otto von Gierke's Social Law of Associations*

#### 8.3.4.1. Gierke's Position and Importance

Like Menger, Otto von Gierke (1841–1927), appointed professor in 1887 in Berlin, criticized the lopsided social-political individualism of the planned BGB, Roman-law-influenced and alien to the population, in a whole series of voluminous journal articles (beginning with Gierke 1889; cf. Janssen 1974, 59ff.; Hofer 2001, 141ff.). And similarly to Menger, Gierke wrote with the same tendency, not about social jurisprudence, but about *Die soziale Aufgabe des Privatrechts* (“The Social Duty of Private Law”): “A system of private law that is aware of its social obligation will also have to aim for the material protection of those strata of society imperiled by the freedom of contract against the pressure of economically superior forces” (Gierke 1943, 29). In this regard, a “drop of socialist oil” was needed to “infiltrate” private law. This often (and frequently imprecisely) quoted phrase, however, only represents half of Gierke’s demands for legal and political reform. After all, he argues—another superficial similarity with Menger—against the antithesis of absolutist public law and individualistic private law, and in favor of an integrated public law—“infiltrated” on the one hand by that drop of socialist oil, but on the other hand also touched by a “breeze of natural law’s dream of liberty” (Gierke 1943, 13). Gierke’s influence on the work of the legislature, however, remained limited. He had a stronger impact at the universities and among judges, due to his insights into the importance of blanket clauses, the law of associations and continuing obligations, due to his support of social components in labor law and tenant law and his demand for *Sozialbindung des Eigentums*, a social obligation associated with property ownership. Through Hugo Preuß (1860–1925), a declared student of Gierke’s, these elements found their way into the Weimar Constitution. “Property ownership carries an obligation. Its use shall also serve the best interest of the community” (Article 153, Section 3). In his role as a sociopolitical reformer, Gierke paved the way for modern labor law, in which the “cooperative” association of employees in unions was to effect a balance of power with entrepreneurial employers, thus creating the basis for a law of collective labor agreements as an autonomous legal creation of the world of work.<sup>36</sup> But Gierke—although a member of the *Verein für Sozialpolitik* (Association for Social Politics) and a co-founder of the Evangelical-Social Congress, that center of “social protestantism”—was not a *Kathedersozialist* (“a teaching socialist”) and cannot be considered a typical proponent of Jurists’ Socialism (cf. Dilcher 1974–1975, 323ff., 334ff.). His social theory of law is not simply aimed at social re-

<sup>36</sup> For a critical evaluation, cf. Spindler 1982. Cf. also more recently Hofer 2001, 115ff., 117ff.



form. Instead, it is also traditionalist, steeped in the national-liberal attitude of the “Germanists” or German-law historians, and influenced by F.-W. Schelling’s romantic philosophy of history and his concept of the organism (Wieacker 1967, 454). And ultimately, beyond all naturalistic social theories of law, Gierke is always in search of the ethical foundations of law. Thus, he sharply rejected Menger’s demand for judicature according to expedience in the case of gaps in the law as “the renunciation of the idea of law on the part of socialism” (Gierke 1889, 122).<sup>37</sup> And when Gierke, like Menger, demanded a “state of the people,” and with it, overcoming the boundaries between private and public law, he did not mean the socialization of all social areas in the wake of class struggle, but the transformation of the institutionalized authoritarian state into a community with a cooperative constitution (cfr. Gierke 1943 and Wolf 1963, 685). Ultimately, his oeuvre’s extraordinary volume, complexity and rich diversity of details make it impossible to reduce it to one formula. After all, it is estimated to comprise around 10,000 printed pages, and it is no coincidence that it has been associated with the most diverse perspectives and labelled with wildly varying epithets. Gierke has been called the father of modern German labor law, but also a reactionary, an ideologue of collectivism and a precursor of National Socialism—which, however, distanced itself very decidedly from Gierke<sup>38</sup>—and the inner contradictions of his works, resulting from the structure of Gierke’s personality, have been pointed out (Wieacker 1967, 454).

In any event, Gierke’s work found a very strong echo. The recognition he enjoyed both nationally and internationally found its expression in the *Festschrift* commemorating his 70th birthday on January 11, 1911, on which 44 scholars, including a number of English, French and Italian authors, collaborated. This day also brought him the conferment of a hereditary title of nobility. In 1909, a partial English translation of his *Genossenschaftsrecht* (“Law of Associations”), edited by F. W. Maitland, was published; in 1914 Jean de Pange published his French translation. At the age of 80, Gierke died after a brief illness on October 10, 1921. His library was bequeathed to the University of Commerce in Tokyo, where it was given its own department.

#### 8.3.4.2. Life and Scientific Development

Gierke’s life and his scientific development illustrate the thematic and intellectual breadth of the work (on the following, cf. Wolf 1963, 669ff.). Otto Friedrich Gierke was born on January 11, 1841 as the son of a Prussian civil servant in Stettin, studying in Heidelberg and Berlin, where he received major

<sup>37</sup> Cf. also Gierke’s fine article on *Recht und Sittlichkeit*: Gierke 1963.

<sup>38</sup> Cf. Höhn 1936, 7, 150: “no longer useful for our times”; a mere “variation on the individualistic legal system.”

impulses from the leading expert on German law and national-liberal “political professor” of the Paulskirche, Georg Beseler (1809–1888) (cf. Kern 1982; Schröder 1982–1983), and where he also completed his doctoral thesis on the topic of *Lebensschulden* (obligations from fiefdom). Returned from the war of 1866—Gierke had taken part in the battle of Königgrätz as a lieutenant of the *Landwehr* artillery—he wrote a professorial dissertation comprising about 1,100 pages, entitled *Rechtsgeschichte der deutschen Genossenschaft* (“The Legal History of German Associations”) (Gierke 1868)<sup>39</sup> within a few months. In it, he attempts to prove that even in ancient times, an independent German sense of justice existed with its own ideas and institutions, separate from Roman law. To him, the central institution of this kind was the “association” or “cooperative,” supposedly the prototype of German communal order. In any case, with it, he had found the key concept of his theory of law. As a private lecturer in Berlin, he gave lectures on German legal history, German private and feudal law as well as commercial, maritime and exchange law, but also on doctrine of state, constitutional law and canon law. After participating in the German-French war, Gierke was appointed adjunct professor in Berlin in 1871 and held a regular professorship from 1872 in Breslau, where he was associated with Wilhelm Dilthey (1833–1911), creator of the *geisteswissenschaftliche Methode* (method of “human sciences”)<sup>40</sup> and was acting rector in 1882–1883 as well. In his Rector’s Speech, entitled *Naturrecht und deutsches Recht* (“Natural Law and German Law”), he summarized the results of his investigations into this topic (Gierke 1883). From them, the monograph on *Johannes Althusius und die Entwicklung der naturrechtlichen Staatstheorie* (“Johannes Althusius and the Development of the Natural-Law Theory of State”) had previously resulted (Gierke 1968). Gierke’s later attempt to formulate a system of German private law in three volumes, based on the results of his studies in legal history, was less successful. However, his rediscovery of the major Calvinist social theorist and political thinker Althusius brought Gierke great and well-deserved fame. In 1884 he was appointed professor in Heidelberg, in 1887 in Berlin. To Gierke, Althusius’s corporate theory of a social organism which “grows towards the top through a graded series of associations” was a prime example for the specific German combination of the native legal tradition with a general naturalistic social theory, whose proximity to the population distinguished it both from the absolutist as well as the revolutionary version of the theory of the social contract and the contract of sovereignty.

During all these years, Gierke continued his work on the German law of associations. The second volume, published in 1873, traces the concept of associations until the time of the reception of Roman law, while the third (1881)

<sup>39</sup> On this and the three subsequent volumes, cf. Janssen 1974, 20ff.

<sup>40</sup> Gierke published a detailed review of the first volume of Wilhelm Dilthey’s *Einleitung in die Geisteswissenschaften* (1883): cf. Gierke 1884.

features the history of the theory of corporations of ancient and medieval times. Gierke's examination of the basic concepts of constitutional law led to one of the field's highlights in the shape of his review of Laband's *Reichsstaatsrecht* ("Imperial Constitutional Law"): *Labands Staatsrecht und die deutsche Rechtswissenschaft* ("Laband's Constitutional Law and German Jurisprudence"), published in 1883. The main point Gierke attacks is Laband's construction of the state as a legal person, i.e., an abstract and merely fictitious entity, using the resources of individualistic private law alone. Instead, he proposes his idea of the actual existence of an overall public-law personality or body which would be not only a ruling authority, but also an association. In this, he sees a "social being," a "personality of a higher order" which is specifically not made up of private individuals, but from *Gliedpersönlichkeiten* (member personalities) (Gierke 1961, 31ff.). According to this, the state is not just a legal organism, but also "a natural and intellectual-moral social organism, whose existential order must necessarily also be a legal order, but which is not limited to the latter" (ibid., 53). It is distinguished from other corporations constituting part of the state by the fact that its corporate power is the highest of its kind (ibid., 72). Throughout the discussion about the federal nature of the German Empire, Gierke insists that only the state as a whole holds the key distinction of sovereignty. Twenty years later, Gierke provided a well-rounded and lively summary of this, his "organic theory," as part of his Berlin Rector's Speech on *Das Wesen der menschlichen Verbände* ("The Nature of Human Associations") (Gierke 1954). However, his *German Law of Associations* remained unfinished. While 1913 saw the publication of a fourth volume, this only described modern theories of state and corporations up to the middle of the 17th century, and those of natural law up to the beginning of the 19th century. The outbreak of World War I led Gierke, the veteran of the 1866 and 1870/71 wars, to make a number of patriotic statements (Gierke 1914, Gierke 1915a). One of his last publications, however, returns to the legal-philosophical foundations of his scientific work. As early as his Breslau Rector's Speech in 1882, Gierke had defended the idea of law against its "corruption" by the principles of utility and power, and especially against the legal positivism of the setting of law by decree (Gierke 1883, 11f., 32; the following ibid., 9f., 11f.). This, however, does not constitute a plea for an ideal natural law. On the contrary: Against radical and revolutionary concepts of natural law, Gierke placed his faith in positive law, but only in the sense of a law that had developed as part of national cultural processes and could thus be labelled positive. Gierke's legal philosophy is a "philosophy of legal history."<sup>41</sup> In the midst of a war, Gierke's *Recht und Sittlichkeit* ("Law and Morality") emphasized that law must remain focused on the "legal idea" of what is right, even in times of armed conflict (Gierke 1963, 46f.). Even if the archetype of justice reveals itself to us as little

<sup>41</sup> Wolf 1963, 690, taking up a phrase by Dulckeit.

as the archetypes of what is good and true, it remains an “immutable human value,” thus providing an immanent criterion through all the historic permutations of law: both “archetype and ultimate goal” (*ibid.*, 34, 37, 40).

#### 8.3.4.3. Central Topics: The Actual Body Corporate and the Development of the Law of Associations

Erik Wolf has called Gierke’s theory of the “reality of the body corporate” the “specific result” of his “idiosyncratic social-ethical historicism” (Wolf 1963, 693). This view holds that the social world is made up of living organizations, natural and historical embodiments of the people’s spirit on a “higher plane of existence [...] above the order(s) governing the lives of individuals,” finding the “essence of existence” in their “destination for a higher communal form of living” (Gierke 1915b, 26, 98). This, according to Wolf, is the core of Gierke’s much-criticized “organism theory” (Wolf 1963, 694). One may discover in it a similarity with Hegel’s idealism or even more with Schelling’s philosophy of identity: Gierke’s approach has the sharp profile of a theory of law or doctrine of state only in its political perspective of a national-liberal striving for an “organic” unity of the traditional monarchy and the liberty of the people rooted in history. This is what Gierke’s teacher stood for: Georg Beseler, one of the “political professors” of the Paulskirche Parliament. The organic state personality was to reconcile sovereignty and association, unity and liberty (on this and the following, cf. Böckenförde 1995, 147ff., 157ff., Dilcher 1974–1975, 355ff., and Schönberger 1997, 338f., 340ff.). This required overcoming not only the idea of the fictitious legal person as the pandectists had conceived it, but also the notion of a collective of individuals which rational natural law and its theory of a social contract had advanced. Understanding the state as a “social organism” thus meant seeing it both as an actual social unit and as an “ideal entity.” Gierke’s special achievement lies in having embraced the national-political goal of a constitutional state bound by its own history with a theory of associations whose approach was characterized by developmental history and social theory, i.e., by a general theory of how human understanding develops that—unlike the contract theory of natural law—did not think along individualistic and mechanic-associative lines, but followed Althusius’s concept of consociation. According to this, the social order results from various layers of associations, some of them natural, some of them formed on purpose. The most comprehensive and highest of these is the state, which therefore differs from the associations it incorporates only quantitatively and because of its sovereignty, but not by its nature or in essence. If one recalls the effect that Maitland’s English translation of the *Law of Associations* had, Gierke’s theory is reminiscent of the sociological pluralism of Harold Laski (1893–1950), even if later on Gierke, as already indicated, was to expressly conclude an *Artunterschied* (fundamental difference,

literally “different species”) with regard to the state’s sovereignty, as witnessed by his review of Laband’s *Constitutional Law*.

However, one way or another, Gierke’s theory of associations is not a general theory of associations aiming to dismantle the state from the angle of the social sphere. Gierke does not think along the lines of an antithesis of state and society; instead, his approach is developed from the pre-modern associations that still united sovereign and cooperative elements, public and private spheres seamlessly within them. This, however, does not mean that the concept of consociation was a piece of medieval romanticism untouched by the social question and the living conditions of industrial workers. On the contrary: As already stated, Gierke’s emphatic wish was to bring the acute social challenges of private law to general attention, the concept of association being his point of departure. Furthermore, he sought to revive the traditional forms of cooperative liberty of the people, duly transformed, as part of a liberal national constitutional state. This begins with harsh criticism of Laband’s abstract concept of citizenship as a *staatliches Gewaltverhältnis*, i.e., control exercised by the state over the individual, which—Gierke claims—fails to adequately express “the particular nature of citizenship as a membership in the community” with all its consequences, including the “right to participate, according to the constitution, in the expression of the state’s will” (this and the following quote according to Gierke 1961, 36ff.).

Most important, however, is Gierke’s complaint that Laband’s denegation of the nature of all basic rights as rights (thereby, Gierke goes far beyond criticising the lack of a catalogue of basic rights in Bismarck’s Imperial Constitution) fails to acknowledge their fundamental constitutional importance for the organization of the community. By means of the basic rights, he claims, the state differentiates its own sphere from the “spheres of the individuals (or more limited associations).” “After all, individual persons make up the body of the state not as a sum of atoms equal to each other, but in a certain constitutional order.” To Gierke, these “more limited associations,” in comparison to the state, are the municipalities, but the member states of a federal state are also seen from this “associative” point of view (*ibid.*, 75). Further associative organizations do not seem to be excluded. However, it remains open whether and how—being based on the freedom of the individual—they can mediate between individuals and state.

Under these premises, Laband’s treatment of the *Reichstag* (Imperial Parliament) must appear completely amiss. For according to Gierke’s analysis, Laband’s system does not really allow for the *Reichstag* as an organ of state and co-bearer of imperial power next to the *Bundesrat* (Federal Council) as the supposed “general assembly” of the Empire. To Laband, the state “as an active subject of law” was ultimately the same as the “government,” “while the people’s representatives appear to be only a committee of external advisors on matters of state interest” (this and the following *ibid.* 52; cf. also

Schönberger 1997, 165ff., 347ff.). Gierke sees the negative consequence of this theoretical dismantling of the *Reichstag's* state function, and its being limited in practice to the preparation or ex-post examination of the state's actions, in the reduction of the actual element of state in each of the state's actions to a mere "command," in which the *Reichstag* has no part. According to Gierke, this cuts the state's creation of law to the quick. For on the one hand, law comprises only the positive laws, historically and concretely determined by the law-giver. But the "value," "power" and "stability of the rule of law depend upon the question to what extent the positive law is felt, wished for and comprehended as the ever-adequate expression of the underlying legal idea" (Gierke 1961, 94; the following *ibid.*, 76ff., 80). Thus, in the creation of law, the state must act not only as an "agent of the will, but also an agent of the consciousness of the community." If this connection is sundered, however, by Laband's formalistic separation of the content of law and the command inherent in it, the law-giver loses the "noblest part of his duty," and justice, in the shape of law, loses its "specific content and value." Obviously, these losses are to be avoided by having a law-giver responsible for both elements, functioning both as an organ of the sovereign body of the state and as an organ of the "natural, spiritual and moral organism of society" (*ibid.*, 53) corresponding to its associative organization, as reflected in its creation, configuration and procedures.

## 8.4. Towards Legal Neo-Idealism

### 8.4.1. Josef Kohler's Criticism of Jhering in the Name of Metaphysics

Were it measured by number of publications, Otto von Gierke's extraordinary literary output would be easily eclipsed by the scientific production of Josef Kohler (1849–1919), his colleague at the Berlin faculty whose bibliography comprises far more than 2,000 titles from all fields of law—however, this is not the case when measured by volume and importance (on this and the following cf. Spendel 1983). Born in Offenburg (Baden) as the son of a schoolmaster, Kohler studied in Freiburg and Heidelberg. While working as a judge in Mannheim, he wrote an overview of German patent law which brought the 29-year-old an appointment as professor at the University of Würzburg in 1878. After a ten-year period he accepted a professorship at the University of Berlin in 1888, just one year after Gierke's appointment there. His *Deutsches Patentrecht* ("German Patent Law") was the first of a whole series of works on copyright and intellectual property rights, for which he coined the phrase *Immaterialgüterrecht* (rights to immaterial goods), which has since stood for a personal right supplementing "intellectual property," a term referring only to property rights. The discipline of legal history owes him major editions of sources, including that of the Codex Hammurapi (1750 B.C.), on which he



began working in 1904. He also gave lasting impulses to the fields of comparative law and especially the development of legal ethnology through many of his publications and the co-founding of the *Zeitschrift für vergleichende Rechtswissenschaft* (“Journal of Comparative Jurisprudence”).

However, Kohler did not achieve fame for his publications on legal philosophy. His *Lehrbuch der Rechtsphilosophie* (“Textbook of Legal Philosophy”), marked by the main idea of “cultural development” which dominates and qualifies this and all other works by Kohler, characteristically contains not a word about the central problem of the relation and the differentiation between law and morality: the “Cape Horn of jurisprudence,” according to Jhering (Kohler 1909a, 1f., 15). Gustav Radbruch gave the book a rather scathing review (Radbruch 1910). Indeed, the specifically philosophical content of the work—apart from the sections dealing with the history of philosophy—hardly goes beyond what Kohler had written in the first 15 pages of the narrow volume *Moderne Rechtsprobleme* (“Modern Legal Problems”) (Kohler 1913), published shortly before, which deal with *Das Problem der Rechtsphilosophie* (“The Problem of Legal Philosophy”). The rest more closely resembles a general doctrine of law.<sup>42</sup> In that short version, he claims that the development of human culture, striving ever-higher according to the law of causality, which creates law and is also supported by law, “is based on a whole that is independent of time and space” (Kohler 1913, 6). “Today, philosophy,” as he writes elsewhere at the same time, “is characterized by metaphysics. None of the more profound thinkers of our times can ignore the conviction that something must be behind the world of phenomena and that the multitude of experiences must be summarized in one entity” (Kohler 1907–1908a, 11). Among these “more profound thinkers,” for whom the intuitive grasp of processes that cannot be fully explained empirically (a process that obviously cannot be controlled methodologically) plays an important role (Stier 2006, 123), Kohler did not count the greatest of his opponents, Jhering, although the latter had also believed in the progress of humanity. According to him, Jhering’s *Purpose in Law* in all its “banality” had “failed, mired in miserable dilettantism” (Kohler 1909a, 116).<sup>43</sup>

Kohler only engaged in a concrete dispute with Jhering once, when interpreting Shakespeare’s *The Merchant of Venice* (Kohler 1883). As is common knowledge, in this play, the Venetian merchant Antonio has pledged a pound of his flesh to the moneylender Shylock if he fails to repay a loan. At the end, the Jew Shylock is repelled by the court, which allows him to cut his pound of flesh from Antonio’s body, according to the bond, but forbids him to spill any

<sup>42</sup> Cf. Castillejo y Durante 1910–1911, 62: “Kohler elaborates his legal doctrines more than the general foundations of his philosophical system.”

<sup>43</sup> Similarly Kohler 1908–1909, 446. He calls Jhering an “amusing entertainer” in: Kohler 1914, 23. There are many derogative comments about other authors in Kohler’s works.

blood in doing so, since the bond did not extend to the drawing of blood. In his *Struggle for Law*, Jhering gave a very clear assessment of the case: The bond was null and void, “since its content was immoral,” and it should have been rejected immediately. After the court, however, initially accepted its validity, it then bent the laws of Venice by its “sordid dodging maneuver” and also cheated Shylock, the pariah, out of his subjective right—Shylock, who had every right to believe that not only his claim, but also the objective law of Venice was at stake here (Jhering 1992a, 58ff.). Kohler, however, contradicts Jhering’s present-day condemnation of the immoral cruelty of the bond and calls it superficial and unhistoric, since at an early stage of legal development, which all people on earth underwent at some point, a debtor’s liability extended to his body as well. However, Venetian law at Shylock’s time had already been left behind by the cultural level of legal consciousness which had been reached in the meantime, creating a contradiction. Therefore, Shylock’s claim should have been rejected with *this* argument, instead of the rabulistics of “Wise Daniel” (meaning: sly Portia). This is as consequent as it removes the bitter humor of comedy from Shylock’s tragedy. In this context, however, we are more interested in the characteristics of Kohler’s legal philosophy: The outlook upon universal history (“all people on earth”), the significant perspective of an upward cultural development and the supporting function fulfilled by law, which may, however, fall behind the development of the sense of justice and law under certain circumstances. This is exactly what Kohler is discussing here, illustrated by the extreme case at hand, and thus revealing the typical contemporary focus of the discourse: the relation between law and judge, or, more precisely, the problematic genesis of a judge’s decision when the underlying law is insufficient for dealing with the facts to be judged.

In retrospect, Kohler saw “the dawn of the Free Law Movement” in his remarks, and himself, accordingly, as an early proponent of the free law theory (Kohler 1919/1883, VI; see *supra* Section 8.2.7.2). When adopting the concept of cultural legal opinions which might be important for a judge’s decision, even though they are not expressly formulated anywhere, Roscoe Pound pointed out the fact, obviously important to him, that Kohler himself had been a judge at the outset of his career (according to Stier 2006, 158, fn. 55). Methodologically, Kohler’s conviction that in the case of the written law falling behind the level of development of a people’s cultural consciousness and the consciousness of law determined by it, a judge could not avoid the latter, led to the objective method of interpretation. According to it, in case of doubt, the subjective will of the historic law-giver is not the deciding factor, as Menger and others postulated, but instead the will of the law in an objective and teleological sense. The law creates an “intellectual organism” with an “organic pursuit of its purpose,” from the immanent principles of which the current cultural interests are to be promoted (Kohler 1886, 1f., 7ff., 37). As part of the process, the courts are to proceed carefully “within the letter of the

law,” step by step, and follow a leading “doctrine.” For the further development of “what is given by law” is a “free act of science,” which, however, requires acknowledgment by the courts (*ibid.*, 50ff., 60).<sup>44</sup>

Later in his legal philosophy, Kohler deals with the relation between cultural development and the general configuration of laws. These reflections are based on his studies in comparative law carried out since the end of the 1870s, and, corresponding to the concept of a universal history of law, they focus on the world-wide development of culture as a metaphysical entity. “Culture is development, development is an upwards motion from the lower to the higher; therefore, the cultures of various people must be seen not just as variations on the same basic themes, but also as different stages of a global movement”—as stages with their own sets of laws (Kohler 1901, 273). The course of development was not just determined by the spirit of a people, but also by that of a few *Übermenschen* (super-men), who could advance a people by decades. Studies in comparative law were to assemble raw material for philosophy, enabling the latter to examine the “workings of the universal spirit” (Kohler 1907–1908b, 198).

The key concept of the metaphysical world process which Kohler considers the function of law, is, as has been indicated, “cultural development.” It can only be understood and evaluated as part of an “ideology” which comprehends the “motion of the eternal elements” and views “progress as the essence of the world” (Kohler 1913, 2, 9).<sup>45</sup> Therein, humanity has the duty to advance culture, i.e., to create as many “eternal cultural assets” as possible (Kohler 1909a, 1, 12). The ultimate goal of cultural development is the maxim: “To discern all and to be capable of everything”—in other words, that “humanity may become increasingly divine in its comprehension and its dominance over the earth” (Kohler 1909a, 14, 17).<sup>46</sup> The legal order is part of the “existential circumstances of humanity and human culture” (this and the following quoted according to Kohler 1913, 10, and Kohler 1909a, 2, 59f.), and its duty is to protect not only subjective rights but also cultural assets, and to promote cultural progress. Therefore, it must be adapted to different and

<sup>44</sup> Later, Kohler used the entirety of the legal order as the point of reference for questions of the interpretation of laws: Kohler 1917–1918, 2, 5f., 10.

<sup>45</sup> Kohler 1907–1908a, 9: “The term development implies, however, that the configuration of time is nothing else than eternity and its movement, more specifically, in its incessant upward motion: development is historically super-historic; the historic element is what merely unfurls at the last moment what was already in existence at the first moment, due to the unified motion of time.”

<sup>46</sup> Kohler 1909–1910, 171: “If [...] cultural assets are nothing but insight and power, then one has to say that both are the divine elements of humanity and that by increasing them, we too ascend towards the divine, adding further divine elements to the divine. In this manner, we join hands with the highest religions and especially the doctrine of redemption—except that it is not a god redeeming man, but man redeeming god.”

changing cultural demands and be configured in such a way during each cultural epoch “that it corresponds to the seeds of development of that cultural epoch.” What exactly all these terms mean precisely and in detail, and what their consequences are—these are questions that his numerous critics were unable to have answered by Kohler, in spite of their frequent queries. All they received was the remark—as dark as it is questionable—that cultural development “can only take place through an incredible deed of the multitude of individuals” and that we (must) “*unconsciously trust that fate will lead us*” (Kohler 1913, 14; italics taken from the original).

Otherwise, Kohler continuously referred to Hegel’s philosophy, as if that cleared up all questions—not, however, without calling it a “partially failed attempt” (ibid., 8). This led to the epithet “Neo-Hegelianism,” which he took over from Fritz Berolzheimer, his collaborator on the edition of the *Archiv für Rechts- und Wirtschaftsphilosophie* (“Archives of Legal and Economic Philosophy”) (Berolzheimer 1907–1908, 133; Kohler 1909b; on the following Stier 2006, 103ff.). Kohler concentrates on “Hegel’s basic concept, development” and at the same time, he turns against Hegel’s “logicism” and dialectics. By this, he means the transposition of the categories of human thought upon the shape of world development, and the assumption that this development conforms to certain laws of logic (Kohler 1913, 8; Kohler 1909a, 14; cf. also Kohler 1907–1908c, 1908–1909, 1909–1910a, 1909–1910b).

Kohler’s Neo-Hegelianism also modifies the principle of the sameness of thinking and being, although he vehemently rejects Kant’s dualism. Supposedly, being and thinking meet on a higher plane. Contradicting Hegel, Kohler wishes to discover the universal rules of the development of human culture through empiricism, specifically with the help of studies in comparative law and ethnological investigation (Kohler 1904).<sup>47</sup> Accordingly, the rationality of reality and the reasonable direction of events towards a goal are reduced to a metaphysical connection between the details that make up this colorful panoply of life. Hegel’s progress of the idea thus mutates to the progress of culture, and only individual elements of the great philosophy of the spirit remain: evolution, teleology, pantheism—on the whole, “a shrunk-down version of Hegel’s philosophy” at best (Schild 1991, 63). In its substance, this offers little more than the inspiration of the *élan vital* of Bergson’s philosophy of life (Kohler 1913–1914) and Nietzsche’s metaphysics of power (Kohler 1907–1908d). Despite all its weaknesses, however, Kohler’s culturally anthropological metaphysics of development with their progression towards the sphere of a pantheistic ideology are relevant for their high symptomatic value. After all, they document the desire of his contemporaries around the turn of the century for a universal ideological orientation regarding life and values.

<sup>47</sup> Even Fritz Berolzheimer (1906, 16) remarked with a critical undertone: “In Kohler’s legal philosophy, the point of view of universal history dominates all other aspects.”

#### 8.4.2. Fritz Berolzheimer's Neo-Hegelian "Real Idealism"

In 1909, Fritz Berolzheimer (1869–1920) wrote, in agreement with Kohler: "We are Neo-Hegelians since, like Hegel, we recognize and accept the immanent reason of law, the relative justification of each step of legal development. We are Neo-Hegelians inasmuch as we have absorbed the empirical method of modern science" (Berolzheimer 1909–1910a, 31; on the following Berolzheimer 1904–1907, vol. 1, 98ff., 102f.; vol. 2, 233ff., 237ff., 247). The subject of such empirical observation, i.e., the observation of the psychology of nations and historic contemplation, is culture as it actually exists in all its diversity and mutability. In contrast to the dialectics of Hegel's *Phänomenologie des Geistes* ("Phenomenology of Spirit"), the reasons behind the universal process are to be derived from it, meaning: "not as a conceptual development from the system of pure reason." Thus, the reason of law is not measured according to the level to which it corresponds to the developmental stage of the logical process, but according to its congruence with the actual consciousness of law of the current phase of cultural development. Again in agreement with Kohler, the title of Berolzheimer's five-volume main work alone stresses the importance of economy for this process: *System der Rechts- und Wirtschaftsphilosophie* ("System of Legal and Economic Philosophy") (Berolzheimer 1904–1907). This continues a point of view which had been gaining currency since the middle of the century, provoked at first more by the technical and economic boom following the breakthrough of the German industrial revolution than by Marxism. The book by the "Germanist" Wilhelm Arnold (1826–1883) on *Cultur und Rechtsleben* ("Culture and Legal Life") of 1865—Arnold was a professor in Marburg at the time—is an instructive example.<sup>48</sup> He diagnosed characteristics of the spiritual life of cultivated nations in seven areas: language, art, science, customs, economy, law, and state. Religion, remarkably, no longer figures here. His main reason for the "intimate connection between law and life" was the relation between law and economy, which followed the universal rule of interaction or reciprocity. But unlike Arnold and much more strongly than Kohler, Berolzheimer discussed the social structures of economic life as part of his concept of economy, given the growing workers' movement and the "social question."<sup>49</sup> Furthermore, ever since the 1866 publication of Friedrich Albert Lange's (1828–1875) highly successful *Geschichte des Materialismus und Kritik seiner Bedeutung in der Gegenwart* ("The History of Materialism and Critique of its Importance in Present Times") with its recourse to Kant, younger authors had been unable to avoid the question of the scientific method. Thus, Berolzheimer—who had little interest in or respect for meth-

<sup>48</sup> Arnold 1865. The following *ibid.*, 17. About the author: Kroeschel 1975, 253ff.; Stier 2006, 33f.

<sup>49</sup> Cf. the impressive remarks by Stier 2006, 23ff.

odological questions—came to propagate a “jurisprudential-economic method.” In contrast to the abstract theory of norms and to the materialistic dogmatization of the circumstances of production as the sole determining factor of law, Berolzheimer wished to link formal law and economic content in this way. His philosophical system thus had to be one of “legal and economic philosophy.” Therein, the basic economic concepts were to be fixated within the framework of the state, and—corresponding with the insight into the interaction between law and economy—the foundations were to be laid for laws designed according to economic circumstances. Within this context, legal philosophy is dedicated to the formal, normative and abstract side of justice, while economic philosophy takes care of its material side (Berolzheimer, 1904–1907, vol. 2, 10f.; cf. Stier 2006, 27ff.).

Therefore, it is self-explanatory that the collaboration between Kohler and Berolzheimer should be documented in a journal entitled *Archiv der Rechts- und Wirtschaftsphilosophie* from 1907 to 1933. They both signed as editors, while Berolzheimer took care of the actual editorial work and acted as *Verlagssyndikus*, the company syndic. Both authors’ articles on the topic of “Neo-Hegelianism” were published mainly in this journal (cf. Kohler 1909a, 1913; cf. also Kohler 1907–1908c, 1908–1909, 1909–1910a, 1909–1910b and furthermore Berolzheimer 1907–1908, 1909–1910a, 1909–1910b, 1909–1910c, 1913–1914). Kohler had met Berolzheimer while the latter was writing his main work between 1904 and 1907, the above-mentioned five-volume *System*. Shortly before, in 1902, Berolzheimer’s attempt to have his professorial dissertation on criminal law accepted by the faculty of law in Munich had failed. The faculty had rejected even the evaluation of his habilitation thesis because of a lack of “moral integrity” of the applicant, due to an unproven accusation of homosexual activities; but perhaps his Jewish background had more to do with the refusal. Berolzheimer, born in 1869 in Fürth, had earned his doctorate at the University in Erlangen and worked as a lawyer. Obviously, his conversion to the protestant church had not helped. With Kohler’s support, he moved to Berlin.

Insisting upon the independence of law against the materialistic marginalization of the legal order in Marxism, and complying with the demands of empirical research at the same time, without merely falling into the trap of historical or national-psychological relativism, or worse, of the idea of all events as an infinite series of coincidences, demanded a kind of “real idealism.” That is how Berolzheimer wished to justify the criterion of law beyond all economic influences, both in the areas of law-giving and judicature, which is also why he condemned the Free Law Movement as mere *Gefühlsjurisprudenz* (sentimental jurisprudence) (Berolzheimer 1910–1911). This seemed the only way to arrive at an objective criterion for the assessment of the development of law. Berolzheimer views legal philosophy as a “critical theory of cognition regarding positive law (both that which has become and



which is becoming)” (Berolzheimer 1904–1907, vol. 2, 1f.; on the following *ibid.*, vol. 1, 187ff.). It must start with reality, because ideas are not accessible before being experienced, but it must aim for the “real elements of what exists, for the idea.” Berolzheimer spoke of a “real-idealistic philosophy of insight” (Berolzheimer 1904–1907, vol. 1, 320.; the following *ibid.*, 187). All individual phenomena and individual objects are “true and real only as an emanation, as the outflow of absolute infinity, inasmuch as they are connected to it. However, the individual object is determined as an emanation of infinity by the idea.” These and other statements about ideas as the eternal and immutable “archetypes” of being, which the human spirit does not create, but merely comprehends and expresses, sound rather more like Neo-Platonism than Neo-Hegelianism (Stier 2006, 111). Unsurprisingly, Berolzheimer did not pursue this approach consequently, but ultimately followed an empirical understanding, combined with the concept of development, in the sense of regulatory ideas, namely the leading tendencies of cultural development of an epoch. In order to comprehend more than the fact of legal development as an “eternal flow of all events,” namely “its inner laws of existence, its philosophical content (*power and freedom*),” the leading historical, empirical, sociological point of view, which also compared the positive laws of nations, required “supplementation” by a critical theory of cognition and—regarding history—by “historical-philosophical observation” (Berolzheimer 1904–1907, vol. 3, Preface, V).

Since the “cultured human being,” according to Berolzheimer, had suffered an atrophy of the natural drives and instincts of the “natural human being,” he was forced to ensure his survival through powerful artificial institutions and cultural “artefacts”: social associations, religion and ethics, the state, and especially the means of law.<sup>50</sup> In opposition to Kohler’s Quietism, which propagated the mere observation of the connection between law and culture, Berolzheimer hereby maintained the perspective of an active political development of the law. On the other hand, he rejected Jhering’s idea that social processes could be controlled and that cultural development took place as a conscious pursuit of a purpose. Rather, he held that the purposes pursued were rarely attained, or led to quite different results than the desired ones. Furthermore, sometimes purposes were only pursued subconsciously. However, even illusions and objectively wrong political ideas drove cultural development forward. It is consistent that Berolzheimer considered leader personalities necessary to propel the masses forward. Cultural development, heightening the power potential of human beings, appeared to him an aristocratic process. This notion of the course of development, however, was not supposed to set mutability absolute and lead to nihilism. Berolzheimer defended the idea of law, even if its content could obviously not be rendered in terms of an abso-

<sup>50</sup> On this topic and with detailed references, Stier 2006, 106ff.

lutely valid formula. Therefore, the goal was to understand the “developmental rules governing the idea of justice and law” and the “decisive points of the developmental curve” (Berolzheimer 1904–1907, vol. 3, 101; Berolzheimer 1913–1914, 508). With this cultural-history concept, Neo-Hegelianism opposes Neo-Kantianism in the “fundamental controversy of 20th century legal philosophy” (Berolzheimer 1909–1910c, 522). By way of abstraction, Berolzheimer discerns three periods of cultural-historical development, which of course does not run in a linear, consistent and simultaneous fashion: On the first level, he sees an undifferentiated, religiously determined unit of society, authority, cult and law; on the second, the development of an unlimited power of law, achieved by the strict separation of law and ethics. (He calls this—coining a parallel term for *amoral*—the *anethische Periode* [unethical period].) Ultimately, he sees the idea of Christianity as the most powerful and pure expression of the synthesis of morality and law (Berolzheimer 1904–1907, vol. 3, 12).<sup>51</sup> At the same time, he views the whole as a process of human emancipation, in which the central moral idea of humanity becomes apparent and is revealed in law as the idea of freedom. To him, this moral-legal synthesis of humanity as the bearer of rights is a fact of cultural development, leading beyond the negative sense of freedom as the abolition of slavery of any kind—be it religious, political or economic—to the acknowledgment of each human being as the bearer of rights. With the emancipation of the fourth estate, he believed the series of great processes of emancipation in modern times to be concluded (*ibid.*, vol. 2, 299f.). This also showed him that the concept of humanity was also subject to certain permutations in the course of the overall cultural development. Thus, 18th century Humanism saw human beings as “members of a herd,” led to generalization through its emphasis on equality and the acknowledgment of basic human rights, and found its ultimate expression in communism, the democratic idea and socialism. The concept of humanity of the 20th century, on the other hand, recognized the individuality of the human being and led to the emancipation of those groups whose individuality had not been acknowledged previously, namely women and workers (*ibid.*, vol. 2, 284).

In terms of legal philosophy, however, this only leads to a “regulatory principle” derived from the currently valid concept of culture, a “relative law of culture” instead of an “absolute natural law.” Within limits, “the legal opinions of a certain epoch” were a source of law “to a certain extent,” and the relative law of culture with its “objective principles of law” derived by induction constituted a legal order superior to the (written) law. As examples of such direct corollaries of the idea of freedom, Berolzheimer names “the legal nullity of trusts, inasmuch as they eliminate competition (free trade); the illegality of boycotts; the invalidity of an employment contract stipulating excessive work hours” (Berolzheimer 1910–1911, 19). This was aimed at the so-called “senti-

<sup>51</sup> On the same topic, with further references, Stier 2006, 114f.

mental jurisprudence” of the Free Law Movement, interpreted as voluntaristic and decisionist. Otherwise, the relative law of culture remained a mere framework and directive for the possible or rather necessary design of laws.

With the help of the experience-derived criterion of *the design of laws in accordance with the dominating culture of the time*, we can delineate the borders beyond which law would be deemed unjust. [...] *Within* the borders set by the legal consciousness of a certain cultural epoch, discretion reigns, the coincidence of party majorities, even arbitrariness and mere power factors. But the *legal consciousness* pertaining to a certain culture, which is developed further by the unfolding of a certain culture, cannot be violated without negative consequences. If it is not paid heed to voluntarily, it will blaze its own violent trail. (Berolzheimer 1909–1910c, 525)

Berolzheimer finds the reason for his statement that the general legal consciousness shows a cultural law that may be relative, but is also still objective, in a sense or feeling of justice which he inflates to an intuitive insight into law, on the assumption that the idea of justice is existentially important and necessary to human beings and that its content can be grasped by intuition, corresponding to the human ability to have emotional insights in the context of a metaphysical ideology.

The sense of justice and law of a certain cultural epoch is a basic factor determining legal philosophy, the design of laws and the upholding of law, which cannot be grasped empirically in its entirety; it goes beyond human knowledge and art. The sense of justice is part of the eternal process which places the individual in direct context with the universe. (Ibid., 526; Berolzheimer 1904–1907, vol. 1, 311, 313)

But this supposed expression of a higher reality remains a pronouncement. The truth is that the idea of law can only be described as an insight of cultural psychology, and thus remains bound to factual circumstances (Stier 2006, 156f.). These, however, were such that the existing opposition between classes ruled out a unified legal consciousness. Still, Berolzheimer was confident: “After the time of cultural *multifariousness and diremption*, gradually a new uniformity and homogeneity is arising.” He claimed that it was exactly this cultural diremption which drove progress towards a new culture. Around it, he saw “materialism,” i.e., Haeckel’s monism, struggle with “medieval intolerance” and “enlightened tolerant Protestantism with all its related forms of idealistic philosophy.” “Which of these directions provides the way upwards to a new, lasting height of culture” is hardly doubtful for the “attentive observer,” but obviously not immediately obvious to everyone (Berolzheimer 1904–1907, vol. 2, 491), a fact that makes the appearance of a strong leadership personality inevitable again.

In the meantime, as mentioned earlier, it is already clear that “freedom has indeed always been and become the goal and result of any cultural development in state and commerce, especially during the past 2,000 years” (ibid., 310). Thus, the question remains which concrete legal consequences this idea of freedom has beyond the economic and labor-law issues already mentioned.

In accordance with the “ethicalizing of law” brought about by the idea of freedom, these are all postulates of the law that should be. For everywhere, it is the idea of development which is charged with the transition from what is to what should be. The rejection of any form of slavery and exploitation and the acknowledgment of each individual’s liberty has already been mentioned. In addition, Berolzheimer holds that the conceptual design of the employment contract as a relationship among equals must be rejected and the freedom of contract modified by safety regulations, limitations via the *Reichsgewerbeordnung* (Imperial Trade and Industry Regulation Act), and the acceptance of collective bargaining (Berolzheimer 1909–1910b, 198). The state, transformed by the idea of freedom into a constitutional state and by the corresponding emancipation of its citizens into a cultural state, now had to support all cultural endeavors, including social ethics and social welfare. Still, Berolzheimer feels it incumbent upon himself to issue a warning that social ethics must not be overdone (Berolzheimer 1910–1911, 19; cf. also 1904–1907, vol. 3, 186, 345ff., 394ff). By this, he means an overemphasis on workers’ rights. Suddenly, the idea of freedom is reduced again: Supposedly, in the realm of labor law, the moral and legal idea of culture serves only to prevent exploitation (Berolzheimer 1904–1907, vol. 4, 130). Similarly, the legal equality between men and women only prohibits the exploitation of women; it does not require equal participation of women in the political process. Likewise, he claims that the prohibition of oppression, according to which no person may be treated as a mere object, does not lead to the conclusion that a representative constitution is necessary (*ibid.*, vol. 4, 231). Supposedly, social ethics, boosted by parliamentarianism, disadvantaged the other classes (*ibid.*, vol. 2, 221ff., 488f., 492). Therefore, Berolzheimer rejected parliamentarianism just as much as the sovereignty of the people, incompatible with his elitist attitude, and recommended a *neuständische Klassenvertretung* (class representation of new estates). To him, the latter promised a balance and overall strengthening of national interests; therefore he saw economic neo-corporatism as the “right developmental tendency” (*ibid.*, vol. 3, 79ff., 233ff., 244; cf. also Berolzheimer 1899, 29f.). On the horizon, the epoch of fascism dawns.

#### 8.4.3. *The Purpose of Law as a Value—The Neo-Kantian Beginnings of Gustav Radbruch and the End of the “Long 19th Century”*

##### 8.4.3.1. Roots

One of the most important texts in the field of legal philosophy during the first half of the 20th century is *Rechtsphilosophie* (“Legal Philosophy”) by Gustav Radbruch (1878–1949), an expert in criminal law, the politics of criminal law and legal philosophy. It first appeared in 1914 under the title *Grundzüge der Rechtsphilosophie* (“Basic Principles of Legal Philosophy”)—

shortly before the outbreak of World War I which ended the “long 19th century.”<sup>52</sup> After an unaltered second edition of these *Grundzüge* in 1922, a third, extensively revised edition entitled *Rechtsphilosophie* followed in 1932, which was published in six further editions until 1983 and was translated into Japanese, Spanish, Portuguese and Polish. His *Einführung in die Rechtswissenschaft* (“Introduction to Jurisprudence”), written in 1910 on the basis of this legal philosophy, found even wider dissemination, with 11 editions and translations into Russian, Polish, Spanish, Korean and also into Italian, by Dino Pasini in 1958. Radbruch’s legal-philosophical beginnings, which these works embody, reflect the major impulses dominating the discussion of legal theory at the end of the 19th century.

The son of a merchant from Lübeck had begun his legal studies—motivated rather by a social and familial sense of duty than by any true interest (which tended towards philology and art history)—in 1898 in Munich.<sup>53</sup> There, he was particularly impressed with the lectures on *Nationalökonomie als Wissenschaft* (“National Economics as a Science”) by Lujo Brentano (1844–1931), a leading proponent of social reform within national economics, and thus a *Kathedersozialist*. Radbruch’s three semesters in Leipzig, from 1898 to 1900, introduced him to empirical psychologism in macroeconomics (Karl Bücher) and philosophy (Wilhelm Wundt), and also to the sociological view of history as cultural history (Karl Lamprecht, *Die kulturhistorische Methode* [“The Method of Cultural History”], 1900). However, he was especially inspired by Rudolf Sohm’s lectures on canon law and their central hypothesis that a specifically spiritual canon law was impossible. It was his reading of the textbook on criminal law by Franz von Liszt (1858–1919) that motivated Radbruch to move to Berlin to complete his studies. Fascinated by the manifold impulses this great academic teacher passed on, Radbruch joined Liszt’s seminar on the politics of criminal law after he had passed his first legal state exam in 1901—“the step that determined my life,” as Radbruch wrote in retrospect. As mentioned earlier (see *supra* Section 8.2.7.2), Liszt, author of the famous “Marburg Program” and founder of the “modern” school of criminal law, propagated replacing the metaphysically justified and purpose-free retaliation punishment by a punishment serving the protection of legal interests on an empirical basis, which would affect the offender both in the sense of individual deterrence and in the interest of resocialization. On the other hand, to him, such “individual

<sup>52</sup> It has become usual, not only in German historiography, to express by this attribution that the 19th century as a designation of an epoch comprises a phase of modernization driven by a wide range of crises that began with the French Revolution and ended with World War I, respectively the October Revolution. Cf. Blanning 2000; Kocka 2001; Bauer 2004; Wehler 1995, 1250ff.; with great differentiation Stolleis 1997.

<sup>53</sup> On this and the following, cf. Radbruch’s autobiography (Radbruch 1961); also his brief “life description,” in Kaufmann 1968, 21–5; also Spendel 1967; Wolf 1963, 713–65; Kaufmann 1987.

prevention” was the legal form of an unavoidable social drive to punish. As Radbruch was to write later, the discussion took place before the changing background of the concept of state: from the liberal state to the state of social intervention, from the constitutional state to the “administrative state” (Radbruch 1988, 40). Thus, to Liszt, the politics of criminal law and social politics became siblings (cf. Naucke 1982). It is unnecessary to repeat here how much this idea of a purpose, together with the assumption of a “social drive,” owes to Rudolf von Jhering. Radbruch continued down this road and in this spirit, he later pushed through a reform of criminal law during his time as Imperial Minister of Justice in 1921–1922; however, he was not quite as consequent about the implementation of a *Zweckstrafe* (purposeful punishment) as Enrico Ferri (1856–1929) was in his draft of an Italian penal code in 1921.

However, in his own words, Radbruch’s “intellect was most lastingly influenced” during his ten years of being a private lecturer in Heidelberg (1903–1914). Karl von Lilienthal, one of the older students, collaborators and friends of Liszt’s, had enabled him to write his professorial dissertation here on criminal law, procedural law and legal philosophy. At the time, Heidelberg was home to Wilhelm Windelband (1848–1915), Emil Lask (1875–1915), Ernst Troeltsch (1865–1923), Max Weber (1864–1920) and Georg Jellinek (1851–1911). Heinrich Rickert (1863–1936), who was influenced by Windelband and founded the so-called South-West-German (axiological) school of Neo-Kantianism together with him, joined the university in 1916, but had been present through his fundamental works long before that (especially: *Kulturwissenschaft und Naturwissenschaft* [“Cultural Science and Natural Science”], 1899). His time in Heidelberg—to Radbruch, this also meant a most animated exchange with his intellectually agile and pugnacious friend Hermann Kantorowicz (1877–1940), well-accustomed to sociological thought and deeply versed in legal history, who was also a precursor of “free law” (see *supra* Section 8.2.7.2). Thus, Radbruch also took part in the contemporary discussion on written law and the decision of individual cases, probably not coincidentally in the *Archiv für Sozialwissenschaft und Sozialpolitik* (“Archives of Sociology and Social Politics”), one of whose editors was Max Weber: *Rechtswissenschaft als Rechtsschöpfung—Ein Beitrag zum juristischen Methodenstreit* (“Jurisprudence as a Creator of Law—A Contribution to the Methodological Discussion of Law”) (Radbruch 1987a; the following quotations *ibid.*, 418, 421; cf. also Foulkes 1968). In recognition of the impulses provided by Jhering, the article ends with the demand for an “honest commitment to the judicial development of law,” since this was the only way that the “estrangement between law and the people” could be ameliorated—a statement that had appeared in similar form in Oskar Bülow’s writings.<sup>54</sup> Even

<sup>54</sup> Bülow (1972, 48) had ended his contribution emphatically in 1885: “The letter of the law and the judiciary create a people’s justice!”



while he was working on his professorial dissertation, he had encountered the 1902 work *Die Lehre vom richtigen Recht* (“The Doctrine of the Right Law”) by Rudolf Stammler (1856–1938), meaning especially his strict conceptual differentiation between set law and the right law (Stammler 1964).<sup>55</sup> Under the impression of Kant’s critique of cognition in their “Marburg-style” Neo-Kantian interpretation (Hermann Cohen, Paul Natorp), now Windelband’s students Emil Lask and Heinrich Rickert convinced him completely of the necessity of a methodological dualism, in keeping with the distinction between reality and value. Rickert also originated the thought that certain cultural “values” are the point of departure for special sciences which are “related” to these values. Thus, Radbruch saw jurisprudence as a “value-related” science, oriented towards the “value of law.” Formal methodological dualism with its antinomic terminology and logical determinations was supplanted by philosophical interest in the real contrast between historic ideologies and their ultimate purposes, which determine culture—and thereby, law—and cannot be proven scientifically. Troeltsch and Weber taught him to see instances of secularized theology therein as well, while Lask demonstrated the interlocking of logical and empirical, cognitive and normative elements in the terminology of the historical humanities. On the whole, all this has the effect of spiritualizing the concept of purpose in cultural-philosophical terms.

Radbruch’s years as a private docent in Heidelberg (in 1910, he was finally appointed adjunct professor) were also the beginning of his civil and political engagement and commitment. As a member of the progressive *Volkspartei*, he became a city councilor and also a member of the orphans’ council. A short while afterwards, his experience as a front soldier turned him into a socialist for good, having originally enlisted as a volunteer orderly.

#### 8.4.3.2. Radbruch’s Review of the 19th Century

Radbruch’s *Einführung in die Rechtswissenschaft* (“Introduction to Jurisprudence”), first published in 1910, grew from lectures he held at the Academy of Commerce in Mannheim, meaning that it was not intended only for (beginning) jurists; thus, beyond the description of the individual areas of law and their issues, it paints a picture of law and jurisprudence as part of the overall culture. It is introduced as the epitome of what the “cultural laws”—which comprise not only legal norms, but also those of custom and morality, logic and aesthetics—aim for: “logical, aesthetic and ethic values,” i.e., the “balance” of “scientific insight, artistic creation, moral capability and social order” (Radbruch 1987c, 101f.). This opens up a double possibility “of defining the nature of culture—and thereby also the nature of law,” i.e., by distinguish-

<sup>55</sup> Cf. also Stammler 1888. On the same topic, cf. Gustav Radbruch’s habilitation thesis: Radbruch 1995, 85; Radbruch 1987b, 445–8.

ing between the bearers of these cultural purposes: the individual on one hand and “super-individual entities” such as nations or humanity itself on the other. With reference to Emil Lask’s *Rechtsphilosophie* (“Legal Philosophy”) (Lask 1905), two contrasting “opinions on the duty of law and state” are derived from this. To one of them, law only has a value justified by individual ethics, and no value of its own. It finds its illustration in the contract establishing a state, while the super-individualistic view is illustrated by the image of the organism. After all, the organic doctrines of state consider not the individual, but the whole, consider law to have its own immanent value and justice to be the ultimate end in itself. The salient point of Radbruch’s *Einführung* of 1910 is his instruction to the jurists-to-be that this contradiction cannot be resolved by science, and that instead, everyone must choose the side most suited to his personality, and that this choice means as much as the election of a political party. The first view was represented by the authoritarian-conservative and the Catholic *Zentrum* parties, the second by the liberal *Fortschrittspartei* (Progress Party) and socialism, which, after all, differed from liberalism only in the question of economic organization (Radbruch 1987c, 103f.).

Radbruch’s description of the individual areas of law also reflects the great debates of the time. One of the keynotes in his treatment of private law is the “spirit” of the German Civil Code (BGB), then a novelty. His short characterization reads: “liberal basic concepts, socially modified” (ibid., 126; also the source for the following). According to Radbruch, this social modification is the result of a coincidental alliance between two camps critical of the BGB’s draft along purely Roman-law and liberal lines, in spite of their different motivations: “Germanists” and socialists. The “super-individually oriented Germanists” wanted to limit the individual’s freedom “for the sake of the whole,” the socialists—who, according to Radbruch, were also individualists—“for the sake of other individuals, of the economically disadvantaged, of the ‘unpropertied classes’.” Later editions of *Einführung* also name the critics indicated here: Gierke and Menger. In the section devoted to criminal law, of course the dispute about the purpose of punishment, still or yet again relevant, takes center stage, and with it the intellectual heritage of the “modern school of criminal law” of his revered teacher Franz von Liszt (ibid., 132ff.). Similarly, the concept of purpose dominates his introduction to the theory of interpretation, emphasizing the inevitability of judicial development of law, as part of the contemporary debate on the relationship between law and judges (ibid., 192ff.).

This introduces a whole series of topics which return four years later in greater detail in Radbruch’s *Grundzüge der Rechtsphilosophie*, reflecting the influence of the philosophical and theoretical legal discussions of the turn of the century. In this context, Radbruch’s introductory explanation of his legal-philosophical position as a consequence of the intellectual history of the 19th

century is particularly interesting. Under the chapter title *Das Wesen der Rechtsphilosophie* (“The Nature of Legal Philosophy”), Radbruch sets out, true to his own maxims, with a (Kantian) “commitment” to a legal philosophy of that law “which should be valid, not of the positive, but the right law, not of the law, but of the value, the meaning, the purpose of law—of justice” (Radbruch 1993, 22; the following *ibid.*, 23, 25, 26f., 29f., 31f.). This commitment includes a decision in favor of methodological dualism, against the monistic method of evaluating law. The “struggle between the natural law movement and the Historical School” is supposed to illustrate this contradiction and demonstrate simultaneously how the programmatic self-limitation of science to the purely empiric examination of legal reality only seemingly “led to the total eclipse of the contemplation of legal values by the contemplation of legal reality.” After all, the ineradicable question of the evaluation of historic facts quickly turned the “value-blind” historic “legal positivism” into a decidedly “romantic-reactionary” legal philosophy, even legal politics. Hegel’s legal philosophy appears as an example for such “sharp contrasts” even within methodological monism. For the program of “reactionary irrationalism” of the Historical School is contradicted by “Hegel’s rationalism,” which tries to find rational law especially in historic law, “with its decidedly more liberal demands.” Radbruch rightfully points out that the “intermittently absolute rule of the Historical School over the science of private law” has led to an “estrangement from philosophy,” while Hegel continued to inspire public and especially criminal law. However, Radbruch sees Neo-Hegelianism as represented by Kohler less as part of the tradition of Hegel’s legal philosophy than as having methodological kinship with the Historical School. For since it rejects “especially Hegel’s basic idea that the system of reason can be documented in its self-expression throughout the history of mankind,” it must “justify the value content of reality irrationally by a pantheistic creed.” Among the “Diadochi” of Hegel’s system “set upon its feet,” Radbruch counts the biological and economical materialists. Both tried “to base legal evaluation upon the legal observation of natural science” with the aid of the concept of development, whether the driving forces behind the process of upward motion are interpreted in an anatomic-physiological-mechanic or in a technical-economical manner.

After the failed attempts to achieve a materialistic-empirical justification of values, it seemed inevitable to stick to the purely positivistic examination of reality and to declare legal philosophy impossible. Thus, the “highest storey in the edifice of positive jurisprudence, only recently completed” now is called “General Theory of Law” (*ibid.*, 33f.; the following quotations *ibid.*, 34f.). Its task is

to examine the common, most general concepts of law, shared by several legal disciplines, possibly also transcending the national legal order and providing comparisons of related legal concepts in different nations; yes, even transcending the field of law as such and examining its empirical relationships with other areas of culture in sociological and historical terms.

As representatives of this discipline, which develops into a philosophy of positive law and thus is more than a mere “euthanasia of legal philosophy,” he names Karl Bergbohm, Ernst Rudolph Bierling, Adolf Merkel and Ernst Immanuel Bekker. After this, the key phrases of the entire section follow. This general theory of law, especially that put forward by Merkel, would have been unthinkable without Rudolf von Jhering (on this and the following *ibid.*, 36ff.). In his oeuvre, Radbruch sees all the above-mentioned “topics of thought” enter into a debate “from which the rebirth of legal philosophy and the revision of the jurisprudential method we are witnessing today have emerged.” Jhering had filled the program of the Historical School with the “spirit of Roman law,” had overcome it with his teleologic theory of law and had opposed the irrationalism of the Historical School with a new rationalism, similar to Hegel, even though this took the shape of a historical-sociological theory of law. According to Radbruch, only one step was missing in order to overcome the methodological monism inherent in both schools, just one step

to move on from sociology to legal philosophy: as soon as he began seeing himself not as a contemplative observer of the purposes set by others, but as a protagonist of the legal development, establishing purposes himself, he should not have focused on a factual setting of purposes, but the demands of the purpose itself; he should have experienced the confrontation between the empirical legal reality and a normative legal criterion, admitting the dualism between the contemplation of legal reality and legal values; and ultimately, he should have overcome the utilitarianism of partial purposes by proposing a final, absolute idea of purpose. (*Ibid.*, 37)

Indeed, despite the external break, Jhering’s two main works can be seen as a continuous attempt to reconstruct the unconditionally prescriptive meaning of law, beyond the mere descriptive formulation, elaboration and combination of the legal concepts of traditional legal material.<sup>56</sup> The re-establishment of methodological dualism in the Kantian sense, however, had only been the “commendable deed” of Rudolf Stammler (Radbruch 1993, 38) and his “clarion call against positivism” (Radbruch 1987d, 455).

Radbruch, however, did not wish to stop at the point of Stammler’s formalism of natural law with its changing content, but wanted to “contribute to the determination of the content of the right law” (Radbruch 1993, 40f.), travelling the only remaining avenue: that of relativism, which he represents, naming as his main references Georg Jellinek and Max Weber (*ibid.*). In concrete, this means that legal philosophy cannot decide the conflict of opinions on legal purposes (or legal ideals). But it can and should analyze them and their preconditions, consequences and interrelation, in order to provide a scientific foundation for the personal decisions that have become unavoidable and necessary. In any case, the question of the purpose of law—meaning: the ultimate,

<sup>56</sup> Cf. Rückert 2005, 131. However, also see Landau 1993 already.

absolute definition of purpose, the value, the meaning, the idea, the rightness or justice of law—this is the central, even the only topic of legal philosophy (ibid., 46). However, there can be no uniform answer to this, which brings us back to the “theory of parties” sketched out in *Einführung*, thereby leading straight into the disputes of the 20th century.

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A Treatise of Legal Philosophy and General Jurisprudence

Volume 10

The Philosophers' Philosophy of Law from the Seventeenth Century  
to Our Days



# A Treatise of Legal Philosophy and General Jurisprudence

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A Treatise of Legal Philosophy and General Jurisprudence

Volume 10

The Philosophers' Philosophy of Law  
from the Seventeenth Century  
to Our Days

by

Patrick Riley

*Department of Government, Harvard University, USA*

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*For my Mother,  
Hazel Riley Sullivan,  
In the 90<sup>th</sup> year of her Age*

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## A NOTE ON THE AUTHOR

Patrick Riley was born in California in 1941; he received his M. Phil. at the London School of Economics (with Michael Oakeshott) in 1964, and his M.A. (1967) and Ph.D. (1968) from Harvard University (with John Rawls, Judith Shklar, Carl J. Friedrich and Lon Fuller). He then taught at Harvard, 1968–1972. After 35 years at the University of Wisconsin, Madison (the last 20 as Oakeshott Professor of Political, Moral and Legal Philosophy), he returned full-time to Harvard in 2007 (where he taught Leibniz' *Jurisprudentia universalis* in 2007–2008). (He has also taught at Oxford, Cambridge, Berlin, Aix-en-Provence, Florence and Bologna.)

Among his published works are: *Leibniz: Political Writings* (Cambridge University Press, 1972, 1988); *Will and Political Legitimacy: A Critical Exposition of Social Contract Theory in Hobbes, Locke, Rousseau, Kant and Hegel* (Harvard University Press, 1982); *Kant's Political Philosophy* (Rowman and Littlefield, 1983); *The General Will before Rousseau* (Princeton University Press, 1986; Italian ed. Giuffr , 1995); *Leibniz' Universal Jurisprudence* (Harvard University Press, 1996, German and French eds., forthcoming); and *The Cambridge Companion to Rousseau* (Cambridge University Press, 2001; Chinese ed. 2007). His critical edition of Leibniz' *Meditation on Justice* will be published by Yale University Press in the near future.

He has also published critical editions of works by Malebranche, F nelon and Bossuet (Oxford and Cambridge University Press), about 50 book-chapters, and around 200 articles and reviews in leading journals. For years he served as Vice President of the American Society for Political and Legal Philosophy, and as co-editor of the Society's Yearbook, *Nomos*.

## PREFACE

If there is anything distinctive in my treatment of jurisprudence from Grotius to the “left-Kantianism” of Rawls and Habermas, it lies in the four following points:

1) I view the philosophy of law as a final outgrowth of a more general moral philosophy, and that moral philosophy (in turn) as an outgrowth of “first philosophy” (metaphysics, epistemology, theology)—so that “legal ideas” will not be mere *disjecta membra*, arbitrarily thrown up, but will instead be true elements of a *corpus*. (Hence in the cases of Hobbes or Leibniz or Kant I begin with what is most general and fundamental, and move toward “philosophy of law” as something more particular, and as generated by the general and fundamental.)

2) Throughout my volume of *A Treatise of Legal Philosophy and General Jurisprudence* I give great prominence to the *jurisprudentia* of Leibniz (1646–1716)—the greatest German philosopher before Kant. While Leibniz is best known as a mathematician (the co-discoverer of calculus), as a mathematical logician, and as a theologian (the author of *Theodicee*, *theos-dike*, “the justice of God”), he was in fact by profession a “jurisconsult” who served as “intimate counsellor of justice” to the King of Prussia in Berlin, the Emperor in Vienna, and Peter the Great in Petersburg—after having earned a doctorate in jurisprudence at the age of nineteen. Leibniz combines philosophical and jurisprudential greatness in a way achieved by no other: He “demonstrated” what Grotius had only Platonizingly asserted (*etiamsi daremus*); he offered the most intelligent criticisms of Hobbes and Locke; he raised the most lingering doubts about Pufendorf and Christian Thomasius; he made possible much of the later thought of Wolff and Kant. Since Leibniz has never been rendered his jurisprudential “due” in English, the present volume offers an occasion for that rectification.

3) Throughout my volume I also give great prominence to the thought of Leibniz’ friend and correspondent Malebranche (1638–1715)—the greatest French philosopher between Descartes and Rousseau. Without Malebranche’s notion that universe is governed by general laws (*les lois générales*) produced by the “general wills” (*les volontés générales*) of God, the jurisprudence of Montesquieu and of Rousseau would not exist—since the philosophical foundations of the thought of those later masters were (more than anything else) Malebranchian. And Malebranche’s thought also furnished an occasion for the great sceptic David Hume.

4) But the scepticism of Hume slightly chastened the Platonic rationalism which Kant inherited from Leibniz, and led Kant to say that we merely “take”

ourselves to be “objective ends,” indeed members of a Kingdom of Ends resting on universal and equal respect; and a left-leaning version of Kantian “moral teleology” then led to the early left-Kantianism of the young Marx, and ultimately to the liberal-Kantian jurisprudence of John Rawls and Jürgen Habermas—both of whom try to detach Kantian practical conclusions from their “background” in transcendental idealism (in a way somewhat differently attempted by Hannah Arendt and Jean-Paul Sartre). Throughout my volume I give prominence to Kantianism—not just because of its influence on (early) Marx, Rawls and Habermas, but because the central Kantian practical notions (moral egalitarianism, universal republicanism, infinite movement “toward” eternal peace) seem to be the best moral-legal principles for a contemporary, non-theocratic, non-utilitarian world.

Before concluding this *Preface*, three additional matters need to be briefly commented on:

(A) Though *The Philosophers' Philosophy of Law* begins mainly with the “17th century,” I nonetheless offer a “Prologue on Machiavelli” (died 1527). This is simply because certain later figures are hard to make intelligible without a knowledge of “Machiavelism”—above all Hobbes, Leibniz, Rousseau, Hegel, and Nietzsche. (Hegel, for example, takes the view that Machiavelli’s historical “realism” is the antidote to Platonic transcendental flight to an imaginary “Beyond.”) Since modern legal philosophy can never be wholly separated from political thought, a brief chapter on the great Florentine is fully warranted.

(B) When I use the terms “Platonic demonstration” or “Platonizing demonstration” in connection with Leibniz, Malebranche, Kant, and others, I mean not syllogistic logic in the manner of Aristotle’s *Posterior Analytics*, but simply Plato’s tendency to say—in *Meno*, *Phaedo*, *Euthyphro*, *Republic*, and *Theaetetus*—that problematical and contested moral ideas such as “justice” and “virtue” are conceptually like geometry and mathematics: rational, necessary, universal, eternal, God-loved, free of Heraclitean flux (and therefore not made in time by arbitrary “public decision”; Plato, *Theaetetus*, 172b). Since Platonic “geometrizing” rationalism turns up in figures as unlikely as Montesquieu and Hume—in the first case favourably, and in the second not—that version of rationalism forms a thread leading from Leibniz and Malebranche to Kant, and gives an ongoing vertebrate structure to a substantial part of modern jurisprudence.

And (C) I treat some “philosophers of law” who are not philosophers in a broader sense (concerned with metaphysics, ontology, epistemology), but who cannot be omitted because certain far greater “real” philosophers then become intelligible: Leibniz for example, cannot be understood without his opposition to Pufendorf’s “voluntarism,” without his reverence for “the incomparable Grotius”—thought Pufendorf and Grotius are not “philosophers” in a full, broader sense. Indeed my volume should be seen as a *continuum* in

which some figures are philosophers first and “lawyers” second (Leibniz, Malebranche, Kant, Hegel, Nietzsche) and some others are principally lawyers and only secondarily philosophers (Pufendorf, Grotius, Thomasius, Montesquieu). But an over-strict and over-narrow definition of philosophy would simply exclude too much: Here I follow the wise practice of Guido Fassò, who views “philosophy” in a helpfully latitudinarian way.

I dedicate this volume to my three teachers who taught me most about jurisprudence as an outgrowth of moral philosophy: Michael Oakeshott, Judith Shklar and John Rawls. And I dedicate this book, above all, to the person who has (for forty years) made all of my intellectual work possible: my wife, Joan Zoccola Riley—the “why and wherefore” of my life.

Patrick Riley

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## Chapter 1

# THE (NON)-LEGAL THOUGHT OF NICCOLÒ MACHIAVELLI

### 1.1. Introduction

Machiavelli is the most ardent Romanist (or Rome-lover) among all modern political philosophers: Indeed his greatest single work is a set of *Discourses* on Livy's history of Rome (cf. Meinecke 1884, chaps. 4 and 5). But while most of the great Rome-lovers—most notably Dante, Leibniz and Rousseau—give enormous weight to Roman law as *the* towering and permanent Roman achievement (outlasting the fall of Rome herself; cf. Barker 1923) Machiavelli by contrast gives absolute priority to the personal creative genius of Romulus, of Numa, of the Antonine “good” emperors (Machiavelli 1950a, Book 1, chap. 10). (And brilliant personal creativity is far from the sober generality and deliberate impersonality of law.) Dante could say (in *De Monarchia*) that what “justifies” Rome is Christ's willingness to be born under Roman-law *jurisdictio* (*De Monarchia*, Book 2, *passim*); Leibniz could call Roman law *la raison écrite*, the only rival to geometry (Leibniz 1948a, 534); Rousseau could venerate the sheer *généralité* of a Roman law to which all egoistic *volonté particulière* must be subordinated (Rousseau 1959b, Book 4, *passim*). But Machiavelli rarely refers to Roman law (except to acknowledge briefly its continuing dominance) (Machiavelli 1950a, Book 1, “Introduction”): What mattered to him was Roman civic *virtù* and the personal genius of “founders” such as Romulus—who indeed neglected law to the point of fratricide, as in the killing of Romulus (*ibid.*, Book 1, chap. 9). What mattered to Machiavelli in short, was the very personal, extra-legal, extra-orderly creativity of great men (who are then worthy of perpetual “imitation,” whenever *fortuna* affords an historical opportunity) (*ibid.*, Book 2, Introduction). Rarely, indeed, has a “Romanist” given so little weight to Roman law, or in fact to law *tout court*, as Niccolò Machiavelli.

To appreciate exactly why Machiavelli gives such slight weight to law—even the law of his beloved Romans—a more general understanding of his political-moral philosophy and philosophy of history is necessary; it is to those aspects of his thought that one now turns.

### 1.2. Law as Personal Creativity in the “Legislator”

It is difficult to come to terms with Machiavelli on his own ground, since he has been more vilified and condemned than any social philosopher who ever wrote; he has served, in Michael Oakeshott's words, as “the scapegoat of the

European consciousness" (Oakeshott 1975, chap. 3, 234), as the source to whom all evil doctrines and practices can be traced. Since the sixteenth century his name has been used interchangeably with the ideas of scheming, treachery, bad faith, and political murder; his reputation in the English-speaking world was fixed as early as 1593 by Shakespeare, who placed a "Machiavellian" speech in the mouth of Richard Duke of Gloucester (soon-to-be Richard III), the supposed killer of the "little princes" in the Tower of London:

Why, then, I do but dream on sovereignty;  
 Like one that stands upon a promontory,  
 And spies a far-off shore where he would tread,  
 Wishing his foot were equal with his eye;  
 And chides the sea that sunders him from thence,  
 Saying, he'll lade it dry to have his way:  
 So do I wish the crown, being so far off;  
 And so I chide the means that keeps me from it;  
 And so I say—I'll cut the causes off,  
 Flattering me with impossibilities—  
 [...]  
 Then, since this earth affords no joy to me,  
 But to command, to check, to o'erbear such  
 As are of better person than myself,  
 I'll make my heaven to dream upon the crown;  
 And, whiles I live, to account this world but hell,  
 Until my misshap'd trunk that bears this head,  
 Be round impaled with a glorious crown.  
 And yet I know not how to get the crown,  
 For many lives stand between me and home:  
 And I,—like one lost in a thorny wood,  
 That rends the thorns and is rent with the thorns;  
 Seeking a way and straying from the way;  
 Not knowing how to find the open air,  
 But toiling desperately to find it out,—  
 Torment myself to catch the English crown:  
 And from that torment I will free myself,  
 Or hew my way out with a bloody axe.  
 Why, I can smile, and murder while I smile;  
 And cry, content, to that which grieves my heart;  
 And wet my cheeks with artificial tears,  
 And frame my face to all occasions.  
 I'll drown more sailors than the mermaid shall;  
 I'll slay more gazers than the basilisk;  
 I'll play the orator as well as Nestor,  
 Deceive more slyly than Ulysses could,  
 And, like a Sinon, take another Troy:  
 I can add colours to the chameleon;  
 Change shapes with Proteus for advantages,  
 And set the murderous Machiavel to school.  
 Can I do this, and cannot get a crown?  
 Tut! were it further off, I'll pluck it down. [*Exit.*]  
 (Shakespeare 1919a, *Henry VI*, Part 3, Act 3, Scene 1)



But it is not only a matter of Shakespeare: Frederick the Great of Prussia wrote a celebrated *Anti-Machiavel* (despite his own predatory bellicosity) (Frederick the Great 1760); and even today it is scarcely a compliment to call a policy “Machiavellian.”

Against all of these unflattering opinions, some scholars have taken the view that what Machiavelli really had in mind was the revival of ancient Roman civic virtue, Roman-republican love of country, and that the harsh advice given to the (new) prince in *The Prince* was necessary in an evil and violent age, in which one could not gain power and restore antiquity by calm and measured means. It is certainly true that later political-legal theorists as important as Montesquieu, Rousseau and Hegel saw Machiavelli in this second, Rome-restoring light (Hegel 1956, Part I, sec. II, chap. III); Rousseau even thought that Machiavelli’s real views were contained in the *Discourses* (a sustained eulogy for the Roman republic), and that *The Prince* was a satire against Renaissance princes (Rousseau 1959b, Book 2, chap. 7).

Rousseau’s view is more striking than plausible, but one can see why the argument about Machiavelli’s giving strong advice in evil times might be credible. Consider the political condition of Italy in 1512, when Machiavelli (lately driven from Florentine power) began to write *The Prince* and the *Discourses*: There was no national government or law whatever (and none on the horizon until the mid-19th century); the country was divided between five principal powers (the Papacy, Venice, Florence, France, and Spain) (Machiavelli 1950a, Book 1, chap. 12, *inter alia*)—with no single power strong enough (or bright enough) to overcome the others and consolidate, unified rule. This, surely, was a time to give tough-minded advice, if any time ever was; and *The Prince* is often taken to be the work of an Italian patriot anxious to restore the ancient civic greatness of Italy (hence the closing chapter of *Il Principe*, “Exhortation to liberate Italy from the barbarians”: Machiavelli 1950b, chap. 26).

Machiavelli’s advice was tough and quite shocking to his contemporaries, even if we have grown more used to it. His theory was perhaps more startling historically than absolutely—that is, more startling following on the essential social ideas of ancient and medieval thought, than considered in itself. Ancient thought, and even some Christian philosophy after Aquinas, had concerned itself with the notion of an ethical community designed for the attainment of virtue, and ruled by wisdom, reason, and law. Against this kind of Graeco-Christian backdrop Machiavelli’s ideas came as a terrible jolt:

My intention being to write something of use to those who understand, it appears to me more proper to go to the real truth of the matter than to its imagination; and many have imagined republics and principalities which have never been seen or known to exist in reality; for how we live is so far removed from how we ought to live, that he who abandons what is done for what ought to be done, will rather learn to bring about his own ruin than his preservation. A man who wishes to make a profession of goodness in everything must necessarily come to grief

among so many who are not good. Therefore it is necessary for a prince, who wishes to maintain himself, to learn how not to be good, and to use this knowledge and not use it, according to the necessity of the case. (Machiavelli 1950b, chap. 15)

With this celebrated paragraph, the entire medieval worldview of the relation between “this world” and a “higher” world, of the legal-political order as the “secular arm” of a universal *respublica christiana*, of politics and law as consequences of “the Fall” of man, were simply swept away, and the Papacy (with its canon law) was seen merely as one more (ineffective) power engaged in an impotent struggle for power in Italy. Machiavelli said with mock seriousness that he would not examine the Papacy too closely, because it was “upheld by higher causes, which the human mind cannot attain to” (Machiavelli 1950a, Book 1, chap. 2) but it was clear that he hated it (or rather felt contempt for it) because of its “universalist” pretensions—as in Boniface VIII’s *Unam Sanctum*—even though it could not unify Italy, let alone the world.

[A]s there are some of the opinion that the well-being of Italian affairs depends upon the Church of Rome, I will present such arguments against that opinion as occur to me; two of which are most important, and cannot according to my judgment be controverted. The first is, that the evil example of the court of Rome has destroyed all piety and religion in Italy, which brings in its train infinite improprieties and disorders; for as we may presuppose all good where religion prevails, so where it is wanting we have the right to suppose the very opposite. We Italians then owe to the Church of Rome and to her priests our having become irreligious and bad; but we owe her a still greater debt, and one that will be the cause of our ruin, namely, that the Church has kept and still keeps our country divided. And certainly a country can never be united and happy, except when it obeys wholly one government, whether a republic or a monarchy, as is the case in France and in Spain; and the sole cause why Italy is not in the same condition, and is not governed by either one republic or one sovereign, is the Church; for having acquired and holding a temporal dominion, yet she has never had sufficient power or courage to enable her to seize the rest of the country and make herself sole sovereign of all Italy. And on the other hand she has not been so feeble that the fear of losing her temporal power prevented her from calling in the aid of a foreign power to defend her against such others as had become too powerful in Italy; as was seen in former days by many sad experiences, when through the intervention of Charlemagne she drove out the Lombards, who were masters of nearly all Italy; and when in our times she crushed the power of the Venetians by the aid of France, and afterwards with the assistance of the Swiss drove out in turn the French. The Church, then, not having been powerful enough to be able to master all Italy, nor having permitted any other power to do so, has been the cause why Italy has never been able to unite under one head, but has always remained under a number of princes and lords, which occasioned her so many dissensions and so much weakness that she became a prey not only to the powerful barbarians, but of whoever chose to assail her. This we other Italians owe to the Church of Rome, and to none other. (Ibid.)

Machiavelli had an unfailing eye for hypocrisy and self-deception, for the gulf between what was claimed (e.g., “universal” *jurisdictio*) and what was actually done (little or nothing)—and he concentrated almost exclusively on actual historical achievement.

Machiavelli certainly (above all in *The Prince*) proposes no final “end” of man, or at least proposes no notion of a universal good attainable in a charity-

shaped *respublica christiana*; political power itself (mainly extra-legal) is a worthy end if it leads to historical *greatness*—if, that is, one is remembered in the court of history as a great, if not necessarily good, man (in the manner of Romulus; *ibid.*, Book 1, chap. 9). There is a sentence in Montesquieu’s *Spirit of the Laws* (1748) which reveals the standard of “greatness” that Machiavelli had in mind: “The actions of men are judged, not as virtuous, but as shining; not as just, but as great; not as reasonable, but as extraordinary” (Montesquieu 1989, 278). This idea of historical greatness as a combination of uniqueness and success, overriding conventional morality and established law, is the most radical of all Machiavelli’s ideas, and one that will later be returned to.

Machiavelli was the first great social theorist to insist on a sharp difference between morally good and politically great actions (even if Thucydides and Aristotle were aware of the distinction) (Pocock 1975, *passim*). Machiavelli, indeed, stresses an unbridgeable gulf between the (conventionally) morally good and the politically-historically great. To use a favorite example of his own: Liberality or generosity is commonly accounted a virtue in established morality—but in politics and statecraft the prince, in order to be “liberal,” must either spend his own money (which depletes the amount available for strictly necessary activities, especially war), or he must spend public funds on the public (thereby raising taxation. Machiavelli 1950b, chaps. 7–9). Therefore liberality or generosity is not a political good; but stinginess, rightly considered bad or contemptible in private life, becomes a political “good” which is even instrumental to greatness. To recall a second example often mentioned by Machiavelli: Mercy and clemency are rightly prized as private *virtues*. But (he continues), if a prince (and especially a new prince) shows too much mercy and clemency at the outset of rulership, this may bring on great disorder—if clemency is misread as weakness—and this will require greater rigor and cruelty in the end than would have been necessary had the prince been initially more firm. Therefore (Machiavelli suggests) minimal acts of necessary cruelty and violence, done at the outset, may prevent greater cruelties (including perhaps illegalities) later on (*ibid.*, chaps. 10–12). What Machiavelli was suggesting is that politics has internal “laws” of its own which are not deductions from a more general moral philosophy (in the manner of Kant: Kant 1922c, “Einleitung in der Rechtslehre”) but which are related only to the way in which power is obtained and kept.

The getting and keeping of power in turbulent and fast-changing times makes the idea of politics in Machiavelli an idea of constant princely activity; thus he offers a dynamic rather than static theory of political-social life. Machiavellian politics is no longer a search for a “motionless polity” (in Wolin’s illuminating phrase: Wolin 1960, 1), in which a single best quasi-aesthetic pattern governs the entire kosmos—as in Book IV of Plato’s *Republic*, in which the “harmonious” non-dissonant *psyche* is “writ large” in the harmo-

nious polis (ruled by philosophers), and then writ larger still in the “harmony of the spheres” in Book X (Plato, *Republic*, 443d–e, and Book 10, *passim*). Rather, in Machiavelli, there is a shift from questions of harmonious and stable rule (with resonances of quasi-mathematical consonance) to questions of power, of mastery, of control over an unstable, volatile complex of fast-moving forces. In Machiavelli, then, as *the* non-Platonist par excellence, harmony and geometrical “eternity” yield to a more modest provisional control over barely containable forces (Wolin 1960, “Machiavelli” chapter).

The problem of Machiavelli (as Wolin above all has seen) is to find a form of political-historical explanation which would somehow take account of dynamic, volatile, ever-changing social reality and still provide “directives” or guidelines—even if these are not “geometrically” necessary, in the Platonic manner. “In history,” Wolin (1960, chap. 2) insists, “Machiavelli found such a form of explanation, for the virtue of the language of history was that while it described movement and change, it also assumed certain constant factors operating over time” (cf. Machiavelli 1950a, Book 2, chap. 43). (For Machiavelli what was constant was not Platonic geometry but human psychology: For him it is a permanent truth that feelings of gratitude always degenerate into resentment—such that rulers should take quick advantage of their subjects’ grateful feelings; *ibid.*)

It is for these reasons that Machiavelli constantly says that the man who wants to achieve greatness in his own time must study examples of political success in the past (above all in Roman history) and then “imitate” (intelligently, creatively) those shining examples as nearly as present circumstances and *fortuna* will allow (*ibid.*, Book 2, “Introduction”).

The great Introduction to Book 2 of the *Discourses* on Livy contains the best statement of Machiavelli’s view of antiquity and a good statement of his theory of *imitatio* as the thing most necessary to present success. To be sure, Machiavelli begins by affecting contempt for antiquarians who are over-devoted to the past:

Men ever praise the olden time, and find fault with the present, though often without reason. They are such partisans of the past that they extol not only the times which they know only by the accounts left of them by historians, but, having grown old, they also laud all they remember to have seen in their youth. Their opinion is generally erroneous in that respect, and I think the reasons which cause this illusion are various. The first I believe to be the fact that we never know the whole truth about the past, and very frequently writers conceal such events as would reflect disgrace upon their century, whilst they magnify and amplify those that lend lustre to it. (Machiavelli 1950a, Book 2, “Introduction”)

But then eventually his own real view begins to steal in:

I repeat, then, that this practice of praising and decrying is very general, though it cannot be said that it is always erroneous; for sometimes our judgment is of necessity correct, human affairs being in a state of perpetual movement, always either ascending or declining. We see, for

instance, a city or country with a government well organized by some man of superior ability; for a time it progresses and attains a great prosperity through the talents of its lawgiver. Now, if any one living at such a period should praise the past more than the time in which he lives, he would certainly be deceiving himself; and this error will be found due to the reasons above indicated. But should he live in that city or country at the period after it shall have passed the zenith of its glory and in the time of its decline, then he would not be wrong in praising the past ... [Today], whoever is born in Italy and Greece, and has not become either an Ultramontane in Italy or a Turk in Greece, has good reason to find fault with his own and to praise the olden times; for in their past there are many things worthy of the highest admiration, whilst the present has nothing that compensates for all the extreme misery, infamy, and degradation of a period where there is neither observance of religion, law, or military discipline, and which is stained by every species of the lowest brutality; and these vices are the more detestable as they exist amongst those who sit in the tribunals as judges, and hold all power in their hands, and claim to be adored. (Ibid.)

And finally Machiavelli concludes this Introduction in these ringing words:

I know not, then, whether I deserve to be classed with those who deceive themselves, if in these *Discourses* I shall laud too much the times of ancient Rome and censure those of our own day. And truly, if the virtues that ruled then and the vices that prevail now were not as clear as the sun, I should be more reticent in my expressions, lest I should fall into the very error for which I reproach others. But the matter being so manifest that everybody sees it, I shall boldly and openly say what I think of the former times and of the present, so as to excite in the minds of the young men who may read my writings the desire to avoid the evils of the latter, and to prepare themselves to imitate the virtues of the former, whenever fortune presents them the occasion. For it is the duty of an honest man to teach others that good which the malignity of the times and of fortune has prevented his doing himself; so that amongst the many capable ones whom he has instructed, some one perhaps, more favored by Heaven, may perform it. (Ibid.)

What is astonishing in this “Introduction”—Machiavelli’s greatest encomium of antiquity in general and Rome in particular—is that Roman law does not make even a fleeting appearance; one is told of great Roman “lawgivers” (such as Romulus and Numa), but these lawgivers do not give *law*: Rather through highly personal “talent” they give institutions and virtues which are “as clear as the sun” and which are worthy of perpetual imitation. This is a quasi-aesthetic rather than legal view of “lawgiving”; it is (in Burckhardt’s famous phrase) “the state as a work of art” (Burckhardt 1896, vol. 2, 197). (Rarely has the word “lawgiver” had so little legal content.)

Given the Introduction to *Discourses*, Book 2, it is perhaps permissible to follow an interpretation of Machiavelli which accounts for the Romanizing “idealism” of the *Discourses* and the relative toughness and hardness of *The Prince*. The *Discourses* are a glowing description of Rome at her zenith: an ideal polity which is calm, prosperous, untroubled by an extra-worldly, transcendental religion driving fatal wedges between kinds of duties and virtues.

In the period under the good Emperors he will see the prince secure amidst his people, who are also living in security; he will see peace and justice prevail in the world, the authority of the Senate respected, the magistrates honored, the wealthy citizens enjoying their riches, nobility and virtue exalted, and everywhere will he see tranquillity and well-being. And on the other

hand he will behold all animosity, license, corruption, and all noble ambition extinct. During the period of the good Emperors he will see that golden age when every one could hold and defend whatever opinion he pleased; in fine, he will see the triumph of the world, the prince surrounded with reverence and glory, and beloved by his people, who are happy in their security. If now he will but glance at the times under the other Emperors, he will behold the atrocities of war, discords and sedition, cruelty in peace as in war, many princes massacred, many civil and foreign wars, Italy afflicted and overwhelmed by fresh misfortunes, and her cities ravaged and ruined; he will see Rome in ashes, the Capitol pulled down by her own citizens, the ancient temples desolate, all religious rites and ceremonies corrupted, and the city full of adultery; he will behold the sea covered with ships full of flying exiles, and the shores stained with blood. (Machiavelli 1950a, Book 1, Chapter 10)

There should be only one duty and one virtue—love of the country and of its institutions and customs, and this is civic *virtù*. *The Prince*, on the other hand, is advice for evil (present) times, an account of what is necessary (if not always laudable) to establish sufficient order to allow higher civic forms to evolve (or rather reappear through creative *imitatio*). What is required first, is unity and order; and to get that one must use currently prevailing methods, however extra-legal or even “murderous.” Ultimately one can create a new civic order (which is what *The Prince* is about, Machiavelli 1950b, chap. 1) which will not finally rest on violence and treachery; but one cannot do this in the midst of chaos. For Machiavelli, the founding of a virtuous new state, a new civic order which persists as long as possible in its original form, is the supreme human achievement; everything will ultimately degenerate (even Rome!), but the greatest honor (in what Schiller called the Court of Universal History) is due to those who lay the foundations as perfectly as possible. The perfect civic order is truly a work of art for Machiavelli, not something merely instrumental to something “higher,” as in Hegel (1942, “Introduction,” xii–xvi); those who construct enduring states count as great. What “great” means, of course, is highly problematical: Romulus killed his brother to found the Roman commonwealth; but Rome became a great state largely because of Romulus’ fratricidal boldness, and so the murder was not only excused but *justified*:

I say that many will perhaps consider it an evil example that the founder of a civil society, as Romulus was, should first have killed his brother, and then have consented to the death of Titus Tatius, who had been elected to share the royal authority with him; from which it might be concluded that the citizens, according to the example of their prince, might, from ambition and the desire to rule, destroy those who attempt to oppose their authority. This opinion would be correct, if we do not take into consideration the object which Romulus had in view in committing that homicide. But we must assume, as a general rule, that it never or rarely happens that a republic or monarchy is well constituted, or its old institutions entirely reformed, unless it is done by only one individual; it is even necessary that he whose mind has conceived such a constitution should be alone in carrying it into effect. A sagacious legislator of a republic, therefore, whose object is to promote the public good, and not his private interests, and who prefers his country to his own successors, should concentrate all authority in himself; and a wise mind will never censure any one for having employed any extraordinary means for the purpose of establishing a kingdom or constituting a republic. It is well that, when the act accuses him, the result should excuse him; and when the result is good, as in the case of Romulus,

it will always absolve him from blame. For he is to be reprehended who commits violence for the purpose of destroying, and not he who employs it for beneficent purposes. (Machiavelli 1950a, Book 1, chap. 9)<sup>1</sup>

Here, in this astonishing page, one finally sees how radically Machiavelli is using the word “legislator” (or “lawgiver”). The immediate purpose of this passage from *Discourses*, I, ix, is to defeat Augustine’s claim (in *The City of God*, 91–103) and that Romulus rose to “bad greatness” by uncharitably murdering his brother Remus, in imitation of Cain’s killing of Abel (“the city’s walls stained with a brother’s blood”: *The City of God*, Book 15), and that Romulus, far from being a lawgiver, was in fact a law-breaker guilty of murder and rape (the attack on the Sabine women). For Augustine, Romulus was indeed the giver of a “new law”—but not the new law insisted on in the Gospel according to St. John VIII (“a new law I give unto you, that ye love one another”); for the Bishop of Hippo and founder of Christian practical philosophy, Romulus used sheer *potestas* to crush *caritas* and fraternal sharing of *auctoritas*. In *The Prince*, Chapter 18, Machiavelli had urged that a would-be great prince must often act “against charity” in pursuing his historical purposes (“the end justifies the means”: Machiavelli 1950b, chap. 18); now in *Discourses*, I, ix, this doctrine is broadened into a drastically new idea of a “legislator” who begins his work by violating well-established laws against murder and rape. Nothing could show more clearly that Machiavelli uses the terms legislator and lawgiver in a way that has nothing to do with “law” conventionally understood, that the sober generality and deliberate impersonality of “law” in Bodin, or Grotius, or (even) Hobbes gives way in Machiavelli to “law” as an instantaneous, point-to-point personal creativity which has future “greatness” as its object. Of all modern thinkers who discuss the “rule of law,” Machiavelli does most to magnify “rule” and to diminish “law” itself.<sup>2</sup>

<sup>1</sup> Machiavelli says that “many” will be worried about Romulus, but he is really concerned with one, i. e., Augustine.

<sup>2</sup> Guido Fassò, (1966–1970, vol. 2: 39) in his splendid *Storia della filosofia del diritto*, is certainly correct when he says that “a disregard for law is manifest [...] in the greatest political thinker of the Renaissance, Niccolò Machiavelli.”



## Chapter 2

# THE LEGAL PHILOSOPHY OF HUGO GROTIUS

### 2.1. Introduction

The legal philosophy of Grotius is complex, complicated, and (above all) *eclectic*: It fuses strands which might (independently) constitute a *jurisprudentia*. Since Grotius was an “Arminian” Calvinist who was horrified by the hyper-Calvinist notion that God simply makes justice by an “absolute decree,” he was an antivoluntarist in both law and theology; and that is why he Platonizingly says that “even if we were to say [*etiamsi daremus*] that there is no God,” there would still be uncreated natural justice (which is as natural as the truth of  $A = A$  or  $2 + 2 = 4$ ) (Grotius 1964, Prolegomena, pars 11; see Grotius 1925). In this sense Grotius is a Platonic-rationalist “natural lawyer” much revered by the greatest early-modern Platonist, Leibniz. But Grotius added to this rationalist, antivoluntarist notion of quasi-mathematical natural justice a theory of natural human *sociability* which is more Ciceronian than it is anything else, so that for the great Dutch jurisconsult natural justice and natural sociability reinforce each other.<sup>1</sup> But Grotius also, in a kind of proto-Montesquieuian way that foreshadows *De l'esprit des lois*, took a deep interest in the concrete, empirical details of existing positive law, and especially in the *jus gentium* (Montesquieu 1989, *passim*).<sup>2</sup> These three strands—“Platonist,” “Ciceronian,” and “proto-Montesquieuian”—converge in Grotius’s greatest single contribution to legal philosophy, *De Jure Belli ac Pacis* (1625).

The best course, then, will be to examine these three strands individually, and also in combination; and after that it will be helpful to show how Leibniz—clearly the greatest German philosopher and jurisconsult before Kant—developed Grotius’s Platonic-rationalist idea of quasi-mathematical “natural law” into something broader and fuller than anything imagined by Grotius himself. (Leibniz always called Grotius “the incomparable,” but thought that the great Dutchman had only sketched a demi-Platonic jurisprudence which stood in need of amplification and “demonstration.”)

<sup>1</sup> Cf. above all Cicero, *De Finibus Bonorum et Malorum* (*passim*), and *De Natura Deorum*, Book I (against the Epicureans).

<sup>2</sup> See the view of Isaiah Berlin (1982a) that there is really no connection between the Platonic-rationalist “natural” jurisprudence of Book I and the rest of *Lois*. (Voltaire had said much the same thing, as had David Hume.)

## 2.2. Origin and Genesis of Grotius' Thought

The importance of Grotius in the history of legal philosophy depends not on a theory of the state (*à la* Bodin or Hobbes), or on anything that he had to say about public-constitutional law, but rather on his idea of a law regulating the relations between “sovereign” states—on what had earlier been called the *ius gentium*. The practical importance of re-conceiving and re-stressing the “law of nations” in the early seventeenth century can hardly be over-emphasized: The relations between independent political powers had become steadily more chaotic with the breakdown of the (always feeble) restraints which the medieval Church had fitfully applied; and the rise of absolute monarchies recognizing no authority above or beyond themselves had increasingly made sheer force the arbiter in the dealing of states with each other.

To this must be added the effects of the religious wars which followed the Reformation, “bringing to international relations the intrinsic bitterness of religious hatred and affording the color of good conscience to the most bare-faced schemes of dynastic aggrandizement, and the exploitation of newly discovered territory” (Sabine 1937, 256–7). There were ample reasons why Grotius should have believed that the welfare of mankind required a comprehensive and systematic treatment of the rules governing the mutual relations among states—in a modernized version of the Roman *ius gentium*:

Such a work is all the more necessary because in our day, as in former times, there is no lack of men who view this branch of law with contempt as having no reality outside of an empty name. (Grotius 1964, Prolegomena, pars 3)

The contribution of Grotius to “international law” is beyond the scope of a general history of legal philosophy; with respect to this latter his importance lay in the philosophical principles upon which he sought to found his special subject and which he set out especially in the Prolegomena to his greatest work. In the 17th century it was a foregone conclusion that he should appeal to the generally admitted idea of a fundamental law, of a law of nature, lying behind the civil law of every nation, and binding, because of its intrinsic justice, upon all peoples and upon subjects and rulers alike. In the long tradition of Christian political thought no writer had denied, or even doubted, the validity of such a law.

But with the breaking up of Christian unity and the decline of Christian authority the grounds of this validity called urgently for reexamination. Neither the authority of the church nor the authority of Scripture, in fact, no form of religious revelation, could establish the foundation of a law binding alike on Protestant and Catholic peoples, and governing the relations between Christian and non-Christian rulers. It was natural that Grotius, with his background of humanistic education, should turn back to the even older, pre-Christian tradition of natural law which he found in the writers of classical an-

tiquity. And so he chose, as Cicero had done before him, to put his examination of the grounds of natural law into the form of a debate with the skeptical critic of the Stoic philosophy, Carneades.<sup>3</sup>

The point of Carneades's refutation of natural justice lay in the argument that all human conduct is motivated by self-interest and that law is, in consequence, merely a social convention which is generally beneficial and supported not by a sense of justice but by prudence. Grotius's answer was, in brief, that such an appeal to utility is inadequate, since men are inherently social beings. As a result the maintenance of society itself is central, and not to be measured by any private benefits (other than the satisfaction of their sociable impulses) accruing to individuals. (Sabine 1937, 256–7)

As the eminent Grotius-scholar Richard Tuck translates Grotius' *Prolegomena* in *The Rights of War and Peace*:

When he [Carneades] undertook the critique of justice (which is my particular subject at the moment), he found no argument more powerful than this: men have established *jura* according to their own interests [*pro utilitate*], which vary with different customs, and often at different times with the same people: so there is no natural *jus*: all men and the other animals are impelled by nature to seek their own interests: so either there is no justice, or if there is such a thing, it is the greatest foolishness, since pursuing the good of others harms oneself. We should not accept the truth in all circumstances of what this philosopher says, nor of what a poet said in imitation—"never by nature can wrong be split from right." For though man is an animal, he is one of a special kind, further removed from the rest than each of the others species are from one another—for which there is testimony from many actions unique to the human species. Among the things which are unique to man is the desire for society [*appetitus societatis*], that is for community with those who belong to his species—though not a community of any kind, but one at peace, and with a rational order [*pro sui intellectus modo ordinatae*]. Therefore, when it is said that nature drives each animal to seek its own interests, we can say that this is true of the other animals, and of man before he comes to the use of that which is special to men [*antequam ad usum eius, quod homini proprium est, pervenerit*]. (Tuck 1999, 97)

When Grotius speaks of sociableness or an *appetitus societatis* in "Stoic" thought, he is thinking above all of Cicero—who defended Stoicism in *De Finibus* and in *De Natura Deorum*, but without actually being a "full" Stoic. Grotius must especially have relished the remarkable page in *De Finibus* in which the great Roman juriconsult insists that

in the whole moral sphere of which we are speaking there is nothing more glorious nor of wider range than the solidarity of mankind, that species of alliance and partnership of interests and that actual affection [*caritas*] which exists between man and man, which, coming into existence immediately upon our birth, owing to the fact that children are loved by their parents and the family as a whole is bound together by the ties of marriage and parenthood, gradually spreads its influence beyond the home, first by blood relationships, then by connections through marriage, later by friendships, afterwards by the bonds of neighbourhood, then to fellow-citizens and political allies and friends, and lastly by embracing the whole of the human

<sup>3</sup> Grotius must have derived his information from the fragments of Cicero's *De Republica* preserved by Lactantius—since the Vatican MS (palimpsest) of *De Republica* came to light only in 1818 (and is still radically incomplete).

race. This sentiment, assigning each his own and maintaining with generosity and equity that human solidarity and alliance of which I speak, is termed Justice; connected with it are dutiful affection, kindness, liberality, good-will, courtesy and the other graces of the same kind. And while these belong peculiarly to Justice, they are also factors shared by the remaining virtues. For human nature is so constituted at birth as to possess an innate element of civic and national feeling, termed in Greek *politikon*; consequently all the actions of every virtue will be in harmony with the human affection and solidarity I have described, and Justice in turn will diffuse its agency through the other virtues, and so will aim at the promotion of these. For only a brave and a wise man can preserve Justice. Therefore the qualities of this general union and combination of the virtues of which I am speaking belong also to the Moral Worth aforesaid; inasmuch as Moral Worth is either virtue itself or virtuous action; and life in harmony with these and in accordance with the virtues can be deemed right, moral, consistent, and in agreement with nature. (Cicero, *De Finibus Bonorum et Malorum*, Book V, XXIII)<sup>4</sup>

For Grotius, as instructed by Roman jurisprudence, and especially by Cicero, the preservation of a peaceful social order is itself an intrinsic good, and the conditions required for that purpose are as binding as those which serve more strictly private ends. As Grotius argues,

This maintenance of the social order, which we have roughly sketched, and which is consonant with human intelligence, is the source of law properly so called. To this sphere of law belong the abstaining from that which is another's, the restoration to another of anything of his which we may have received from it, the obligation to fulfil promises, the making good of a loss incurred through our fault, and the inflicting of penalties upon men according to their deserts. (Grotius 1964, Prolegomena, pars 8)

For Grotius, then, there are certain minimal conditions or values which must be realized, human nature being what it is, if an orderly society is to persist. Specifically these are, in the main, the security of property, good faith, fair dealing, and a general agreement between the consequences of men's conduct and their deserts. These conditions are not the result of voluntary choice or the product of convention but rather the reverse; choice and convention follow the "natural" necessities of the case.

For the very nature of man, which even if we had no lack of anything would lead us into the mutual relations of society, is the mother of the law of nature. (Ibid., pars 16)

And at one further remove, moreover, this natural law gives rise to the positive law of states; the latter depends for its validity upon the underlying grounds of all social obligation and especially upon that of good faith in keeping covenants (the notion that *pacta sunt servanda*):

For those who had associated themselves with some group, or had subjected themselves to a man or to men, had either expressly promised, or from the nature of the transaction must be understood impliedly to have promised, that they would conform to that which should have

<sup>4</sup> A passage also cherished by Leibniz in his 1689 Rome commentary on Cudworth's *True Intellectual System of the Universe* (Leibniz 1948b).

been determined, in the one case by the majority, in the other by those upon whom authority had been conferred. (Ibid., pars. 15)

Grotius believed that, within the framework of natural law, there was ample room for considerations of utility, which may very well vary from people to people, and which also may dictate practices looking to the advantage of all nations in their international dealings. But certain broad principles of justice are natural—that is, universal and unchangeable—and upon these principles are erected the varying systems of municipal law, all depending upon the sanctity of covenants, and also international law, which depends upon the sanctity of covenants between rulers.

Grotius accordingly gave the following definition of natural law:

The law of nature is a dictate of right reason, which points out that an act, according as it is or is not in conformity with rational nature, has in it a quality of moral baseness or moral necessity; and that, in consequence, such an act is either forbidden or conjoined by the author of nature, God. (Ibid., Book I, chap. I, pars x, 1)

This reference to the command of God is only negatively important: As Grotius was at pains to make clear, it added nothing to the definition and implied nothing in the way of a religious sanction. For the law of nature would enjoin exactly the same if, by hypothesis, there were no God. Moreover, it cannot be changed by the Calvinizing “will” of God. The reason for this is that God’s power does not extend to making true a proposition that is inherently self-contradictory; such a power would be not strength but weakness, or—as Leibniz would soon say—“tyranny.”

Just as even God, then, cannot cause that two times two should not make four, so He cannot cause that that which is intrinsically evil be not evil. (Ibid., Book I, chap. I, pars x, 5; cf. Prolegomena, pars 11)

According to Grotius, there is nothing arbitrary in natural law, any more than there is in arithmetic. The dictates of right reason are whatever human nature and the nature of things imply that they must be. Will enters as one factor into the situation but the *sic volo, sic iubeo* of God or man does not create the obligatory nature of the law. Referring to the authority of the Old Testament, Grotius distinguished carefully between commands which God gave to the Jews as a chosen people and which therefore depended merely upon divine will, and the evidence which it, along with other important documents, affords of natural relationships. Nothing could show more clearly his independence of the system of divine sovereignty implicit in Calvinism—as will soon be seen in comparing Grotius with the anti-Calvinism of Leibniz.<sup>5</sup>

<sup>5</sup> Above all in Leibniz’s *Unvorgreifliches Bedencken* (1698–1701)—treated ahead in Section 2.4. See also Sabine 1937, 258ff.

### 2.3. Grotius on “Demonstrative” Natural Law

The great importance of this theory of “modern” natural law was not due to the content which Grotius attributed to it, for in this respect he followed the familiar trails of the ancient lawyers. Good faith, substantial justice, and the sanctity of covenants had been at all times the rules to which a natural origin was attributed. The importance was methodological: It provided a rational, and what the 17th century regarded as scientific, method for arriving at a body of propositions underlying legal arrangements and the provisions of the positive law. It was essentially an appeal to reason, as the ancient versions of natural law had always been, but it gave precision to the meaning of “reason” such as it had not had in an equal degree in antiquity (except for Plato). The references which Grotius frequently makes to mathematics are significant. Certain propositions in the law, like the proposition two times two equals four, are axiomatic; they are guaranteed by their clearness, simplicity, and self-evidence. No reasonable mind can doubt them, and once they are accurately understood and clearly conceived, they form the elements of a rational insight into the fundamental nature of reality. Once grasped they form the principles by means of which systematic inference can construct a completely rational system of theorems. The identity of this method with what was supposed to be the procedure of geometry is obvious; it is a form of geometrizing “Platonic rationalism” (as in *Meno* and *Phaedo*). This is why Ernst Cassirer is so correct when he says that in Grotius’ *De Iure Belli ac Pacis*, “the Platonism of modern natural law is most perfectly expressed” (Cassirer 1955, 240).

This quality was exactly what commended it to Grotius. He stated specifically that, like a mathematician, he proposed to withdraw his mind from every particular fact. In short, he intended to do for the law just what, as he understood the matter, was being done with success in mathematics or what Galileo was doing for physics.

I have made it my concern to refer the proofs of things touching the law of nature to certain fundamental conceptions which are beyond question, so that no one can deny them without doing violence to himself. For the principles of that law, if only you pay strict heed to them, are in themselves manifest and clear, almost as evident as are those things which we perceive by the external senses. (Grotius 1964, Prolegomena, pars 39)

Because of the prevalence of this idea of good method, the 17th century became the era of “demonstrative” systems of law and politics, the purpose being to assimilate all sciences, the social as well as the physical, as much as possible to a form which was believed to account for the certainty of geometry; this was broadly true for thinkers as different as Hobbes and Leibniz (both of whom revered Euclid).

The distinctive character of Grotian jurisprudence has been best understood, perhaps, by Guido Fassò—in his magisterial *Storia della filosofia del diritto*:

This *rational* and *social* nature of man is, for Grotius, the source of law proper, by which is meant precisely *natural* law as it derives from the essential and specific traits of human nature, to whose realization and preservation such law is devoted. Its fundamental principles consist in respecting that which belongs to others, returning to others their property and any profit deriving from it, keeping promises, and holding others accountable for any crimes they commit; but as we have observed, there stands above these specific principles the general principle, the source of all legal obligations, encapsulated in the motto *stare pactis*.

So, as something immanent in man's very nature, or essence, natural law cannot not in any case be modified by any will: "All that we have said so far," Grotius now comments in words that have since become celebrated, "would somehow equally subsist even if we granted—which cannot be done without committing the most serious impiety—that God did not exist or did not care for humanity" (*etiamsi daremus, quod sine summo scelere dari nequit, non esse Deum, aut non curari ab eo negotia humana*). In this proposition was detected, as early as with Grotius's own contemporaries, an audacity bordering even on impiety, since by its claim that God's natural law is independent, it appears to destroy all transcendent, theological, religious bases of morality, thereby founding morality on human nature alone and consequently upholding its absolutely immanent, rationalist, laic character. (Fassò 1966–1970, vol. 2: 100–1)

And then Fassò goes on to say, in a splendidly helpful page, that

in fact this Paragraph 11 of the *Prolegomena*, with which their philosophical part is essentially brought to a conclusion, seems to support just such an interpretation—for it appears that an anti-theological and laic conception of natural law is expressed by Grotius even in some passages of Book I of *De iure belli ac pacis*. In these passages, which properly begin the discussion of the law of peoples, with Grotius turning to the question of the legitimacy of war and the concept of just war, natural law is described as "a norm of right reason, enabling us to know whether an action is morally necessary or immoral depending on whether or not it conforms with our rational nature, and enabling us to know as well what consequence God, nature's author, prescribes or prohibits for such an action." It is also claimed that "the actions this norm refers to are in themselves obligatory or illegitimate, and for this reason must necessarily be understood as prescribed or prohibited by God," and that "natural law is immutable, so much so that even God cannot change it [...]. Just as God cannot make it so that two and two does not give four, so He cannot make it so that that which by its intrinsic essence is bad should not be bad."

We will see later what significance and what scope Grotius meant these propositions to have. No doubt, they immediately were perceived as indeed audacious and innovative; and while they drew from the Catholic church a condemnation of *De iure belli ac pacis*, they also elicited from some contemporaries, such as Pufendorf, as well as from commentators somewhat above his rank, such as Thomasius and Barbeyrac, a judgment which would then become received wisdom, namely, that the theory of natural law begins with Grotius. (Ibid.)

## 2.4. Grotius' Influence on Leibniz

While Guido Fassò is quite right to stress the influence of Grotian "modern" natural law on Pufendorf, Christian Thomasius, and Barbeyrac, he does not mention the enormous weight which *De Jure Belli ac Pacis* had for Leibniz; and Leibniz was the philosopher of the first rank which Pufendorf, Thomasius, and Barbeyrac were not. It is therefore worthwhile to show how and why Leibniz claimed to have brought to "demonstration" (Platonic) truths which Grotius had only "advanced."



If one looks at Leibniz's mature jurisprudential writings—for example, the 1706 *Monitò* on Pufendorf's legal theory which Barbeyrac translated into French—the Platonic/Grotian insistence on the mathematical-geometrical certainty of “natural” justice is as clear as daylight:

Neither the norm of conduct itself, nor the essence of the just, depends on a free decision, but rather on eternal truths, objects of the divine intellect, which constitute, so to speak, the essence of divinity itself [...]. Justice, indeed, would not be an essential attribute of God, if he himself established justice and law by his free will. And, indeed, justice follows certain rules of equality and of proportion [which are] no less founded in the immutable nature of things, and in the divine ideas, than are the principles of arithmetic and of geometry. So that no one will maintain that justice and goodness originate in the divine will, without at the same time maintaining that truth originates in it as well: an unheard-of paradox by which Descartes showed how great can be the errors of great men; as if the reason that a triangle has three sides, or that two contrary propositions are incompatible, or that God himself exists, is that God has willed it so. It would follow from this, too, that which some people have imprudently said, that God could with justice condemn an innocent person, since he could make it such that precisely this would constitute justice. [...] It is without doubt most true, that God is by nature superior to all; all the same the doctrine itself, which makes all law derivative from the command of a superior, is not freed of scandal and errors, however one justifies it. Indeed, not to mention that which Grotius justly observed, namely that there would be a natural obligation even on the hypothesis—which is impossible—that God does not exist, or if one but left the divine existence out of consideration; since care for one's own preservation and well-being certainly lays on men many requirements about taking care of others, as even Hobbes perceives in part (and this obligatory tie bands of brigands confirm by their example, who, while they are enemies of others, are obliged to respect certain duties among themselves—although, as I have observed, a natural law based on this source alone would be very imperfect); to pass over all this, one must pay attention to this fact: that God is praised because he is just. There must be, then, a certain justice—or rather a supreme justice—in God, even though no one is superior to him, and he, by the spontaneity of his excellent nature, accomplishes all thing well, such that no one can reasonably complain of him. [...] Divine justice and human justice have common rules which can be reduced to a system; and they must be taught in universal jurisprudence. (Leibniz 1768d, iii, 275)

Exactly in the manner of his jurisprudential hero, Leibniz believed that the main threat to Platonic-rationalist natural law was hyper-Calvinism—the doctrine that by a sovereign “absolute decree” God not only chooses to save the “elect” by pure divine will (regardless of human merit) but also *makes* justice: justice itself is (so to speak) a divine fabrication *ex nihilo*. To defend a Platonic-Grotian jurisprudence, and to face down the hyper-Calvinists who were increasingly powerful in Germany (the Prussian court was Calvinist) (see Schrecker 1934, 32ff.), Leibniz wrote—together with his colleague the Lutheran abbot Gerhard Molanus—a jurisprudential-theological treatise called *Unvorgreifliches Bedencken (Disinterested Thoughts)*. And this treatise is the most eloquent defense of anti-Calvinist Grotian rationalism in the later 17th century. (To vanquish the Calvinists, Leibniz relies above all on Plato's *Euthyphro* (9e–10e), which holds that rational “absolute justice” is loved—not caused—by the gods themselves.)

One doesn't really "need" Platonism just to bridge the (not too huge) differences between Calvinists and Lutherans; Leibniz uses Platonism, which goes well beyond his immediate, limited irenic needs, precisely because of his "global Platonism" (as René Sève has aptly called it: Sève 1994, 18n.). It is revealing, indeed, that Leibniz should fall back on Plato's *Euthyphro* when something more modest, less radical, would be sufficient. ("Reason not the need," as King Lear says—or rather, go beyond what is narrowly, immediately *needed* to reason itself. For what reason dictates universally to all rational beings—even to the gods themselves in *Euthyphro*—will also be automatically valid for Lutherans and Calvinists. And a Christian-Platonist universalizing ecumenism will then later shape the *Theodiciée*, viewed as a kind of proto-Kantian "religion within the limits of reason alone"; Leibniz 1710, "Preliminary Dissertation.") The theological fine-points of the "Disinterested Thoughts" are of greater interest to the history of theology than to the history of philosophy; but it is *philosophically* interesting that Leibniz should use Platonic rationalism (lately echoed by Grotius) to draw together two modern, north-European Christian sects. Tertullian had famously asked, "If we have Jerusalem, what need have we of Athens?" (Tertullian, *De praescriptiones haereticorum*, VII, quoted in Barker 1956, 448–9); Leibniz uses "Athens" to bridge quarreling sides of a divided "Jerusalem." He enlists Plato to mediate between Luther and Calvin—not surprisingly, given his view that "the doctrine of Plato concerning metaphysics and morality is holy and just [...] and everything else he says about truth and the eternal ideas is truly admirable" (Leibniz 1768b, 458ff.).

As the 1699 letters to Molanus will soon make clear, what Leibniz (following Grotius) found most worrying in Calvinism was the notion that by an "absolute decree" God willed the election of the saved and the reprobation of the damned—not from foreknowledge of good or bad use of faith and grace on the part of human beings, but simply as an exercise of unquestionable sovereign power. (Euthyphro, in "his" dialogue, had urged that *whatever* the gods love counts as right, but Socrates refutes him; small wonder that Leibniz should view Calvin as a kind of Euthyphro *après la lettre*). The idea of "tyrannical" divine *potestas*, undirected by any rational *causa impulsiva* or benevolent charity Leibniz had eloquently denounced as morally intolerable near the beginning of the "Discourse on Metaphysics" (1686):

Why praise [God] for what he has done if he would be equally praiseworthy in doing exactly the opposite? Where will his justice and his wisdom be found if nothing is left but a certain despotic power, if will takes the place of reason, and if, according to the definition of tyrants [Thrasymachus's definition of justice in Plato's *Republic*], that which is pleasing to the most powerful is by that very fact just? (Leibniz 1999, prop. 2)

Almost exactly the same kind of tyranny-rejecting language appears in Leibniz's letter of February 1698 to his collaborator Molanus: "Every act of

divine will has a determining reason [*causa impulsiva*], otherwise God would not be supremely wise." Condemning the notion of willful divine "tyranny" yet again, Leibniz makes Christ himself speak against it—and in Greek, the language of Plato. (Leibniz then actually compares divine tyranny to the Roman practice of decimation—something bloody, arbitrary, and not personally *deserved*—and urges that "jurisconsults" will view such tyranny with "aversion," as "one of the impossible things"; Leibniz 1923–2004, I, 15, no. 208.) But it is in the October 1699 letter to Molanus, which crowns Leibniz's "Correspondence vol. 17," that Leibniz expands his Christian-Platonist or "Grotian" objections to Calvinist "absolutism" as something *unjust*:

God does not act through absolute power alone, without reason, as would a tyrant, and it is always his supreme wisdom which makes him choose the best—though the reasons for this depth of his counsel may be unknown to us. Thus the love of God and the respect which we owe him is not injured at all; his wisdom, his goodness, and his justice remain in their entirety, as well as his power and his supreme right [...]. This sovereign master does not act without reason, or by some obscure movement of his power alone, which would be the act of a tyrant, but through reasons (however unknown to us) which his perfections furnish to him: In a word, sovereign wisdom, has as much of a role as sovereign power. (Leibniz 1923–2004, vol. 17, 609)

Sections 175–8 of the *Theodicée*, a decade later, against the supralapsarians, merely amplify these complaints about "tyranny" and "injustice" in the letters to Molanus. And that is why Mark Larrimore is so correct when he urges that the *Theodicée* is not only a vindication of God but a "series of meditations on better and worse ways of conceptualizing the workings of perfect wisdom, power and goodness"—so that the book "makes a distinctive contribution to ethics" (Larrimore 2001, 77)—distinctive though (at bottom) *Grotian*.

The Platonic-rationalist antivoluntarism outlined in these letters to his collaborator had been long-aimed by Leibniz not just against the more radical forms of Calvinist theology, but against Descartes's even more thoroughgoing and extreme voluntarism in the *Reply to the Six Objections*. Descartes insisted that

it is self-contradictory that the will of God should not have been from eternity indifferent to all that has come to pass or that will ever occur, because we can form no conception of anything good or true [...] the idea of which existed in the divine understanding before God's will determined him to act. (Descartes, *Reply to the Six Objections*, cited in Riley 1996, 23)

One of the most consistent things in Leibniz's philosophical development was his hostility to such hypercreationist notions, as an early (1677) letter of his shows: "I know that it is the opinion of Descartes that the truth of things depends on the divine will. This has always seemed absurd to me [...]. Who would say that A is not non-A because God has decreed it?" (Leibniz 1923–2004, I, 8) (If Grotius had lived until 1677, he would have said exactly the same thing.)

In the history of philosophy the idea that the concept of justice, as an “eternal verity,” is not a mere adjunct of power, that it is an idea whose necessary truth is at least analogous to the truths of mathematics and logic, is commonly associated with Plato. Now while it is not true that Leibniz was a Platonist in any doctrinaire sense—his clinging to Pauline “charity” and to Augustinian “good will” would have made that difficult—nonetheless he did agree with Plato on many points of fundamental importance. “I have always been quite content, since my youth,” he wrote to Rémond in 1715, “with the moral philosophy of Plato, and even in a way with his metaphysics; for those two sciences accompany each other, like mathematics and physics” (Leibniz 1875–1890, III, 637).

The Platonic work which Leibniz admired most—at least for use in moral and legal philosophy—was the *Euthyphro*, which he paraphrased almost literally in his most important work on justice, the “Meditation on the Common Concept of Justice” (Leibniz 1998c). In the *Euthyphro*, which deals with the question whether “the rules of goodness and of justice are anterior to the decrees of God” (in Leibniz’s words), Plato “makes Socrates uphold the truth on that point.” And that truth is, as Ernst Cassirer puts it, that the good and the just are “not the product but the objective aim and the motive of his will” (Cassirer 1902, 428)—a sentence that could have been written by Grotius himself.

The opening lines of Leibniz’s “Meditation” on justice merely convert Platonic dialogue into straightforward prose:

It is agreed that whatever God wills is good and just. But there remains the question whether it is good and just because God wills it or whether God wills it because it is good and just: in other words, whether justice and goodness are arbitrary, or whether they belong to the necessary and eternal truths about the nature of things, as do numbers and proportions. (Leibniz 1998c, 45)

Leibniz then goes on, in the “Meditation,” to equate Hobbes with the Thrasymachus who had viewed justice not as geometrically “eternal” but as the product of the will of the powerful. And this remarkable opening of the “Meditation,” with its Platonizing linkage between “eternal” justice and “proportion” (*à la* Philebus) reminds us that, in Philip Beeley’s words, “Leibniz was convinced that human minds are something like metaphysical images of the divine mind,” so that “the investigation of pure concepts” such as numbers or geometry (or justice) is “a part of gaining insight into God” (Beeley 2002, 102)—a perfectly “Grotian” thought.

Leibniz’s devotion to the doctrine of Plato’s *Euthyphro* is clear not just in the “Meditation on the Common Notion of Justice” (and then later in the *Theodicy*), but in the slightly earlier “Unvorgreifliches Bedenken” (ca. 1698–1701), which (as we have seen) he wrote partly to counter the extreme view that God creates everything *ex nihilo* through his “fullness of power”

(*plenitudo potestatis*) and creative “will” alone. One must consider, Leibniz now says, “whether the will of God really makes right [*das Recht*], and whether something is good and right simply because God wills it, or whether God wills it because it is good and right in itself [*an sich gut und recht ist*].” The radical voluntarist view of justice as a divine “product” Leibniz ascribes to a number of now-obscure Calvinist theologians, but also to those Cartesians “who teach that two times two makes four and three times three makes nine, for no other reason [*Ursach*] than that God wills it” (Leibniz 1948d, vol. 1, 428).

But such a radically voluntarist position, for Leibniz (as for Grotius before him), is as calamitous morally and theologically as it is mathematically: For on such a view “the *aeternae veritates* would have no certainty in themselves, and even the *bonitas et justitia dei* would be only extrinsic denominations, and in fact would be groundless, if their truth derived from God’s will alone. *Si tantum staret pro ratione voluntas*.” Those who say, Leibniz adds, that “God wills the evil of punishment without regard to the evil of sin,” that he wills to “eternally damn” men even before “any of their sins come into play,” forget that such a view “in no way abides with God’s justice, goodness, and charity” (ibid.) (The last clause is a conscious reworking of I Corinthians 13, “Now abideth faith, hope, charity, these three”; Leibniz replaces “faith” and “hope” with two additional *moral* virtues.) For if God’s decree were “quite absolute, and had no *causam impulsivam* whatsoever, then God would be an acceptor of persons, through election, and would deal with men as a tyrant with his underlings [...] for no other reason than *sic volo sic jubeo*” (ibid.). This phrase from Juvenal’s *Satire* VI, line 223, continues with another phrase which had great weight with Leibniz: The whole sentence reads *Hoc volo, sic jubeo, sit pro ratione voluntas*, and was understood by Leibniz to say, “Thus I will do, thus I ordain, my will takes the place of reason.” Here, in his boldest stroke, Leibniz virtually equates hyper-Calvinists with the willful woman in Juvenal’s *Satire* who crucifies an innocent slave merely because she *wants* to. And since Christ (the *caritas* lover) was also a crucified innocent, Leibniz links all unjust crucifiers to partisanship for extra-rational “absolute” decrees: He deploys pagan Juvenal to make Christian Calvin more charitable (ibid.; cf. Juvenal, *Satire* VI). (It is surely significant that Grotius, too, was horrified by the phrase *hoc volo, sic jubeo*—since Grotius and Leibniz had a (roughly) similar humanist education.)

## 2.5. Conclusion

Had Hugo Grotius lived an additional half-century, he would have been very struck by Leibniz’s idea that hyper-Calvinism destroys not only “necessary” mathematical truth, but also justice itself—by making everything essentially arbitrary, the temporal product of divine *fiat*. (There is a sense in which

Leibniz is right to say that he is “demonstrating” what Grotius had merely *advanced*.) But Grotius was also claimed as a jurisprudential father by Pufendorf and Thomasius—figures rejected by Leibniz as philosophically feeble (“not much of a lawyer and even less of a philosopher”).

What this means is that Grotius’s influence in offering a “modern” (but finally Platonic-Ciceronian) natural law was simply enormous—so that figures such as Leibniz and Pufendorf, who agree about virtually nothing, nonetheless shared a belief in Grotius’s giant significance. In this sense the common view that Grotius inaugurates modern “natural” jurisprudence is perfectly correct. But there is also a sense in which Grotius is a spiritual predecessor of Montesquieu: For both *De Jure Belli ac Pacis* and *De l’esprit des lois* are structurally similar, inasmuch as both begin with a “Platonizing” encomium of “natural” justice (as geometrically certain), then move on—for the bulk of their works—to a detailed, empirical consideration of *ius civile* and *ius gentium*. The point is that the great Dutchman and the great Frenchman thought it essential to *connect* themselves to a venerable Platonic-rationalist tradition—when (in some sense) they “need” not have done so. And this offers further confirmation of Grotius’s central importance.

## Chapter 3

# THE LEGAL PHILOSOPHY OF THOMAS HOBBS

### 3.1. Introduction

It is best to view Hobbes (1588–1679) as the father of modern “legal positivism”—the doctrine that (in Hobbes’ words) “where there is no law there is no justice,” and that the so-called “state of nature” is a moral vacuum in which force and fraud are “cardinal virtues” (Hobbes 1957, 307, 86). Hobbes’ main view in *Leviathan*—setting aside equivocal utterances about natural laws as “eternal and immutable” dictates of reason (in a Platonic-Ciceronian manner)—is that the state of nature is a “state of war” in which life is “solitary, poor, nasty, brutish, and short”; that the only salvation from such a kingdom of darkness is the setting up of artificial sovereigns through “covenants” of which human will is “the essence”; that sovereigns make, interpret and enforce laws understood as authoritative commands (not mere “counsel”) backed by the fear of legal punishment (“the passion to be reckoned upon is fear [...] [and] covenants without the sword are only words”); that even if the Hobbesian sovereign as *fons et origo* of authoritative law mainly operates within the received constraints of English common-law (e.g., no punishment without crime), it is not the historical venerability of that common law which makes it authoritative, but rather the sovereign’s having willed it *ex plenitudo potestatis* (ibid., 83ff.). If potentially fatally-colliding “appetites,” aggravated by pride and vain-glory, can be channeled by positive laws which protect rather than destroy the “natural right” of self-preservation, then Hobbesian “endeavoring” beings can pursue “felicity” without instantaneous fatality (given that death is the universal *summum malum*, even if each person’s *summum bonum* is relative to what he finds good). If key notions such as “covenant” and “will” are deeply problematical in Hobbes’ thought, there is nothing equivocal about his idea of law: For him law and justice are coextensive, and it is only the “fool” who imagines that he can dispense with legal justice and outwit his neighbor in the race for the “garland” of felicity.

As Hobbes concisely put the matter in his late and remarkable *Dialogue between a Philosopher and a Student of the Common Law of England*:

Seeing then that a just action [...] is that which is not against the law; it is manifest that before there was a law, there could be no injustice; and therefore laws are in their nature antecedent to justice and injustice [...]. There is not amongst men a universal reason agreed upon in any nation, besides the reason of him that hath the sovereign power. Yet through his reason be but the reason of one man, yet it is set up to supply the place of that universal reason [...] and consequently our King is to us the legislator both of statute-law and of common-law. (Hobbes 1839–1845a, vol. 5, 22–9)



So central to Hobbes' social theory is sovereign-commanded *law* that he even re-defines crucial notions in traditional Christian moral doctrine—especially the idea of “conscience”—through jurisprudential categories. In a typically radical passage from *Leviathan* (Chapter 29), Hobbes boldly insists that:

I observe the disease of a commonwealth that proceed from the poison of seditious doctrines [...] [one of which holds] *that whatsoever man does against his conscience is sin*, and it dependeth on the presumption of making himself judge of good and evil [...]. [But for] him that lives in a commonwealth [...] the Law *is* the public conscience, by which he hath already undertaken [by covenant] to be guided. Otherwise in such diversity as there is of private consciences, which are but private opinions, [...] [the commonwealth] must needs be distracted, and no man dare to obey the sovereign power, further than it shall seem good in his own eyes. (Hobbes 1957, chap. 29)

(The term “public conscience” is of course a deliberate paradox, and to equate such “public conscience” with sovereign *law* is highly unorthodox; this is an all-shaping legalism which led the young Michael Oakeshott—later the greatest of Hobbes-scholars—to say that “Hobbes’ theory is a ‘legal’ theory, *not* a philosophical one”<sup>1</sup>)

### 3.2. Law and “Covenant” in Hobbes

Since Hobbes’ philosophy of law is set within a contractarian moral-political framework stressing “covenant,” “will,” and “consent,” it is best to begin with that general framework itself.

That consent, promise, and agreement as the foundation of covenants—contracts depending on trust—are fundamental in defining what Hobbes means by the lawmaking authority of sovereigns and the obligations of subjects is scarcely open to doubt.<sup>2</sup> First, and most important, he consistently defines the sovereign power of a commonwealth in terms of those ideas. “The right of all sovereigns,” Hobbes urges in Chapter 42 of *Leviathan*, “is derived originally from the consent of every one of those that are to be governed.” The authority of any prince, he claims in Chapter 40, “must be grounded on the consent of the people, and their promise to obey him.” The advantage of looking at both formulations together is that he first defines the right to rule (through law) in terms of consent, while the second draws in authority and promise as well, showing the intimate relation of these ideas to each other. The fullest statement of this view is to be found in Chapter 21 of *Leviathan*:

<sup>1</sup> *Marginalia*, in Oakeshott’s copy of *Leviathan*, apparently from the late 1920s—copy in the Oakeshott-Archive, London School of Economics, London.

<sup>2</sup> John Plamenatz, however, suggests that it is “perhaps not important” to determine just how significant consent is in Hobbes’s thought (Plamenatz 1962, 1:127); and Stuart M. Brown, goes farther than most commentators in treating covenant in Hobbes as an unproblematical given (Brown 1965, 57–71).

In the act of our submission [to a law-making sovereign] consisteth both our obligation, and our liberty [...] there being no obligation on any man, which ariseth not from some act of his own; for all men are equally and by nature free. And because such arguments, must either be drawn from the express words, I *authorize* all his actions, or from the intentions of him that submitteth himself to his power [...] the obligation and liberty of the subject is to be derived either from those words or other equivalent. (Hobbes 1957, 377, 309, 141)

To make it clear that covenants between men for the establishment of legal sovereignty are *voluntary*, Hobbes speaks, in Chapter 40 of *Leviathan*, of “wills, which make the essence of all covenants” (ibid., 307).<sup>3</sup> Such covenants, or contracts depending on trust, are just as important in a “commonwealth by acquisition” (a polity gained by conquest) as in a “commonwealth by institution.” The difference between them is that in the former men contract directly with the conquering sovereign to obey in exchange for life and security, while in the latter they contract with each other to make a sovereign the beneficiary of their agreement to give up the full exercise of their natural rights, as long as they are protected. As a result even the conqueror of a subjected people derives his *legal* rights over them not from his power but from their consent: “It is not therefore the victory that giveth the right of dominion over the vanquished,” Hobbes says in Chapter 20 of *Leviathan*, “but his own covenant. Nor is he obliged because he is conquered [...] but because he cometh in, and submitteth to the victor” (ibid., 132). As Hobbes says in a passage from *Liberty, Necessity and Chance*, some people believe that “conquerors who come in by the sword, make their laws also without our assent,” that “if a conqueror can kill me if he please, I am presently obliged without more ado to obey all his laws.” But, Hobbes asks, “may not I rather die, if I see fit?” He concludes, “[t]he conqueror makes no law over the conquered by virtue of his power; but by virtue of their assent, that promised obedience for the saving of their lives” (Hobbes 1839, 80).<sup>4</sup> In the end, the difference between commonwealths by institution and by acquisition is not fundamental, since both derive their legal legitimacy from voluntary acts of (potential) subjects.<sup>5</sup> In both, wills “make the essence of all covenants.”

It is not only sovereign lawmaking authority, however, that is authorized or legitimized by consent. In the English version of *De Cive* Hobbes redefines the juridical concept of distributive justice not in terms of desert or

<sup>3</sup> This phrase is extracted from the middle of a sentence dealing with covenants between God and Abraham and his family.

<sup>4</sup> This passage is given full weight by Brian Barry in his helpful article, “Warrender and his Critics” (Barry 1972, 64).

<sup>5</sup> The idea of a commonwealth by acquisition causes one problem for Hobbes, however: in contract there must be acceptance by both sides (“without mutual acceptation there is no covenant”). But this makes the sovereign-by-conquest a party to a covenant and thus gives him contractual obligations to those whom he defends. This is ordinarily something that Hobbes wants to avoid. See Hobbes 1957, 90.

merit but in terms of what has been agreed to: if I give “more of what is mine to him who deserves less, so long as I give the other [who deserves more] what I have agreed for, do I no wrong to either.” This redefinition depends, of course, on Hobbes’s view that all men are, or must be taken to be equal, which rules out the possibility of preeminent natural merit (Hobbes 1949, 46, 50; cf. Hobbes 1957, 100–1). He takes up the same position in Chapter 11 of *Leviathan*, where he holds that “a man may be worthy of riches, office, and employment, that nevertheless can plead no right to have it before another; and therefore cannot be said to merit or deserve it,” for merit “presupposeth a right, and that the think deserved is due by promise” (Hobbes 1957, 90). Even merit and desert themselves, as distinguished from worth, are redefined in terms of voluntary acts, not of intrinsic excellence; any “Platonic” notion of natural justice is made impossible. Not surprisingly, in view of his version of merit, Hobbes goes on to claim in both *De Cive* and *Leviathan* that the distinction between masters and servants exists “by consent of men,” and that it is “not only against reason, but also against experience,” to hold that servants or slaves are intrinsically inferior to masters or that “masters and servants were not introduced by consent of men” (Hobbes 1949, 50; cf. Hobbes 1957, 100).<sup>6</sup>

The validity of law, moreover, is in some ways dependent on consent. While Hobbes often characterizes law as the command or the will of the sovereign—as distinguished from counsel, or mere advice—it remains true that law is not just “a command of any man to any man; but only of him, whose command is addressed to one formerly obliged to obey him” (Hobbes 1957, 238–41). Since this “former” obligation is itself defined in terms of consent, law is a valid command only when pronounced by an authorized person—a person whose authority has been willed, established by consent. Command alone has no more significance in Hobbes than power alone.

Passing beyond these immediately practical matters, Hobbes views the creation and use of language (including of course the vocabulary of law) as the result of agreement; it exists, he says in Chapter 3 of *De Cive*, “as it were by a certain contract necessary for human society.” At one point, in Chapter 18 of *De Cive*, Hobbes even goes so far as to insist that “to know truth, is the same thing as to remember that it was made by ourselves by the common use of words.” (Hobbes 1949, 198).<sup>7</sup> His theory of language as something wholly

<sup>6</sup> Leo Strauss suggests that Hobbes’s thoughts on mastery and slavery serve as the “philosophic basis” of the great “Master and Servant” chapter of Hegel’s *Phenomenology of Mind* (Strauss 1963, 57–8). For an argument against this ingenious suggestion, see Riley 1980, 279–81.

<sup>7</sup> Hobbes 1957, 90 expands this discussion into the nominalist doctrine that only words are universal and are imposed by agreement on a certain range of phenomena by virtue of some “common quality” or accident. How common qualities are recognizable if there are only universal names but no universal essences is a fascinating question that cannot be gone into here.

conventional is important not only as an instance of his general reliance on agreement or consent in the explanation and/or justification of social phenomena (such as law) but also in relation to his theology, which does much to shape his concept of will. Since, in Hobbes's opinion, language is imposed on the world, and since we cannot truly know God, "words, and consequently the attributes of God, have their signification by agreement and constitution of men." That is, what we know of God is not really something we know; we ascribe attributes to him that we think "honorable" (Hobbes 1957, 238–41). Voluntarism has surely gone far in a philosopher if he defines not only language but God as well in terms of concepts simply agreed to.

In view of such radicalism it is not very astonishing that Hobbes goes on, in *Liberty, Necessity and Chance*, to redefine revelation in the light of this voluntarism, and in a way that deprives ecclesiastics, the prime causes of political chaos, of all right, except by delegation, to interpret the law revealed in Scripture. Hobbes's argument is so bold and sweeping that it must be fully cited:

The Bible is a law. To whom? To all the world? He [Bishop Bramhall] knows it is not. How came it then to be a law to us? Did God speak it *viva voce* to us? Have we any other warrant for it than the word of the prophets? Have we seen the miracles? Have we any other assurance of their certainty than the authority of the Church? And is the authority of the Church any other than the authority of the Commonwealth, or that of the Commonwealth any other than that of the head of the Commonwealth, or hath the head of the Commonwealth any other authority than that which hath been given him by the members? [...] They that have the legislative power make nothing canon, which they make not law, nor law, which they make not canon. And because the legislative power is from the assent of the subjects, the Bible is made law by the assent of the subjects. (Hobbes 1839, 179)<sup>8</sup>

What is of interest here, apart from the sheer audacity and formidable logic of this passage, is not simply the assertion that the Bible is law only if made "canonical" by the sovereign but the reassertion that the general right of that sovereign is derived from the assent of the subjects, that through the sovereign considered as their lawmaking agent the people will the Bible to be what it "really" is.

Hobbes does not stop at redefining law, legitimacy, obligation, distributive justice, language, the attributes of God, and the canonical character of Scripture in terms of consent and agreement; he also conceives the relations of God to his chosen people, the Jews, as a consequence of consent. "By the Kingdom of God," he says in Chapter 35 of *Leviathan*, "is properly meant a

<sup>8</sup> It would be difficult to reconcile this passage with Eldon Eisenach's (1981, 106) argument that in Hobbes "men see double: in Part II of *Leviathan* they see their own construct, and in Part III they see a Vicar of Christ." This line between a construct and a Vicar of Christ cannot be drawn, since Hobbes's whole point in *Liberty, Necessity and Chance* is that if the sovereign is a vicar—an authorized interpreter of Scripture—this is because his subjects "assent" to view him in that light. Thus, the sovereign's vicarate is constructed by popular assent.

Commonwealth, instituted, by the consent of those which were to be subject thereto, for their civil government, and the regulating of their behavior.” Both the ancient Jews and modern Christians, in Hobbes’s opinion, are linked to God by consent. Both recognize his legal authority: the Jews in an actual earthly kingdom under a kind of regency of Moses and the Christians in a kingdom to come. One can even say that there are two levels of consent in God’s relation to his chosen peoples: First, there is a covenant between those who subject themselves to God as a sovereign; but second, our knowledge of this covenant comes from Scripture, which is itself “law” only because we have agreed to consider it as such, by allowing the civil sovereign to make the Bible “canonical.” We consent, then, to believe that God’s relation to his chosen peoples is also based on consent. In any case God’s kingdom, whether of the Old Testament or covenant or of the New, exists “by force of our covenant, not by the right of God’s power” (Hobbes 1957, 269–70).

This last observation turns out to be quite important later on, inasmuch as for Hobbes all legal authority and right exist by covenant or agreement unless there is an “irresistible power” in some sovereign, whether God or man, a power that, according to Hobbes, gives rise to absolute rights of “dominion” (ibid. 234–5).<sup>9</sup> God was entitled to give laws to the Jews as their civil sovereign, because he was the beneficiary of an antecedent obligation, created by covenant to obey; but he could have ruled them by natural “irresistible power.”<sup>10</sup> It is essential to point this out because it shows one of the limits to consent in Hobbes’s political-legal theory. Indeed, of the several impediments that stand in the way of considering him a consent theorist pure and simple, one of the most problematical is the way in which he treats the relation of power to the right to rule. While it is undoubtedly true, as Michael Oakeshott maintains, that one of Hobbes’s central doctrine was the belief that there is “no obligation on any man, which ariseth not from some act of his own,” (Hobbes 1957, 179)<sup>11</sup> in both *De Cive* (Chapter 14) and *Leviathan* (Chapter 31) Hobbes says that irresistible power carries with it a right to rule. But if the right to rule can be derived from the possession of irresistible power, then a theory of obligation or legitimacy based on voluntary acts of one’s own is

<sup>9</sup> See the similar argument in Hobbes 1949, 177–178.

<sup>10</sup> The definition of law in chap. 26 of Hobbes’s *Leviathan* (1957, 172), seems to require “former obligation,” and God’s simple power does not seem to involve obligation; but chap. 35 speaks of God as an omnipotent lawgiver.

<sup>11</sup> Cf. Oakeshott 1962a, 282. The chief merit of this wonderful essay, apart from the notability of its style, is its ability to show Hobbes’s greatness at every turn, even when it is being critical. It becomes less than wholly persuasive only when Oakeshott asserts that the social contract need not be seen as obligatory and that only civil law gives rise to real obligations in Hobbes. Against this the present reading holds that no laws would be obligatory if the lawmaker were not authorized, and that this authorization comes precisely from an “act of one’s own.” But Oakeshott’s essay is essential to any serious reader of Hobbes.

made superfluous: “that obligation which rises from contract [...] can have no place [...] where the right of ruling [...] rises only from nature” (Hobbes 1949, 179). Or rather, such acts would be superfluous if there were any person on earth possessed of irresistible power; but the fact that only God actually has such power makes artificial right—right depending on covenant—necessary. If the natural right of a man to all things were conjoined with irresistible power, then that power would entitle him to rule, and all other men would be obliged to submit an account of their weakness. As Hobbes says in Chapter 31 of *Leviathan*,

Seeing all men by nature had right to all things, they had right every one to reign over all the rest. But because this right could not be obtained by force, it concerned the safety of every one, laying by that right, to set up men, with sovereign [legal] authority, by common consent, to rule and defend them: whereas if there had been any man of power irresistible, there had been no reason, why he should not by that power have ruled, and defended both himself, and them, according to his own discretion. (Hobbes 1957, 234)

While dwelling on those aspects of Hobbes’s theory that keep him from being simply a consent theorist it is important to note that Hobbes never allows the concept of natural rights—the liberty of self-preservation that leads at once to a right to all things and to universal warfare because that right is equal for all men—to be restricted even by a man’s own consent. “The right men have by nature to protect themselves, when none else can protect them,” he urges in Chapter 21 of *Leviathan*, “can by no covenant be relinquished.” It is for this reason that Hobbes says that a criminal on the way to his legal execution has a right to resist his executioners, notwithstanding the fact that by authorizing the sovereign to make any laws he has consented to all the laws: “a covenant not to defend myself from force, by force, is always void [...] no man can transfer, or lay down his right to save himself from death, wounds, and imprisonment [...] and therefore the promise of not resisting force, in no covenant transferreth any right; nor is obliging” (Hobbes 1957, 144, 91).

Natural rights, then, are ultimately inalienable, though the sovereign may have a concurrent absolute legal right, given by covenant, that will conflict with natural rights; for example, he may have a right to kill me even though I have a right to avoid being killed. (On this point see particularly Hobbes 1957, chap. 21; but cf. *ibid.*, chap. 28.) The case, however, is rather different with natural law. While Hobbes calls the laws of nature “dictates of reason,” which are “immutable and eternal,” (Hobbes 1957, 104) in a passage in *Leviathan* that recalls Cicero’s famous formulation in Book 3 of *De Republica*,<sup>12</sup> he nonetheless holds in *Liberty, Necessity and Chance* that is “absurd” to say that “the law of nature

<sup>12</sup> *De Republica* 3.22.33, in Barker, 1956, 196: “true law is right reason conformable to nature; it is universally diffused, unchanging and eternal [...] all nations, at all times, will be bound by the one eternal and immutable law.”

is a law without our assent,” for the law of nature “is the assent itself that all men give to the means of their own preservation” (Hobbes 1839, 180). The natural “laws” may be only “conclusions, or theorems concerning what conduceth to the conservation and defense” of all men, and that dictate the seeking of peace as well as all the corollaries of such an endeavor—gratitude, equity, acknowledgment of equality; but Hobbes still speaks of assent in connection with them (Hobbes 1957, 93–105, especially 104).

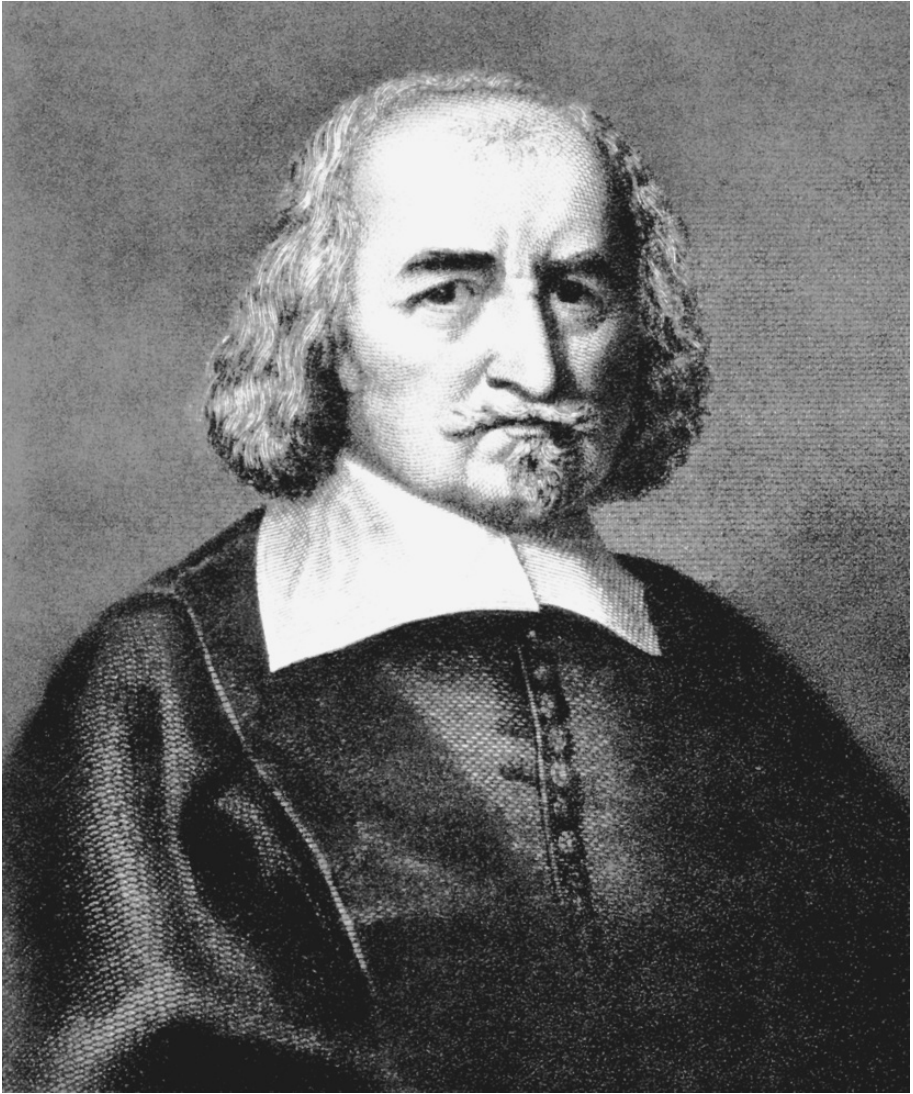
Despite the fact that Hobbes views natural rights as unbridgeable—though the exercise of those rights may be channeled by a society, set up by agreement, that protects them through law—virtually every other concept in Hobbes’s philosophy is defined, in whole or part, in terms of will and consent. The legal authority of sovereigns, the legal obligations of subjects, the nature of justice and merit, the validity of law, the origin of language, and even the attributes of God and the law-giving authority of Scripture are all made possible by voluntary acts: by promising, by consenting, by agreeing. To a certain degree this is even true of natural law as accepted by men, though its content is simply rational. Hobbes’s position does not, of course, involve consent or agreement in the day-to-day operation of the state; one consents only in authorizing the representative person to stand for one’s will.<sup>13</sup> Consent makes most of its appearances in Hobbes with respect to concepts of obedience and submission. This limitation, however, does not make consent unimportant for him; it simply restricts its scope. As a consequence it remains true that covenant is an essential concept in Hobbes, and that wills “make the essence of all covenants.”

### 3.3. Hobbes’ Theory of Will

Now one might well think that a theory that defines so many essential concepts—especially the legal authority of sovereigns and the obligations of subjects—in terms of consent, promise, and covenant, and that suggests that wills make the essence of all covenants, would develop a notion of “will” as a moral faculty whose free choice gives rise to legal authority and to obligation. The family of voluntarist notions on which Hobbes relies seems to need a certain kind of theory of will in order to be usable. Perhaps the traditional Christian view of voluntary moral choice would serve Hobbes’s purpose. His moral and political philosophy often seem to depend on the idea of will as moral agency, of the choosing, self-obligating person as a moral person, as a possible subject of duties (see Oakeshott 1962a, 249–50). But when one turns to what he actu-

<sup>13</sup> Here, of course, Hobbes is to be contrasted with Spinoza and Locke, both of whom make consent important not only in founding the state but in its ordinary operation. Spinoza in particular looked on democracy with favor, despite his theory of absolute sovereignty. See Spinoza 1951, 205–7.





Thomas Hobbes (1588–1679)

ally says about volition, it is hard to find much congruence between his definition of the will and the practical use he appears to make of it. Hobbes said something—though not very much—about the will in *Leviathan*; he said far more in *Liberty, Necessity and Chance*, to which one must turn after examining the relevant passages from *Leviathan*.

A fundamental definition of the will appears in Chapter 6 of *Leviathan* and is amplified in Chapter 46.<sup>14</sup> Since the definition in Chapter 6 is central to all further analysis, it is indispensable to quote it in full:

In *deliberation*, the last appetite, or aversion, immediately adhering to the action, or to the omission thereof, is that we call the WILL; the act, not the faculty, of willing. And the beasts that have *deliberation*, must necessarily also have *will*. The definition of the *will*, given commonly by the Schools, that it is a *rational appetite*, is not good. For if it were then could there be no voluntary act against reason. For a *voluntary act* is that, which proceedeth from the *will*, and no other. But if instead of rational appetite, we shall say an appetite resulting from a precedent deliberation, then the definition is the same that I have given here. *Will therefore is the last appetite in deliberation.* (Hobbes 1957, 38)

This concept of the will appears to be so broad, covering everything from the raising of a hand (or paw) to the undertaking of the sublimest legal and moral duties, that it is too undifferentiated for use in a moral theory based on will. For example, if fleeing from an enraged mob, on the one hand, and promising to obey a law-giving sovereign, on the other, are both voluntary acts, as compared with, say, the circulation of the blood, then this idea of the voluntary is too diffuse to be helpful in a consent theory. The equal ascription of deliberation and hence of will to men and beasts seems inadequate to serve as the philosophical foundation of promise, authority, and duty. Finally, the criticism of the Schools for calling the will a rational appetite does not hold up, since in the Scholastic view it is necessary only that a voluntary decision involve appetite's accepting the counsel of reason, not that all voluntary decisions be solely the product of reason.<sup>15</sup> Hobbes makes it quite clear, though, in the Chapter 46 extension of his definition of will that it is precisely the Scholastic view of volition that he wants to overturn: "For cause of the will, to do any particular action, which is called *volitio*, they assign the faculty, that is to say, the capacity in general, that men have, to will sometimes one thing, sometimes another, which is called *voluntas*; making the *power* the cause of the *act*. As if one should assign for cause of the good or evil acts of men, their ability to do them" (Hobbes 1957, 38).

It would seem that a theory that grounds lawful authority and legal-political obligation on covenant, of which "will" is the essence, should seek to up-

<sup>14</sup> For a brief but penetrating analysis of concept of will in *Leviathan* see Melden, 1961, 5–6.

<sup>15</sup> Thomas Aquinas does not say that will is not will when appetite is not entirely governed by the rationality of the cognitive power; he simply says that appetite should accept the "counsel" of that power.

hold the doctrine that men have a “capacity” to “will sometimes one thing, sometimes another,” and that “the cause of the goods or evil acts of men” is indeed “their ability to do them.” What Hobbes assaults is in fact exactly what he ought to defend. But it soon becomes clear why he cannot accept the Scholastic view; it contradicts his theology. The Scholastic position, he urges, was “made to maintain the doctrine of free-will, that is, of a will of man not subject to the will of God,” or, to put it another way, a will not subject to the efficient or second natural causes of the physical world that God, as first cause, has created (ibid., 446).<sup>16</sup> It is clear why Hobbes wanted to deny that the will could be a free faculty, the cause of its own motion. Of course, a faculty of freely willing would have overthrown his theory of universal determinism; for Hobbes nothing is “self-moved.”<sup>17</sup>

These observations lead directly to the third and last passage in *Leviathan* in which Hobbes treats “the will.”

*Liberty*, and *necessity* are consistent: as in the water, that hath not only *liberty*, but a *necessity* of descending by the channel; so likewise in the actions which men voluntarily do: which, because they proceed from their will, proceed for *liberty*; and yet, because every act of man's will, and every desire, and inclination proceedeth from some cause, and that from another cause, in a continual chain, whose first link is in the hand of God the first of all causes, proceed from necessity. So that to him that could see the connection of those causes, the *necessity* of all men's voluntary actions, would appear manifest . [...] For though men may do many things, which God does not command, nor is therefore author of them; yet they can have no passion, nor appetite to any thing, of which appetite God's will is not the cause. (Hobbes 1957, 137–8)

This passage, from Chapter 21, simply confirms what has been said already, and is perhaps unavoidable if mind is treated as an epiphenomenon of matter.<sup>18</sup> It states with particular force Hobbes's view that will is caused by desire and inclination or appetite, which are themselves caused by perception of a world caused by God. All of this is quite appropriate to an “empirical” psychology, but less appropriate to a theory that derives legal authority and obligation from voluntary acts of self-determining agents. What one starts with, then, in turning to *Liberty, Necessity and Chance* for Hobbes's most extensive consideration of volition is the view that causality and theology, which all but coincide in this case, demand caused volition; that the will is the last appetite or aversion in deliberation; and that there is no difference between appetite

<sup>16</sup> Hobbes adds that a man who believes in free will also believes that “if a man do an action of injustice, that is to say, an action contrary to the law, God [...] is the prime cause of the law [...] but no cause at all of the injustice.” Since God causes everything, the notion of free will is “vain philosophy” (ibid., 445).

<sup>17</sup> “Nothing is determined by itself, nor is there any man in the world that hath any conception answerable to those words” (Hobbes 1839, 293).

<sup>18</sup> See the interesting Watkins 1965. “Hobbes claimed to be an uncompromising materialist,” Watkins notes, “but his account of mind is really an epiphenomenalist rather than a strictly materialist one” (ibid., 251).

and aversion simply and appetite and aversion that are brought about by opinion or reasoning.

In *Liberty, Necessity and Chance*, a long work containing Hobbes's and Bishop Bramhall's mutual refutations of each other's doctrines of will, Hobbes begins with a position that simply reinforces his familiar stance. Bramhall thinks, says Hobbes, that a man can "determine his own will." But no man can do this, he says, "for the will is appetite; nor can a man more determine his will than any other appetite, that is, more than he can determine when he shall be hungry and when not." True liberty, Hobbes goes on, "doth not consist in determining itself, but in doing what the will is determined unto" (Hobbes 1839, 34–5)—assuming, of course, that there is no "impediment to motion," which is Hobbes's most common definition of liberty (Hobbes 1957, 84).<sup>19</sup>

A little later in the treatise Hobbes declares that deliberation is common to men and animals, pointing out that horses, dogs, and other beasts "do demur often times upon the way they are to take: the horse, retiring from some strange figure he sees, and coming on again to avoid the spur." And "what else" than this does a deliberating man do, he asks, who proceeds at one time "toward action, another while retire[s] from it, as the fear of greater evil drives him back"? What Hobbes appears to do in this case, as in many others, is to reduce deliberation to reaction or even to stimulus and response. He is certainly able to find instances in which animal fear and human fear are comparable, but whether it is legitimate to define deliberation in terms of this lowest common denominator is doubtful. Bramhall objected that "deliberation implyeth the actual use of reason." Hobbes himself, in the very passage in which he likens human and animal deliberation, suggests that "voluntary presupposes some precedent deliberation, that is to say, some consideration and meditation of what is likely to follow" an action of ours, which seems in some degree to grant Bramhall's point, unless we suppose that animals meditate (Hobbes 1839, 81, 84, 79).

About a third of the way into *Liberty, Necessity and Chance* Bramhall begins to develop the well-known argument that if the will is caused, then men are not free moral agents and hence not responsible for their actions, the political consequence of which would be that they could neither authorize sovereigns to make laws nor be obligated by those laws. Hobbes claims, says the Bishop, now speaking of lawbreaking rather than lawmaking, that "not the necessity, but the will to break the law makes the action unjust." Bramhall goes on:

I ask what makes the will to break the law; is it not his necessity? What gets he by this? A perverse will causeth injustice, and necessity causeth a perverse will. He saith, "the law regardeth not the will, but the precedent causes of action." To what proposition, to what term is this [an] answer? (Ibid., 155–6)

<sup>19</sup> Sometimes, however, *liberty* is used in a moral or political sense; see, for example, Hobbes 1957, 85, 141.

Hobbes had already provided an answer to this in an earlier part of the work, albeit an answer that could never please a Christian voluntarist who wants to use the will for purposes other than imputation of legal fault. We blame men for wrong voluntary acts, Hobbes urges, “because they please us not.” Is blaming, he continues, “anything else but saying the thing blamed is ill or imperfect? May we not say a horse is lame, though his lameness came from necessity? Or that a man is a fool or a knave, if he be so, though he could not help it?”

It is sufficient to say that the examples are not very apt, since one does not “blame” animals in any ordinary sense, and folly is not comparable to knavery, as Hobbes himself suggests in an immediately preceding remark, in which he urges that we sometimes “represent reasons” to people in order to “make them have the will they have not.” Reasons might be useful to a knave, but not to a true fool. If, however, knavery and folly are equally caused, the place of reasons is hard to understand (*ibid.*, 52).<sup>20</sup>

The question is not just one of lame horses, knaves, and fools. In one of the most bold and striking passages of *Liberty, Necessity and Chance* Hobbes acknowledges that his notion of caused will might seem to be an impediment to justice, to the possibility of lawful conduct, for someone might say that “if there be a necessity of all events” and no free will, “then praise and reprehension, reward and punishment, are all vain and unjust”; and “if God should openly forbid, and secretly necessitate the same action, punishing men for what they could not avoid, there would be no belief among them of heaven or hell” (Hobbes 1839, 114). Here Hobbes states the case against himself with a power that was not in Bramhall’s power.

In Hobbes’s view a bishop should not be so ignorant of Scripture as to forget St. Paul’s letter to the Romans, Chapter 9, in which St. Paul asks whether God’s exercise of irresistible power might ever be unjust. “Is there unrighteousness with God?” St. Paul asks. And the answer is: “God forbid.” Has not “the potter power over the clay, of the same lump to make one vessel unto honor and another unto dishonor?” And cannot God rightfully shape the actions of men in just the same way? The problem with Bishop Bramhall, Hobbes goes on, is that he fails to see what a reading of St. Paul could have shown him: that “the power of God alone, without other help, is sufficient justification for any action he doth.” Whatever God does, even to agents with wills, “is made just by his doing.” This is obvious to anyone who sees that “the name of justice,” as used in human discourse, is “not that by which God Almighty’s actions are to be measured.” If St. Paul is not clear enough, there is the Book of Job (40:9; 38:4):

<sup>20</sup> Hobbes’s claim that we blame people because of their voluntary acts that “please us not” justifies Nietzsche’s indignant assertion that “the doctrine of will has been invented essentially for the purpose of punishment, that is, because one wanted to impute guilt.” See Nietzsche 1954e, 499.

When God afflicted Job, he did object no sin to him, but justified that affliction by telling him of his power. *Hast thou* (says God) *an arm like mine? Where wast thou, when I laid the foundations of the earth?* and the like . [...] Power irresistible justifieth all actions really and properly, in whomsoever it be found. Less power does not. And because such power is in God only, he must needs be just in all his actions. And we, that not comprehending his counsels, call him to the bar, commit injustice in it. (Ibid., 115–6)

Here irresistible divine power works against free will, just as in Chapter 31 of *Leviathan* it works against the covenants of which will is the essence. It is passages such as these that make it impossible to agree with John Dunn that Hobbes “did not believe in permitting theological categories to deflect human terrestrial judgment” (Dunn 1981, 56).<sup>21</sup>

As the treatise unfolds, the advantage is sometimes on the side of Hobbes, sometimes on that of Bramhall. The Bishop, for example, makes a strong point when he suggests that Hobbes has confused the persuasiveness of reasons with the determination of causes (and Hobbes does sometimes speak of reasons as “causes” of the will). “Motives,” by which Bramhall means moral and legal reasons or principles, “determine not naturally, but morally; which kind of determination may consist with true liberty” (Hobbes 1839, 278–9). Being persuaded, that is, is consistent with true liberty because we determine ourselves by accepting reasons as valid. Hobbes, however, holds that “nothing is determined by itself,” thus making a distinction between moral and natural determination impossible (ibid., 293).<sup>22</sup> The Bishop found what he took to be a perfect example of Hobbes’s mistake on this point: Hobbes says, urges Bramhall, “that we are not moved to prayer or any other action, but by outward objects, as pious company, godly preachers, or something equivalent.” Hobbes’s error here, the Bishop continues, “is to make godly preachers and pious company to be outward objects; which are [in fact] outward agents” (ibid., 308–9).<sup>23</sup> The error is to make a person who persuades into an object that causes. Bramhall suggests, not unreasonably, that if Hobbes’s opinion were true that “the will were naturally determined by [...] extrinsical causes, not only motives were vain, but reason itself and deliberation were in vain.” A little later in the treatise he complains that “now [Hobbes] tells us, that ‘those actions which follow the last appetite, are voluntary, and where there is only one appetite, that is the last.’” But earlier, he goes on, Hobbes had said that

<sup>21</sup> This article fails to treat Hobbes sympathetically; in compensation the treatment of Locke is brilliant, perhaps the subtlest and finest of Dunn’s many writings on Locke. In this essay Dunn seems to have captured Locke’s “intention,” which is his stated aim.

<sup>22</sup> Cf. Hobbes 1839, 274, a passage that makes any distinction between different kinds of will impossible. Since, Hobbes says, “of voluntary acts the will is the necessary cause,” and “the will is caused by other things whereof it disposeth not,” such as appetites and aversions, “it followeth that voluntary actions have all of them necessary causes, and therefore are necessitated.”

<sup>23</sup> Cf. Bramhall’s next sentence, which is weak.

“voluntary presupposeth some precedent deliberation and meditation of what is to follow, both up on the doing and abstaining from action.” Hobbes, he says with some exasperation, “confounds all things,” “human will with the sensitive appetite, rational hope or fear with irrational passions, inclinations with intentions,” but particularly “imagination with deliberation” (ibid., 279, 346–7).

Perhaps the most interesting of Hobbes’s observations on will in *Liberty, Necessity and Chance* is one in which he most nearly approaches Spinoza’s view that liberty is an illusion arising from our imperfect knowledge of causes. “Is there any doubt,” Hobbes asks, “if a man could foreknow, as God foreknows, that which is hereafter to come to pass, but that he would also see and know the causes which shall bring it to pass, and how they work, and make the effect necessary?” It is because we do not see and know true causes, he suggests, that “we impute those events to liberty, and not to causes.” At another point in the same work Hobbes contrasts not just liberty and causality but will and causality, saying that “a wooden top that is lashed by the boys, and runs about sometimes to one wall, sometimes to another, sometimes spinning, sometimes hitting men on the shins” would fancy, if it were “sensible of its own motion,” that it “proceeded from its own will, unless it felt what lashed it.” Is a man, Hobbes asks, any wiser than the top when he “runs to one place for a benefice, to another for a bargain, and troubles the world with writing errors and requiring answers” simply because “he thinks he doth it without other cause than his own will, and seeth not what are the lashings that cause his will?” (ibid., 294, 55)

The upshot of *Liberty, Necessity and Chance*, taken as a whole, is that while Hobbes is usually more forceful and cogent than Bramhall, the bishop makes a good point in distinguishing between reasons and causes, between being persuaded and being determined. Hobbes, while treating will as necessitated, does sometimes distinguish, in fact if not in principle, between deliberation and will both in a rational sense and in a sense of alternating appetite and aversion. Hobbes’s theology requires him to insist that “if God had made them free from his own prescience, which had been imperfection” (ibid., 424). This work, then, tends to confirm what Hobbes says about the will in *The Elements of Law*, in *De Cive*, and in *Leviathan*. Little of it suggests a theory of volition on which could be built the obligation of promises or the legal authority of rulers.

### 3.4. Hobbes and Spinoza

What has unfolded thus far is a rather stark contrast between a legal, moral, and political theory that requires a family of voluntarist concepts as its foundation, and a theory of volition as appetite and aversion which is ill suited to account for the moral importance of consenting, promising, and agreeing.



There appears to be a radical disjunction between an important part of Hobbes's social theory and its philosophical underpinnings.

So in Hobbes's case the question to ask is this: If all human activity consists of motion caused by appetite and aversion, themselves caused by "conception" of a caused world, how does one account for ordinary moral and political concepts? In a caused world there is no room for reasons, for judgment, for obligations. Where causality explains everything, there is no need of "determining oneself" in terms of principles that one understands. Yet, Hobbes says, there is "no obligation on any man, which ariseth not from some act of his own," which is the perfect expression of a voluntarist and contractarian point of view. But this act cannot be just any act: It cannot be, say, the mere feeling of an appetite such as lust, because in a world of appetites and aversions the notions of obligation and authority could not exist at all. (By "world of appetite and aversion" is meant just that: A world in which all motion is caused by caused appetites and aversions. It is hard to see how reasons could be present in such a world even as *ex post facto* rationalizations of caused behavior.) For the coherence of his moral and legal doctrines Hobbes needs not just any act but a free act on the part of a free agent, but he cannot provide such an agent without overthrowing the foundations of other parts of his system. He needs a being who can shape his own conduct in terms of reasons and principles, such as natural law, or justice, that he understands. All this he needs; but he provides a being whose sole liberty consists in "doing what his will" (the "last appetite" or "last aversion") is "determined unto." On such a view reasons do not serve as motives, since the notion of a motive is swallowed up by a determinism of appetite and aversion. Thus, when Michael Oakeshott complains—in his essay *Logos and Telos*—of those who reduce Hobbesian "emotion, memory, imagination, will, choice, speech, deliberation, agreement and disagreement, and even self-consciousness to 'appetite' and 'aversion'" to that "inertial motion which is common to all bodies," and who will not allow "Hobbes' cosmology to contain intelligent movement" such as the choice of a political and legal order, he is right in saying that Hobbesian politics becomes unintelligible on an extreme reductionist view (Oakeshott 1974, 234–44, especially 242).<sup>24</sup> But did not Hobbes himself set this reductionism in motion by treating will precisely as the last appetite in delib-

<sup>24</sup> Oakeshott adds that "the device Hobbes sets before his readers, that of association in terms of the recognition of the authority of rules of conduct, has no counterpart in a universe composed of bodies characterized solely by inertial motion" (Oakeshott 1974, 243–4). One sees how close is the relation between this reading of Hobbes and Oakeshott's own theory of *respublica* as rule-recognition in *On Human Conduct* "*Respublica* [...] is manifold of rules and rule-like prescriptions to be subscribed to in all the enterprises and adventures in which the self-chosen satisfactions of agents may be sought [...] it is relationship in terms of the recognition of rules [...] that relation of somewhat 'watery' fidelity called civility" (Oakeshott 1975, 147–8).

eration, so that his voluntarist and contractarian ethics and politics become intelligible only by assuming a gulf between his psychology and his practical philosophy?

An examination of Chapter 16 of Spinoza's *Theologico-Political Treatise* helps throw some light on the meaning of will, consent, promise, obligation, covenant, and law in Hobbes, because Spinoza actually does say much of what Hobbes is alleged to have said. While the differences between them are sometimes rather subtle, they are very instructive.

What is remarkable about Chapter 16 of the *Treatise* is that it outlines a kind of contract theory that seems to rely little, if at all, on any idea of voluntary acts or on any idea of being morally or legally bound by voluntary acts. Hobbes's view, of course, is relatively clear and very different on this point. He asserts in Chapter 14 of *Leviathan* that once a man has voluntarily transferred the exercise of his natural right to a lawmaking "representative person," he is "obliged, or bound, not to hinder those, to whom such right is granted, or abandoned, from the benefit of it: and that he *ought*, and it is his DUTY, not to make void that voluntary act of his own" (Hobbes 1957, 86). Spinoza almost never speaks of duties and obligations that arise out of voluntary actions. This is no accident, for in his contractarianism Spinoza diminishes volition almost to the vanishing point, since it is his view that will is an incoherent notion, a mere cover for our ignorance of determining causes. Hence, Spinoza cannot view the will as an autonomous moral causality capable of producing a morally binding covenant. The decisive passage is in *The Improvement of the Understanding*, where Spinoza says that "men are deceived because they think themselves free, and the sole reason for their thinking so is that they are conscious of their own actions, and ignorant of the causes by which those actions are determined." Ignorance, then, creates in men an illusion of liberty, for "as to saying that their actions depend upon their will, these are words to which no idea is attached." Indeed, those who pretend to know "what the will is," and who try to find "seats and dwelling-places of the soul," usually "excite our laughter or disgust." It is revealing that Spinoza treats will in a section called "Of Falsity," and when he gives examples of persons who fancy that they will freely, he invariably picks those with defective understandings: "[T]he infant believes that it is by free will that it seeks the breast; the angry boy believes that by free will he wishes vengeance; the timid man thinks it is with free will that he seeks flight; the drunkard believes that by a free command of his mind he speaks the things which when sober he wishes he had left unsaid." Spinoza concludes that it is especially "the madman, the chatterer, the boy, who believe themselves to be free" (Spinoza 1927b, 175, 176, 203-4).

One would not expect Spinoza to speak of society as being maintained by covenant, or the perpetual will to preserve peace. Indeed, he confines himself to saying that natural right, which is the same as natural power (Spinoza 1951,

200: “[T]he rights of an individual extend to the utmost limits of his power as it has been conditioned”) is to be “handed over” to governors who will keep people from injuring each other. The use of the phrase *handed over*, a purely mechanical phrase having no relation to willing, or duty, or obligation, is not accidental. Nor is Spinoza’s claim that “a compact is only made valid by its utility” (ibid., 204)<sup>25</sup> and thus a man need not, for example, give a highway robber what he has promised to give him. Hobbes, by contrast, always says that if a man has promised and has thereby gained a benefit, he is obligated unless the civil law says otherwise (Hobbes 1957, 91).

Now Hobbes is sometimes said to maintain very nearly this same doctrine: that promises in themselves do not give rise to any morally binding relations, but that fear and calculation of rational self-interest bring us to promise certain things and that only the sword, or power, can cause us to have a lively enough sense of fear—this time of the sovereign—to honor our commitments (ibid., 92–3). Spinoza does indeed say something quite like this:

Everyone has by nature a right to act deceitfully, and to break his compacts, unless he be restrained, by the hope of some greater good, or the fear of some greater evil. [...] The sovereign right over all men belongs to him who has sovereign power, wherewith he can compel men by force, or restrain them by threats of the universally feared punishment of death. [...] If each individual hands over the whole of his power to the body politic, the latter will then possess sovereign natural right over all things. (Spinoza 1951, 204–5)

Compacts have no intrinsic validity; the right of the sovereign belongs to him because of his power; and individuals do not convey rights (including legal rights) to the commonwealth but simply hand over a quantum of power. Hobbes, though he is sometimes represented as saying no more than this, and though he occasionally does say something like this, quite often says something more, and something different—something perhaps less consistent but more suggestive as well.

It was remarked, in comparing Hobbes with Spinoza, that there is a contract in the latter only in the sense that one “hands over power” to rulers and that one obeys only because of a rational fear of the consequences of not doing do. In Chapter 15 *Leviathan*, however, Hobbes says something quite un-

<sup>25</sup> C. E. Vaughan, in his *Studies in the History of Political Philosophy Before and After Rousseau*, destroys this crucial difference between Hobbes and Spinoza by saying that “the first thing [Hobbesian] men had to do was to hand over all their individual rights” (Vaughan 1960, 1: 25). “Hand over” is Spinoza’s phrase, not Hobbes’s. But the rest of Vaughan’s chapter is a brilliant and often very funny polemic against Hobbes. For example: “A covenant, purely material in its [appetitive] origin, purpose and sanction, comes in the end to rest mainly, if not solely, for its moral consequences. Hence the [Hobbesian] despot, established in the first instance for pure convenience, is in the final issue maintained merely as a painful duty [...] It is a kind of inverted rake’s progress to which the reader has been witness. The author, who at the beginning was possessed by the very demon of force and fraud, presents himself at the end repentant, clothed, and in his right mind” (ibid., 38–9).

like this. He grants that a covenant without the sword is only words and that terror is a necessary condition of legal justice; but it seems clear that fear is neither a sufficient condition nor the only important one.

Because covenants of mutual trust, where there is fear of not performance on either part [...] are invalid though the original of justice be the making of covenants; yet injustice actually there can be none, till the cause of such fear be taken away [...] Therefore before the names of just and unjust, can have place, there must be some coercive power, to compel men equally to the performance [...] and such power there is none before the erection of a commonwealth [...] where there is no commonwealth, there nothing is unjust. So that the nature of justice, consisteth in keeping of valid covenants: but the validity of covenants begins not but with the constitution of a civil power, sufficient to compel men to keep them. (Hobbes 1957, 94)

In this passage Hobbes makes a distinction, not perfectly clear but certainly there, between the “original of justice” and its actuality, between its nature and its validity. This distinction seems to mean that the obligation produced by a covenant, of which will is the essence, is not derived from but only supported by the fear of power. This is confirmed by what Hobbes says about the relation of covenant to sentiments of fear and honor, at the end of Chapter 14 of *Leviathan*.

The force of words, being [...] too weak to hold men to the performance of their covenants; there are in man's nature, but two imaginable helps to strengthen it. And those are either a fear of the consequences of breaking their word; or a glory, or pride, in appearing not to need to break it. This latter is a generosity too rarely found to be presumed on, especially in the pursuers of wealth, command, or sensual pleasure; which are the greatest part of mankind. The passion to be reckoned upon, is fear. (Ibid., 92)

In this case Hobbes speaks of “performance” of covenant (as distinguished from the nature of covenant, which involves consent), of “helps to strengthen it.” By this he seems to mean that covenant itself is one thing—the source of duties—whereas fear, in most cases, or a sense of glory, in a few cases, is what reinforces obligations. A man is not obligated because he is afraid, though fear seems to be required to force men to fulfill their obligations. It would make sense to say that Hobbes distinguishes between a reason for obeying (promise or consent) and a cause (an external legal force) that will insure obedience. A man ought to obey because he has promised and has authorized the sovereign to will on his behalf; but his voluntary act must be shored up by psychological motives, above all fear of legal punishment, because he will not always adhere to his bargains.

This is not an inevitable or irresistible construction of Hobbes's meaning; there is in fact much to be said against it, some of it by Hobbes himself, particularly in Chapter 14 of *Leviathan* (ibid., 89).<sup>26</sup> It has the advantage, how-

<sup>26</sup> Hobbes says that without “right and force” on the part of the state, covenants have no status.

ever, not only of significant textual support but also of clarifying one of the most serious problems in Hobbes: The question of how the social contract can be obligatory if *no* contracts are valid until they are backed by sovereign legal power.<sup>27</sup> As Leibniz insisted in a criticism of contract theory generally, and of Hobbes particularly, it is possible to refute “those who believe that there is no obligation at all in the state of nature, and outside of government; for, obligations by pacts having to form the right of government itself, according to the authors of these principles, it is manifest that the obligation is anterior to the government which it must form” (Leibniz 1972, 196). Viewing covenant, consent, promise, and agreement in themselves as the “nature” of justice and the source of duties, even in a state of nature, can help explain how the Hobbesian social contract would be, in a sense, legitimate before the erection of actual power, despite Hobbes’s assertion that a covenant not guaranteed by sanctions lacks validity. If we consider as well that the first Hobbesian law of nature—to seek peace and follow it (Hobbes 1957, 85; but note the qualifications)—is, though rational, also assented to, and that a covenant of society, in pursuance of this natural law, forms the “original” of justice, one can at least say that there is a lot of evidence to suggest that fear of sanctions should be seen as a reinforcing element only, that consent and will are fundamental. This is actually suggested by Hobbes himself in Chapter 14 of *Leviathan*, in which he says that “covenants entered into by fear, in the condition of mere nature, are obligatory”; but something cannot be at once obligatory and not valid. Hobbes did not make very clear the relation between duty based on contract and “helps” based on fear and threats. Sometimes he seems to say that agreements are always binding—unless they involve an agreement such as one to kill oneself—sometimes that agreements are invalid unless they can be guaranteed by coercive power (*ibid.*, 91–2, 89). But he never says, with Spinoza, that compacts are made valid by their *utility*.

### 3.5. Hobbes, Kant, Machiavelli, and Shakespeare

Finally we will contrast Hobbes with Kant, Machiavelli, and Shakespeare—using for that purpose a famous passage from *Leviathan*, Chapter 15:

The laws of nature oblige *in foro interno*; that is to say, they bind to a desire that they should take place: but *in foro externo*, not always. For he that should be modest, and tractable, and perform all his promises, in such time, and place, where no man else should do so, should but make himself a prey to others, and procure his own certain ruin, contrary to the ground of all laws of nature, which tend to nature’s preservation [...]. And whatsoever laws bind *in foro*

<sup>27</sup> It is Michael Oakeshott’s view, in his introduction to *Leviathan* (Hobbes 1957, ix), that the social contract itself need not, and perhaps cannot, be obligatory. But if this is so, it becomes impossible to say where the sovereign got the authority to make the civil laws that Oakeshott thinks are unquestionably obligatory.

*interno*, may be broken, not only by a fact contrary to law, but also by a fact according to it, in case a man think the contrary. For though his action in this case be according to the law, yet his purpose was against the law; which where the obligation is *in foro interno*, is a breach. (Hobbes 1957, 103)<sup>28</sup>

The second paragraph is almost “Kantian” in its inconsistency on good intention: But there are still difficulties. Among other things, Hobbes speaks of a desire that the natural laws should take place; but desire is not the same as intention, though his other term, *purpose*, comes closer. More significantly, Hobbes seems to hold that men should do what they ought to do only when it is safe to do so. This means that natural right, the right of self-preservation, can prevail even over natural law, which enjoins peace through sovereign ordained law unless the observation of that law will preserve natural right. (But then, there is nothing over which natural right does not prevail in Hobbes, whereas in Kant man is entitled to preserve himself in order to be able to do his duty.<sup>29</sup>) In any case, what is important about this passage, despite the ambiguities, can be seen by comparing it with a superficially similar one from Machiavelli’s *The Prince*: “How we live is so far removed from how we ought to live, that he who abandons what is done for what ought to be done, will rather learn to bring about his own ruin than his preservation. A man who wishes to make a profession of goodness in everything must necessarily come to grief among so many who are not good. Therefore it is necessary [...] to learn how not to be good, and to use this knowledge, and not use it, according to the necessity of the case” (Machiavelli, 1950b, 56).

The superficial resemblances to Hobbes are plain enough: Both Machiavelli and Hobbes speak of the effort to carry out moral ideals in a state of nonsafety. But Hobbes states very clearly that if a man can safely make the laws of nature “take place,” then he is bound to do so and must always intend this, be ready to make this “endeavor.” While Machiavelli speaks of “learning not to be good,” Hobbes talks of men’s natural right to all things, which is quite different, both insofar as it is justified only by self-preservation—but certainly not by the historical “greatness” that is of such weight in Machiavelli<sup>30</sup>—and insofar as by the law of nature “we are obliged to transfer to another, such rights, as being retained, hinder the peace of mankind.” Having a right to all things necessary for self-preservation may lead to not being

<sup>28</sup> Howard Warrender’s interpretation, in his *The Political Philosophy of Hobbes* (1957, 267–314), does indeed rely heavily on this passage; but he suggests that the concept of will is not of great importance in this connection (ibid., 313–4).

<sup>29</sup> Kant *Fundamental Principles* says: “if the unfortunate one [...] preserves his life without loving it—not from inclination or fear, but from duty—then his maxim has a moral worth” (Kant 1949b, 15).

<sup>30</sup> Machiavelli often says that the ordinary rules of goodness must be overridden in the interest of the historical greatness of the state; he justifies Romulus’ slaying of Remus on this ground (Machiavelli 1950b, Book 1, chap. 9, 138–9).

good, but this is far from *learning* not to be good. Both Hobbes and Machiavelli think that what ought to be done is relative to the safety of circumstances, but Hobbes believes this in a way that preserves a large measure of the importance of willing, intending, and contracting, while Machiavelli does not. In general, Hobbes says that a man must will the carrying out of natural law whenever this is consistent with the preservation of natural right. Indeed, for Hobbes, if one does not endeavor after social peace, the result will be the one warned against in Shakespeare's *Troilus and Cressida*:

Take but degree away, untune that string  
 And hark, what discord follows! Each thing meets  
 In mere oppugnancy. The bounded waters  
 Should lift their bosoms higher than the shores  
 And make a sop of all this solid globe.  
 Strength should be lord of imbecility,  
 And the rude son should strike his father dead.  
 Force should be right; or rather right and wrong,  
 Between whose endless jar justice resides,  
 Should lose their names, and so should justice too.  
 Then everything includes itself in power,  
 Power into will, will into appetite;  
 And appetite, an universal wolf,  
 So doubly seconded with will and power,  
 Must make perforce an universal prey,  
 And last eat up himself. (Shakespeare 1919c, Act 1, Scene 3, 775)

For Hobbes, the human race will not “eat itself up” if each man transfers legal authority and power to a sovereign beneficiary; then it will be true of each man that “he ought, and it is his DUTY, not to make void that voluntary act of his own.” The problem lies in the word “voluntary”; for Michael Oakeshott was right to say that “Hobbes never had a satisfactory or coherent theory of volition.” That becomes clear if one considers his claim that “wills [...] make the essence of all covenants”—covenants which artificially produce lawmaking sovereigns—and then interpolates his definition of will as “last appetite” into his moral claim: The result is “the last appetite makes the essence of all covenants,” and it is hard to see how lawmaking authority (which one “ought” to obey) can flow out of mere “appetites.” (Hobbes 1957, 86, *inter alia*; for a fuller treatment of this point, see Riley 2002a). Hobbes’ own theory of legal and moral obligation requires the self-determining free agents who are ruled out by his determinism. The result is that Hobbes’ heroic effort on behalf of the rule of law is partly subverted by inadequacies in his own moral philosophy.

These inadequacies are at their most jurisprudentially damaging precisely in Hobbes’ greatest sustained essay on the nature of law, namely *Leviathan* Chapter 26, “Of Civil Laws.” After saying that “I intend to speak of what is law, as Plato, Aristotle, Cicero, and divers others have done, without taking



upon them the profession of the study of law,” and after adding that “it is not that *Juris prudentia*, or wisdom of subordinate judges, but the reason of this our artificial man the Commonwealth, and his *command*, that maketh law,” Hobbes goes on to insist that:

From this, that the law is a command, and a command consisteth in a declaration, or manifestation of the will of him that commandeth [...] we may understand that the command of the commonwealth is law only to those that have means to take notice of it. Over natural fools, children or mad-men there is no law, no more than other brute beasts; nor are they capable of the title of just or unjust; because they had never power to make any covenant [...] and consequently never took upon them to authorise the actions of any sovereign. (Hobbes 1957, chap. 26)

Here, where Hobbes *juxtaposes* “law,” “covenant,” and “authorizing” (as he can hardly avoid doing), the difficulties leap out: For though Hobbes insists that “wills” make the essence of all covenants (*Leviathan*, Chapter 40) and that “beasts” with last appetites indeed have “wills” (*Leviathan*, Chapter 6)—that is, beasts have what is “essential” to the very covenant which then makes the sovereign authority that afterwards *makes* the law—nonetheless beasts are not “capable of the title of just, or unjust, because they had never power to make any covenant [...] and consequently never took upon them to authorise the actions of any sovereign.” Though “will” is the “essence” of law-authorizing “covenant,” and through covenant is the foundation of commanded law, and through “beasts” have *will*, nonetheless “they had never power to make any covenant”—they had/have what is *essential*, but no *power*. But what “power” is needed to make a covenant, beyond the “will” which is covenant’s essence?

In reality, Hobbes operates with a double theory of volition: one as fully-determined animal *appetite*, one as rational self-determination (to bring about “peace” through law). But his determinism *rules out* the version of “will” that he needs in order to urge that (not merely “bestial”) *will* “makes the essence of all covenants.” What Hobbes most needs he cannot have, and the depriving comes from himself.

## Chapter 4

# CONSENT AND NATURAL LAW IN LOCKE'S PHILOSOPHY

### 4.1. Introduction

Locke is sometimes represented as a consent and social contract theorist (Locke 1967, 41, 324ff.) sometimes as a theorist of natural law (ibid., 287–94), sometimes as a theorist of natural rights, particularly natural property rights (ibid., 375–6). The problem is that all three characterizations are correct; the difficulty is to find an equilibrium between them so that none is discarded in the effort to define Locke's complete concept of right and law.

Sometimes all three of these criteria of right can work together rather than against each other. According to Locke one sets up, by consent and contract, a political system that guarantees the natural rights that one has as a consequence of natural law. The right to consent in politics can even be said to express the natural rights that natural law creates. Without a politics created by voluntary agreement there would be no actual "judge" to enforce the law of nature, and individuals would have to rely on self-help, which Locke calls "inconvenient" (ibid., 317–20). Without the law of nature there would be no criterion for determining what deserves to be consented to. Without natural rights natural law would lack definite and concrete content, such as natural property rights and rights of personal security. Thus, these three criteria can work as an ensemble in which none is superfluous or by itself altogether sufficient. Sometimes one of these criteria of right might oppose what would be permissible according to one of the others taken alone, as when Locke urges that a man cannot consent to give up the natural rights that natural law confers on him; and sometimes one of the criteria may qualify something that one of the others would have allowed, as when Locke says that consent can modify the way in which we enjoy natural property rights in society (ibid., 287–94, 375–6, 317–20). But none of these considerations makes it less necessary to find an equilibrium between consent and contract, natural law, and natural rights.

To be sure, there are some who do try to show that consent, natural law, and natural rights all have claims to be part of Locke's complete concept of right; this is true especially of Hans Aarsleff (1969), Raymond Polin (1969), and Ernst Cassirer (1955).<sup>1</sup> Cassirer in particular provides a good statement of Lockean right in his *Philosophy of the Enlightenment*:

It was Locke who declared in his *Treatise on Government* that the social contract entered into by individuals by no means constitutes the only ground for all legal relations among men. All

<sup>1</sup> The Aarsleff essay is especially fine.

such contractual ties are rather preceded by original ties which can neither be created by a contract nor entirely annulled by it. There are natural rights of man which existed before all foundations of social and political organizations; and in view of these the real function and purpose of the state consists in admitting such rights into its order and in preserving and guaranteeing them thereby. (Cassirer 1955, 249–50)

Assuming at least for the moment that it is reasonable to treat Locke as a theorist seeking an equilibrium between contract and consent, natural law, and natural rights, four main questions arise: What is the exact nature of this balance? Does Locke provide a theory of volition adequate to account for consent as voluntary agreement? What is the nature of the natural law that Locke wants to balance against consent? And what sufficiently constitutes consent—representative government, majoritarianism, tacit consent? In examining these questions it becomes evident that it is precisely when Locke himself does not observe this equilibrium between his standards of right that he is most open to criticism.

#### 4.2. Natural and Civil Law in Locke

Some writers urge that consent and contractarianism are not central in Locke because natural law is for him a sufficient standard of right, one that obviates the need for consensual arrangements. “We are generally prone to think of Locke as the exponent of the social contract,” says Sir Ernest Barker. “It would be more just to think of him as the exponent of the sovereignty of natural law” (Barker 1947, xviii). It is of course true that if one bracketed out of Locke’s system the obligations and rights to which consent and contract give rise, one would be left with a tolerably complete ethical doctrine based on natural law and rights, whereas in Rousseau, by contrast, one would be left with little, since for him obligations derive their whole force from mutual agreements and promises.<sup>2</sup> But surely natural law, though it is necessary for Locke, is not sufficient to define explicitly political rights and duties: There is a distinction to be drawn between the general moral obligations that men have under natural law and the particular legal obligations that citizens have through consent and the social contract. This is clear not only in the *Second Treatise* but in the *Essay concerning Human Understanding* as well.

In Book 2, Chapter 28, of the *Essay concerning Human Understanding*, “Of other relations,” Locke draws a careful distinction between the natural law, to which all men as men are obliged to conform their voluntary actions, and the civil law, to which all men as citizens are obliged to adhere because they have created a human legislative authority by consent. “A citizen, or a burgher,” Locke says, “is one who has a right to certain privileges in this or that place.

<sup>2</sup> Rousseau 1953b, 31: “[T]he engagements which bind us to the social body are obligatory only because they are mutual.”

All this sort depending upon men's wills, or agreement in society, I call instituted, or voluntary; and may be distinguished from the natural" (Locke 1959, 31). In a commonwealth, which is what human wills institute, men "refer their actions" to a civil law to judge whether or not they are lawful or criminal. Natural law, however, is not instituted by consent, even by a Grotian "universal" consent, as Locke explains best in his *Essays on the Law of Nature* (Locke 1958, 160–79). Nor does it merely define "certain privileges in this or that place." It is rather the law "which God has set to the actions of men," and is "the only true touchstone of moral rectitude." But the natural law defines only general moral goods and evils, only moral duties and sins; it cannot point out what is a crime, in the strict *legal* sense, in a commonwealth, in "this or that place": "If I have the will of a supreme invisible lawgiver for my rule, then, as I supposed the action commanded or forbidden by God, I call it good or evil, sin or duty: And if I compare it to the civil law, the rule made by the legislative power of the country, I call it lawful or unlawful, a crime or no crime" (*ibid.*, 475, 481).

To say, then, that the natural law is a complete and sufficient standard of right for Locke is to conflate sin and crime, the duties of man and citizen, what one owes to God with what one owes to the civil magistrate. It is one thing to say, as Locke does in Section 12 of the *Second Treatise*, that the "municipal laws of countries" are "only so far right, as they are founded on the law of nature, by which they are to be regulated and interpreted" (Locke 1967, 293) and quite another to say that natural law renders such municipal laws superfluous, or that the latter can be reduced to the former. Locke does not say, with Hobbes, that the natural and the civil law "contain each other" and are "of equal extent" (Hobbes 1957, chap. XXVI, 4, at page 225). It is true that for Locke all laws—whether divine, civil, or "of reputation"—are formally of one kind: All of them involve a "moral relation" or "conformity or disagreement" of men's voluntary actions "to a rule to which they are referred"; and all of them must have some kind of sanction, some means whereby "good or evil is drawn on us, from the will and power of the lawgiver" (Locke 1958, 474). But this is not grounds for saying that all laws have the same lawgiver or the same sanctions. Indeed, Locke makes clear that the giver of natural law is God, that of civil law the voluntarily instituted commonwealth, and that of reputation the public; the sanction in the first case is reward and punishment in a future life, in the second legal punishment, and in the third the public's "power of thinking well or ill" (*ibid.*, 477).<sup>3</sup>

<sup>3</sup> These distinctions are to be found not only in late works such as the *Essay* but in earlier ones such as the manuscript entitled "Obligation of Penal Laws," which Lord King printed in his *The Life of John Locke* (King 1830, 1: 114–7). In that manuscript Locke says that "there are virtues and vices antecedent to, and abstract from, society," such as the duty to love God, but that there are others "which suppose society and laws, as obedience to magistrates, or

As a result, the kind of objection to Lockean contractarianism that one finds, for example, in T. H. Green (“a society governed by [...] a law of nature [...] would have been one from which political society would have been a decline, one in which there could have been no motive to the establishment of civil government”; Green 1941, 72) is at best half-right. It is partly wrong because a society governed by a law of nature would have had a motive to establish civil government—a motive based not merely on a desire to distinguish between sin and crime, divine and civil law, what one owes as a man and as a citizen, but on a desire to set up some “known and impartial judge” to serve as “executor” of the law of nature, to avoid men’s being the judges of their own cases. Locke, after all, states clearly that there are three good reasons for allowing the natural law to be politically-legally enforced:

*First*, [in the state of nature] there wants an *established*, settled, known *Law*, received and allowed by common consent to be the standard of right and wrong [...] For though the law of nature be plain and intelligible to all rational creatures; yet men being biased by their interest [...] are not apt to allow of it as a law binding to them in the application of it to their particular cases. *Secondly*, In the state of nature there wants a *known and indifferent judge*, with authority to determine all differences according to the established law [...]. *Thirdly*, In the state of nature there often wants power to back and support the sentence when right, and to give it due execution. (Locke 1967, 368–9)

Green, though he is wrong in saying that there is no motive to the establishment of civil government in Locke’s state of nature, is certainly right in saying that the transition from a society truly and completely governed by natural law, if such a society could exist, to one under political government would involve a decline. In Section 128 of the *Second Treatise* Locke argues that under the terms of the law of nature every man “and all the rest of mankind are one community, make up one society distinct from all other creatures.” If it were not for the “corruption” and “viciousness” of “degenerate men,” Locke goes on, “there would be no need of any other” society; there would be no necessity “that men should separate from this great and natural community, and by positive agreements combine into smaller and divided associations” (*ibid.*, 370). If Green is right in pointing out that voluntarily instituted political society in some sense represents a decline, that does not mean that it is unnecessary, that there is no motive for setting it up; for Locke, as for Kant, the mere fact that it would be better if natural law were universally observed, such that

dispossessing a man of his heritage.” In both of these cases—that is, of obedience to magistrates and dispossession of heritages—Locke argues that “the rule and obligation is antecedent to human laws” but that the “matter about which that rule is, may be consequent to them.” One of the consequent matters may be “power of persons”—that is, of definite, namable ruling persons as distinguished from magistrates in general. Although natural law enjoins obedience to magistrates, as Locke in this manuscript says it does, it says nothing about the power of persons; it does not say who in particular shall be obeyed.

one could dispense with politics, does not make politics and law unnecessary, given human life as it is.<sup>4</sup>

Indeed, there is an excellent motive for instituting a political-legal order, assuming that men do not naturally obey natural law completely. That is that natural law does not itself set up or pull down any government; it is men who do so. Natural law does not translate itself into existence, as if it were a beneficiary of the ontological argument: “The law of nature would, as all other laws that concern men in this world, be in vain, if there were nobody in the state of nature, [that] had a power to execute that law.” A government that violates natural law may objectively deserve revolution by placing itself in a state of war with its subjects, by using “force without right,” which creates a state of war either in the state of nature or in society (Locke 1967, 289, 299). But it is people who bring about such an event, properly through the consent of the majority. Natural law helps them decide whether a government is acting legitimately, but it does not tell them which is their legitimate government. It is a criterion of right, but one that requires application. This Locke makes clear, first in general and abstract terms in the *First Treatise* and then, in quite specific political terms, in the treatment of a state’s right to punish alien law-breakers in Section 9 of the *Second Treatise*.

In the *First Treatise*, in a passage as neglected as the rest of that able but tedious work, Locke argues that “since men cannot obey anything, that cannot command,” and that “ideas of government,” however perfect or right, cannot “give laws,” it is useless to establish government, as a general idea, without providing a way whereby men can “know the person” to whom obedience is due. Even if, as Locke says, I am fully “persuaded”—perhaps by natural law injunctions—that I should obey political powers, that “there ought to be magistracy and rule in the world,” I am still at liberty “till it appears who is the person that hath right to my obedience.” Locke adds, anticipating Rousseau, that until one sees “marks” that distinguish him “that hath a right to rule from other men, it may be my self, as well as any other” (ibid., 220–1).<sup>5</sup> He then comes to the passage that matters most for present pur-

<sup>4</sup> Cf. Kant 1970c, 121n: “[G]overnment [...] genuinely makes it much easier for the moral capacities of men to develop into an immediate respect for right.” This does not mean, however, that legality replaces morality; legality simply supplies a context within which self-moralization is more nearly possible.

<sup>5</sup> Cf. Rousseau 1953b, 6: “I have said nothing of King Adam or of the Emperor Noah, father of the three great monarchs, who, like the children of Saturn [...] divided the universe between them. I hope that my moderation will be appreciated; for as the direct descendant of one of these princes, and perhaps in the senior line, how do I know that, if titles were verified, I would not find myself the legitimate king of the human race?” Rousseau’s brilliant enlargement of Locke’s sober point shows that Rousseau was as familiar with the *First Treatise* as with the *Second*. This is confirmed by the fact that in the *First Treatise* Locke speaks of social bonds as chains, as does Rousseau in the famous opening of his *Social Contract*.

poses, suggesting that even if natural law helps to determine what kinds of political action are legitimate, it nonetheless does not point to a particular legitimate ruler:

Though submission to government be every one's duty, yet since that signifies nothing but submitting to the direction and laws of such men, as have authority to command, 'tis not enough to make a man a subject, to convince him that there is *regal power* in the world, but there must be ways of designing, and knowing the person to whom this *regal power* of right belongs, and a man can never be obliged in conscience to submit to any power, unless he can be satisfied who is the person, who has a right to exercise that power over him. (Ibid.)

Since the person possessing that right will not be Sir Robert Filmer's "heir" of Adam, Locke urges, "all his fabric falls," and governments "must be left again to the old way of being made by contrivance, and the consent of men [...] making use of their reason to unite together into society" (Locke 1967, 200–1, 162).

Sometimes, as in Locke's treatment of punishing aliens in the *Second Treatise* (chap. II, sec. 9), it turns out that natural law is directly applied, though not by a person recognized by the alien as one having a magistrate's right to obedience. The magistrates of any community, Locke argues, cannot punish an alien offender against the state on the basis of the civil laws: "[T]he legislative authority, by which they are in force over the subjects of the commonwealth, hath no power over him." But since the alien offender is in a state of nature with respect to the host state, and since the state of nature has a law of nature to govern it, those magistrates can certainly, as executors of the law of nature, enforce that law against the offender. A native offender, however, would be punished under the civil law to which he had in some way consented, and this law would be merely "regulated" by the natural law.

As a result of these distinctions, Locke says (*Second Treatise*, Section 87), it is "easy to discern who are, and who are not, in *political society* together": "[T]hose who are united into one body, and have a common established law and judicature to appeal to, with authority to decide controversies between them, and punish offenders, *are in civil society* one with another; but those who have no such common appeal, I mean on earth, are still in the state of nature" (ibid., 291, 342). Sometimes, then, the natural law is directly applied by an unrecognized person to a political end; but an alien is an exceptional case in the state, and the ordinary case of the citizen is to be determined by a civil law, applied by a properly recognized person, which would have to conform to the natural law.

Locke develops and completes these points in Section 122 of the *Second Treatise*, where he says that merely submitting to the laws of a country and "enjoying privileges and protection" under those laws "makes not a man a member of that society." A man is bound "in conscience" to submit to the administration of a government whose subject he is not, perhaps because such a government can serve as a known and indifferent judge and give effect to natural law in an "inconvenient" world. But nothing can make a man a true

member of a commonwealth except his “entering into it by positive engagement, and express promise and compact.” This merely reinforces what was laid down earlier in the *Second Treatise* (Section 15), where Locke had argued that “all men are naturally” in the state of nature and remain in it “till by their own consents they make themselves members of some political society; and I doubt not in the sequel of this discourse, to make it very clear” (ibid., 367, 296). This clarification, which comes in Section 22, contains one of the fullest statements of Locke’s views on the relation of natural law to consent: “The natural liberty of man is to be free from any superior power on earth, and not to be under the will or legislative authority of man, but to have only the law of nature for his rule. The liberty of man, in society, is to be under no other legislative power, but that established, by consent, in the commonwealth, nor under the dominion of any will, or restraint of any law, but what the legislative shall enact, according to the trust put in it” (ibid., 301).

It seems, then, that natural law cannot be a sufficient standard of Lockean political right whenever men’s “depravity” brings about less than perfect conformity to that law. In consequence, the “great and natural community” of men under a perfectly observed natural law must give way to “smaller and divided associations” whose civil laws must simply be regulated by natural law. Since natural law neither appoints nor removes civil magistrates, neither creates nor pulls down particular political structures, consent, and promise, and contract must provide this appointing, and removing, and creating, and pulling down. When natural law is used directly in politics, and not simply as a criterion of right, it will be in marginal or exceptional cases, such as those of aliens or of rulers who place themselves in a state of war with their subjects. Thus, when Sir Ernest Barker claims that while “we are generally prone to think of Locke as the exponent of the social contract,” it would in fact be more just “to think of him as the exponent of the sovereignty of natural law” (Barker 1947, xviii), he distorts the real issue: The social contract, for Locke, is necessitated by natural law’s inability to be literally “sovereign” on earth, by its incapacity to produce “one society.” Natural law and contractarianism, far from being simply antithetical in Locke, necessarily involve each other, at least given human imperfection and corruption.

It is not the case, however, that Locke placed as much weight on consent and contract in his earlier works as in his later ones, and these differences ought, in all fairness, to be taken into account. In his early *Essays on the Law of Nature* Locke minimized consent and contractarianism. In the sixth *Essay* Locke put forward his general theory, from which he departed little in later works, that “ultimately all obligation leads back to God,” partly because of his divine wisdom and partly because of “the right which the creator has over his creation.” However, even if all obligation ultimately leads back to God and to his justifiable punishments, it is still possible to distinguish between kinds of obligations. Obligations can consist, Locke writes,



in the authority and dominion which someone has over another, either by natural right and the right of creation, as when all things are justly subject to that by which they have first been made and also are constantly preserved; or by the right of donation, as when God, to whom all things belong, has transferred part of his dominion to someone and granted the right to give orders to the first-born, for example, and to monarchs; or by the right of contract, as when someone has voluntarily surrendered himself to another and submitted himself to another's will. (Locke 1958, 185)

Here, the notion of contract as a foundation of right is not only distinctly subordinated but is defined in terms of voluntary surrender and "submission" to another's will rather than in terms of the egalitarianism that leads to the social contract in the *Second Treatise*. A little later in the sixth *Essay* contractarianism is left out of account altogether, and Locke defines legitimate authority simply in terms of a delegation of power by the will of God: "[A]ll that dominion which the rest of law-makers exercise over others [...] they borrow from God alone, and we are bound to obey them because God willed thus, and commanded thus, so that by complying with them we also obey God" (ibid., 187). This is closer to St. Paul than to social contract theory.

It is not exclusively in the *Essays on the Law of Nature* that consent and contract play a small role. One of the papers from the Lovelace collection of Locke manuscripts, entitled "On the Difference between Civil and Ecclesiastical Power," like the *Essays* dates from the early 1670s. Also like the *Essays* it subordinates consent and contract to other considerations. Membership in a church, Locke says, "is perfectly voluntary" and may end whenever anyone pleases, "but in civil society it is not so." Civil societies, far from being purely voluntary, must rely on occasional coercion and "abridgement" of rights if they are to be effective; and they do not arise only through contractarianism, since "all mankind" are "combined into civil societies in various forms, as force, chance, agreement, or other accidents have happened to constrain them." This is an argument that Hume could have accepted and turned to anticontractarian advantage. Locke makes it plain that it is not voluntary consent that legitimizes such a civil society but rather its conforming itself to its appropriate and natural sphere, namely, "civil peace and prosperity," to its avoiding what lies "without" civil happiness: salvation (King 1830, vol. 2:116, 109). Here legitimacy is defined in terms of appropriateness of functions, not in terms of mode of origin.

In all of Locke's mature works, however, consent, contractarianism, voluntarily produced polities, and obligations have a much greater weight, even if they do not displace or replace natural laws and rights. This is true not only of the *Second Treatise* but of such works as the *Third Letter for Toleration* (1692), a work in which Locke, exasperated with an opponent's claim that "civil societies are instituted by [God] for the attaining all the benefits which civil society or political government can yield," including salvation, finally exclaims, "If you will say, that commonwealths are not voluntary societies constituted by men, and by men freely entered into [...] that commonwealths are consti-

tuted by God for ends which he has appointed, without the consent and contrivance of men [...] I shall desire you to prove it” (Locke 1812d, 212).

The most familiar contractarian arguments are found in the *Second Treatise*. Sometimes—indeed, repeatedly—Locke contents himself with the bare claim that consent creates political right, as in Section 102 (“politic societies all began from a voluntary union, and the mutual agreement of men freely acting in the choice of their governors, and forms of government”) and in Section 192 (rulers must put the people “under such a frame of government, as they willingly, and of choice, consent to”). Occasionally, however, he provides a more elaborate argument, particularly when he wants to distinguish legitimate political power from both paternal and despotic power.

*Nature gives* the first of these, viz. *paternal power to parents* for the benefit of their children during their minority, to supply, their want of ability, and understanding how to manage their property [...]. *Voluntary agreement gives* the second, viz. *political power to governours* for the benefit of their subjects, to secure them in the possession and use of their properties. And *forfeiture gives* the third, *despotical power to lords* for their own benefit, over those who are stripped of all property. (Locke 1967, 353, 412, 401–2)

By this time the notion of a species of natural political authority—granted by God, as in the *Essays on the Law of Nature*—has given way completely to voluntarist and contractarian language.

It is never the case, at least not when Locke offers more than mere claims about consent, that consent and contract are treated as the whole of political right, that whatever happens to be produced by this process would *ex necessitatis* be correct. In Locke there is no “general will” that is “always right” (Rousseau 1953b, 40). This is perfectly clear, for example, in Section 95 of the *Second Treatise*, which is one of Locke’s best statements of an equilibrium between the naturally and the consensually right. Since men are naturally “free, equal and independent,” no one can be subjected to the political power of anyone else “without his own consent.” In giving up “natural liberty,” and putting on the “bonds of civil society,” men agree to “join and unite into a community” not for the purpose of being controlled by any objective to which a group may happen to consent but for the purpose of “comfortable, safe, and peaceable living amongst one another, in a secure enjoyment of their properties, and a greater security against any that are not of it.” Security, of course, is authorized by natural law, which protects the innocent by allowing defense against wrongful attacks, while property is a natural right derived partly from God’s giving the earth to men and partly from human labor (Locke 1967, 348–9, 289–96). A political order, created by consent, makes these things possible even given the “inconvenience” of some men’s “corruption” and “depravity.” In this passage there is an equilibrium between consent, natural law, and natural rights: It is because men are made free and equal by God, because they want to enjoy natural rights in the security of a political society in conformity with natural law, that they consent to become

citizens, to conform their voluntary actions to the civil law as well as to the divine law and the law of reputation. Consent operates within a context.

If Locke had built his entire theory of right on consent alone as an exclusive standard, as Hume accused him of doing, he might have been open to the objections that Hume raises against him in his essay “Of the Original Contract” and that others have continued to bring forward. In that essay Hume urges that Lockean contractarianism is not only historically implausible and inaccurate but that it is needlessly cumbersome: Since the real reason for obedience to government is that without such obedience “society could not otherwise subsist,” it is useless to rest the duty of obedience on consent, on a “tacit promise” to obey. We must then ask, “Why are we bound to observe our promise?” For Hume the only possible answer is that observing promises is simply necessary because there can be “no security where men pay no regard to their engagements.” Since actual usefulness is the measure of obedience in general, as well as of promises, it is useless and awkward to base one on the other: “we gain nothing by resolving the one into the other,” since “the general interests or necessities of society are sufficient to establish both” (Hume 1951a, 193–209).<sup>6</sup>

Locke is not really open to this objection, formidable as it is, since he can ground the obligation of promises and of tacit consent not in social utility but in natural law: The keeping of faith, he says, “belongs to men, as men, and not as members of society” (Locke 1967, 195). We have a duty to keep promises faithfully because in breaking our word and in acting deceitfully we would harm other men and thereby violate natural law, which forbids harming others, particularly the innocent, except in self-preservation. Locke maintains that there is a natural duty to keep promises, including political ones; indeed, he often holds that the notion of a promise could not work without God and his natural laws. In the *Essays on the Law of Nature* in particular he argues that without natural law the faithful fulfillment of contracts is “overthrown,” because “it is not to be expected that a man would abide by a compact because he has promised it [...] unless the obligation to keep promises was derived from nature”—that is, from the natural law as the will of God, backed by

<sup>6</sup> Hume, of course, could not have given much weight to Locke’s claim that “voluntary agreement gives [...] political power to governors,” since for Hume will is not a morally consequential idea. This is especially clear in Hume 1951b, 14 (3.1.1): “Let us choose any inanimate object, such as an oak or elm, and let us suppose that by the dropping of its seed it produces a sapling below it which [...] at last overtops and destroys the parent tree; I ask if in this instance there be wanting any relation which is discoverable in parricide or ingratitude? Is not the one tree the cause of the other’s existence, and the latter the cause of the destruction of the former, in the same manner as when a child murders his parent? It is not sufficient to reply that a choice or will is wanting [...] It is a will or choice that determines a man to kill his parent; and they are the laws of matter and motion that determine a sapling to destroy the oak from which it sprang.” Had King Lear lived to read the *Treatise of Human Nature*, he might well have doubted that ingratitude is “sharper than a serpent’s tooth.”

sanctions of infinite weight and duration. Much the same argument is put forward in the *Essay* (Book 1, Chapter 2), where Locke argues that it is “certainly a great and undeniable rule in morality” that men should keep their compacts and adds that a Christian will believe this because of his conviction that “God, who has the power of eternal life and death, requires it of us” (Locke 1959, 119). (A “Hobbist,” however, will believe it only because “the public requires it, and the Leviathan will punish you if you do not”; Locke 1958, 69.) In the *Letter concerning Toleration* Locke bases his refusal to tolerate atheists on the notion that “promises, covenants, and oaths, which are the bonds of human society, can have no hold upon an atheist,” that “the taking away of God [...] dissolves all” (Locke 1812a, 47). This may not be a particularly effective argument, but at least it meets Hume’s charge that Lockean promise and tacit consent have no grounding and hence must always lead back to utility. And it shows that, for Locke, natural law and consent support and even require each other: without natural law and its eternal sanctions men would have no sufficient motive to observe promises and covenants; but without the political societies that are held together by promises and oaths and covenants the natural law would not be enforced by a known and indifferent judge.

Even in his late works Locke does not invariably define political right in terms of consent or even of consent hedged round by natural law. At the very beginning of the *Second Treatise*, for instance, he defines political power as the right of making laws for the purposes of preserving property, defending the commonwealth from foreign injury, and upholding the public good—and this without even mentioning consent. In the *First Treatise*, in a passage reminiscent of the *Essays on the Law of Nature*, he suggests that men are equal and ought to enjoy the same rights and privileges until “the manifest appointment of God [...] can be produced to shew any particular person’s supremacy, or a man’s own consent subjects him to a superior” (Locke 1967, 286, 208). Even here—since the rest of the *First Treatise* is designed to show that God has not appointed such a “particular person”—consent, though it comes second, wins out by a kind of default.

Although it can be shown decisively that Locke at least meant to give consent a great deal of weight as one standard of political right, this does not exhaust problems of interpretation. We are still left with the other questions posed earlier, the next of which is: Does Locke provide a conception of natural law theory adequate to account for one foundation of what is right?

### 4.3. Locke on Natural Law

It should already be clear that Locke set a high value on natural law as a standard to which men ought to conform their voluntary actions, even if he did not think that, given an imperfect world, it could ordinarily be directly “sovereign.” At the very least, natural law provides sanctions in the form of

divine rewards and punishments that gives one a motive to observe obligations based on promise and contract. As we have seen, contractarianism is important to Locke; and his theory of volition usually allows for the notion of voluntary consent. However, some Locke critics argue that his natural law theory is not very coherent. One even maintains that since Locke was a philosopher of “rank and sobriety,” he must have recognized this incoherence and therefore could note possibly have taken his own natural law theory seriously (Strauss 1953, 202–32).

Most of the charges of incoherence in Locke’s theory of natural law revolve around the question of whether that law can be derived from reason alone. In his most famous, if not most truly representative, passage on natural law Locke certainly encourages the belief that natural law simply is reason itself: Section 6 of the *Second Treatise* urges that even a state of nature has “a law of nature to govern it,” and that reason, “which is that law,” teaches all who will consult it that men ought not to “harm each other” in their lives, health, liberty or possessions. The reason for this, Locke goes on, is that men are the “workmanship” of an omnipotent and “infinitely wise” God, that they are “his property, whose workmanship they are, made to last during his, not one another’s pleasure” (Locke 1967, 289). (Here, Locke’s theory that labor creates natural property rights is carried to its most extreme point: God is entitled to govern what he has produced.)<sup>7</sup> The content of natural law is derived from what is necessary to men’s “lasting” during God’s pleasure: Thus, natural law forbids suicide and commands men to “preserve the rest of mankind” whenever their own security is not at stake. The law of nature generally “willeth the peace and preservation of all mankind,” and anything that can reasonably be represented as conducive to that peace and preservation constitutes one of the articles of natural law (Locke 1967, 289).

As is evident in the rest of Locke’s writings, however, he was not usually content simply to identify natural law with reason; indeed, even in the *Second Treatise* (Section 135) he says that all men must conform their actions to “the law of nature, i.e., to the will of God” (ibid., 376). Locke’s reason for shifting the emphasis from reason to divine will is never made clear in the *Second Treatise*—where it would not have been advantageous to enlarge on the difficulties of natural law theory—but is taken up at length in the *Essay*, in *The Reasonableness of Christianity* (Locke 1812c), in the *Essays on the Law of Nature*, and in the unpublished manuscript entitled *Of Ethick in General* (Locke 1830).

In the first of the *Essays on the Law of Nature* Locke states his reasons for believing that natural law is a “decree of the divine will” rather than a mere “dictate of reason.”

<sup>7</sup> On Locke’s theory of divine workmanship see the brilliant study by James Tully, *A Discourse on Property: John Locke and his Adversaries* (Tully 1980, 35–8). The title suggests a limited scope; in fact the book has valuable things to say about every facet of Locke’s thought.

[Natural law] appears to me less correctly termed by some people the dictate of reason, since reason does not so much establish and pronounce this law of nature as search for it and discover it as a law enacted by a superior power and implanted in our hearts. Neither is reason so much the maker of that law as its interpreter, unless, violating the dignity of the supreme legislator, we wish to make reason responsible for that received law which it merely investigates; nor indeed can reason give us laws, since it is only a faculty of our mind and part of us (Locke 1958, 111).

In this case Locke is mainly showing that reason is a faculty or power, that the content of a rule cannot be derived from the existence of a capacity. This is, at least from the point of view of his philosophy, a good argument and one that he never stated with any greater force in his later works.

Most of what Locke says about natural law is contained in the *Essay* (Book 2, Chapter 28) and in *The Reasonableness of Christianity*. In the *Essay* Locke states his familiar view that good and evil are “nothing but pleasure or pain,” that moral good and evil involve “the conformity of our voluntary actions to some law, whereby good or evil is drawn on us, from the will and pleasure of the lawmaker.” After subdividing law into the divine, the civil, and that of reputation, Locke defines divine law as that “which God has set to the actions of men, and whether promulgated to them by the light of nature, or the voice of revelation.” In this instance, then, Locke is resolutely avoiding putting forth a purely rational natural law, instead speaking indefinitely of a divine law that comprises both reason and revelation (Locke 1958, 474, 475). (That he knew exactly what he was doing is shown by his letter to James Tyrrell of August 1690: “You say, that to show what I meant, I should, after divine law, have added in a parenthesis, *which others call the law of nature*, which had been so far from what I meant, that it had been contrary to it, for I meant the divine law indefinitely, and in general, however made known or supposed”; Locke 1976, 113–3.) After recalling the doctrine of the *Second Treatise* that God has a right to give laws to men because “we are his creatures,” Locke concludes by saying that the divine law is “the only true touchstone of moral rectitude.” It is of course intrinsically reasonable and just (*pace* Descartes and his belief that God’s will *creates* the rightness of norms),<sup>8</sup> but the “formal cause” of its being a true law is indeed God’s will: What duty is, Locke argues in Book 2, Chapter 2, of the *Essay*, “cannot be understood without a law, nor a law be known and understood without a lawmaker, or without reward and punishment” (Locke 1959, 76). In the manuscript entitled *Of Ethick in General*, written at roughly the same time as the *Essay*, Locke enlarges on this point. Let philosophers “discourse ever so acutely, of temperance or justice,” he says, “but show no law of a superior that prescribes temperance, to the observation or breach of which law there are rewards and punishments annexed, and the force of morality is lost, and evaporates only into words, disputes, and niceties.” Those who provide mere definitions of virtues and vices, he argues,

<sup>8</sup> For the relevant Descartes passages see Kenny 1979, 16–26.

“mistake their business” and are only “language-masters,” so long as they do not prove the existence of a “superior power” who has the right to obligate men. “To establish morality, therefore, upon its proper basis, and such foundations as may carry an obligation with them, we must first prove a law, which always supposes a lawmaker: one that has a superiority and right to ordain, and also a power to reward and punish according to the tenor of the law established by him. This sovereign lawmaker who has set rules and bounds to the actions of men is God, their Maker” (Locke 1830, 122–133).

In *The Reasonableness of Christianity*, which contains Locke’s most problematical utterances on natural law, special new difficulties arise. In the works just discussed the question was whether reason alone can supply a content for natural law, as Section 6 of the *Second Treatise* had suggested. On this point Locke’s final opinion appears to be that even a perfectly rational moral principle would not be a real law unless it were “willed” by a superior being who has a right, by virtue of having created everything, to govern his creation as he sees fit, and that even if reason helps us find that law, it does not constitute that law.

What is remarkable about *The Reasonableness of Christianity* is that Locke vacillates in a confusing way on the question of whether reason alone can demonstrate a “science” of ethics. After observing that before the advent of Christ “human reason unassisted failed men in its great and proper business of morality,” that it never “from unquestionable principles, by clear deductions, made out of an entire body of the ‘law of nature,’” Locke switches temporarily to the view that a science of ethics can be proven either through purely rational demonstration or through revelation. Whoever wants his moral opinions, “however excellent in themselves,” to pass for actual natural laws, Locke says, either must show that he “builds his doctrine upon principles of reason, self-evident in themselves, and that he deduces all the parts of it from thence, by clear and evident demonstration,” or must “show his commission from heaven, that he comes with authority from God, to deliver his will and commands to the world” (Locke 1812c, 140, 142). What is extraordinary here is that Locke presents these as alternatives, apparently equally valid; but according to his usual principles even a demonstration of the rationality of a principle would not make it obligatory: if rationality alone were sufficient, God’s will, and his right to govern, would be superfluous. (Cf. Descartes 1979, 16–26, where roughly the same argument is made.) This is probably why Locke, despite the fact that in *The Reasonableness of Christianity* he appears to believe that the moral philosophers had simply failed to demonstrate a rational ethics that remained in principle demonstrable, finally reverted to his more characteristic view that even if reason could be shown to require some definite practical conduct, obligatoriness would still be necessary.

Those just measures of right and wrong, which [...] philosophy recommended, stood on their true foundations [...]. But where was it that their obligation was thoroughly known and allowed, and they received as precepts of a law; the highest law, the law of nature? That could

not be, without a clear knowledge and acknowledgement of the law-maker, and the great rewards and punishments, for those that would, or would not obey him. (Locke 1812c, 144)

While Locke thought that the revelation of God's existence through miracles was something that the "many" who could not "know" (and therefore had to believe) could use as a grounding for natural law,<sup>9</sup> he also thought that God's existence could be rationally demonstrated and that such a demonstrably extant God *qua creator* would have a right to govern, insofar as such a right is contained in Locke's idea of creation (Locke 1967, 289). Ultimately, Locke had some reason for defining the divine law loosely, as either reason or revelation, in Book 2, Chapter 28, of the *Essay*. What matters most is that for natural law to be a real law, God must rightfully will it; it matters less whether the few know this through reason—through the concept of God as creator—or the many know it through revelation and miracles. The only thing that is truly confusing in *The Reasonableness of Christianity* is that Locke keeps hinting that if men were better at reasoning, they might hit upon a purely demonstrable rational ethics "in a science like mathematics," but that "the greatest part of mankind want leisure or capacity for demonstration" (Locke 1812c, 146). However the real problem is that such an ethics would lack a "formal cause," or a legislator. Either reason or revelation may discover such a legislator in God, but in neither case does reason alone *constitute* the content of ethics.

Apart from this one problem—and Locke was obsessed with the demonstrability of ethics, though he never produced such a demonstration—his natural law theory is relatively coherent. Its content, though not constituted by reason, is always reasonable, since God is as all-wise as he is omnipotent; that content defends God's creation against the voluntary wrongdoing of men and is backed up by sanctions of "infinite weight and duration" in another life.

With this last point we come to the most serious attack ever leveled against Locke as a natural law theorist. Leo Strauss in *Natural Right and History* observes that most commentators on Lockean natural law, such as J. L. Gough, are content to say that it contains "logical flaws" but that they do not go nearly far enough. In Strauss's opinion "Locke cannot have recognized any law of nature in the proper sense of the term." Since he grants that this conclusion "stands in shocking contrast to what is generally thought to be his doctrine," he tries to support it by a close and sometimes brilliant exegesis of a number of Lockean texts. But the substance of his argument, stated in his own words, is this:

[Locke] says, on the one hand, that, in order to be a law, the law of nature must not only have been given by God, but it must in addition have as its sanctions divine "rewards and punishments," of infinite weight and duration, in another life. On the other hand, however, he says that reason cannot demonstrate that there is another life. Only through revelation do we know of the sanctions for the law of nature or of "the only true touchstone of moral rectitude."

<sup>9</sup> *Ibid.*, 146: "The greatest part cannot know, and therefore must believe."



As a result, Strauss says, Locke's measures of right and wrong "do not have the character of a law," for they lack sanctions that reason can *demonstrate*, and therefore "there does not exist a law of nature" (Strauss 1953, 220, 203, 212).

Strauss gains an unfair advantage by calling the law of nature, as distinguished from revelation, the "only true touchstone of moral rectitude" in Locke, whereas Locke in fact said that it is divine law, comprising both rational natural law and revelation, that constitutes this touchstone. Since Locke never said that reason can demonstrate anything more than the probability of immortality, Strauss distorts Locke by speaking as if Locke first said that a purely rational natural law alone constitutes the "only true touchstone of moral rectitude" and then said inconsistently that reason cannot demonstrate immortality. Strauss's substitution of the phrase "law of nature" for "divine law" looks like a small alteration, but in fact it is a major one that alone makes his argument possible. He is doing exactly what Locke criticized Tyrrell for doing in 1690. What is more, even if Locke's theory of natural law were as inadequate as Strauss says it is, there would still be no grounds for saying that Locke himself could not have believed it: only Strauss's conviction that Locke was deliberately "perplexing his sense," providing an esoteric and an exoteric doctrine, would lead necessarily to that conclusion. As Locke himself argued in his *First Letter to the Bishop of Worcester*, it cannot be said that because a writer is obliged to use "imperfect, inadequate, obscure ideas, where he has no better," he is deliberately trying to "exclude those things out of being, or out of rational discourse by making them obviously implausible" (Locke 1812b, 9).

If it is the requirements of Strauss's mode of interpretation rather than anything in Locke that make him say that Locke could not have believed in his own natural law theory, his philosophical objection still identifies some problems. Here, a great deal turns on the word *demonstration*. Actually, Strauss was not by any means the first to object to Lockean natural law on the grounds that the immortality of the soul, on which eternal rewards and punishments would be visited, could not be demonstrated by Locke; Tyrrell had made the same objection in 1690, and Locke at least tried to meet it. In his reply to Tyrrell Locke said that while he thought that demonstration in religion and morality could be taken much farther than it had been, nonetheless one sometimes had to settle for something less: "The probability of rewards and punishments in another life, I should think, might serve for an enforcement of the divine law" (Locke 1976, 112). Even if, Locke wrote in the *Essay*, the immortality of the soul cannot be demonstrated, the "bare possibility, which nobody can make any doubt of," of another life governed by divine rewards and punishments makes it a good bargain to conform one's voluntary actions to the divine law: "[I]f the good man be in the right, he is eternally happy; if he mistakes, he is not miserable, he feels nothing" (Locke 1958, 365). If Locke did not believe that the immortality of the soul was demonstrable by reason unaided by revelation, he did at least think that such immortal-

ity was probable and that a Pascalian wager on that point was reasonable; but Strauss, by not even mentioning Locke's theory of probability, strives to create the impression that Locke's theory of immortality is utterly groundless.

Locke did, of course, think that immortality could be proved by revelation and that nothing in genuine revelation can contradict reason. In the *Essay* (Book 4, Chapter 18) Locke grants that the notion that "the dead shall rise, and live again" though true is "beyond the discovery of reason" and that only revelation and faith can uphold it. He adds that while everything that God has revealed "is certainly true" and that "no doubt can be made of it," nonetheless nothing that is "contrary to, and inconsistent with, the clear and self-evident dictates of reason, has a right to be urged or assented to as a matter of faith" (*ibid.*, vol. 2: 425). But it is mainly in the *Second Reply to the Bishop of Worcester* and in *The Reasonableness of Christianity* that Locke treats immortality with care. "God has revealed that the souls of men shall live forever," he urges in the *Second Reply*, and "the veracity of God is a demonstration of the truth of what he has revealed." The fact that "a proposition divinely revealed" cannot be demonstrated by "natural reason" alone does not make it "less credible than one that can"; apparently it is sufficient that there be no manifest conflict between reason and what is revealed (Locke 1812e, 476). And in *The Reasonableness of Christianity* Locke points out at length all of the passages from Scripture that suggest the probability of "immortality and eternal life" and characterizes such an eternal life as "the reward of justice and righteousness only." Then, in a central passage that reinforces his view of divine rewards and punishments as the main sanction of the divine law, he points out the connection between those sanctions and immortality: "Life, eternal life, being the reward of justice or righteousness, appointed by the righteous God [...] it is impossible that he should justify those who had no regard to justice at all whatever they believed. This would have been to encourage iniquity, contrary to the purity of his nature; and to have condemned that eternal law of right which is holy, just and good [...]. The duties of that law [...] are of eternal obligation" (Locke 1812c, 107, 111–29).

Locke, then, is certain that the divine law, as the only true touchstone of moral rectitude, requires immortality and sanctions; that reason alone, though it must not conflict with revelation, is not something out of which a complete "science of ethics" can be deduced. This is probably why he always put off writing a "book of offices," saying in a well-known letter to his friend Molyneux that "the gospel contains so perfect a body of ethics, that reason may be excused from that inquiry, since she may find man's duty clearer and easier in revelation, than in herself" (Locke 1979, 595). He might have added that without divine will and sanctions there would be no absolute obligation to do even that which is "conformable to right reason," that it is not simply clearer and easier to pass from reason to revelation but necessary as well (Locke 1812c, 141–2).

Ultimately, Locke's theory of natural law is problematic only if one thinks that he began by saying that such a law is derived from reason alone and later

changed his argument. However, apart from the passage in the *Second Treatise* on a natural law that simply is reason, Locke's writings generally state that the divine law depends on both reason and revelation. Locke is unlike, say, Grotius in his effort to "rationalize" natural law: Locke could not have accepted even as a Grotian hypothesis the notion that the truths of morality are exactly like those of logic and mathematics, for obligation would be lacking (*De Jure Belli ac Pacis*, 1.1.10). Still, taken on its own terms, Locke's natural law is tolerably coherent. Perhaps the phrase "divine law" should always be used when discussing Locke's ultimate moral norm. But since he himself often uses the idea of natural law, it is safe to employ that term, so long as one remembers that when Locke is being strict, the natural law is only a part of the divine law; revelation is needed as well to provide a complete touchstone of moral rectitude.

#### 4.4. Conclusion

In the end, Locke's political and legal system is rather impressively defended. He provides a theory of natural, or rather divine law that, taken as a whole, is intelligible, even if one might not want to derive the validity of such law from divine will, and even if one might wish that he had not occasionally argued as if such a law could be derived from reason alone. He shows that the general moral obligations under such a law need to be given political specificity through consent and contract, through finding a person whom it is a citizen's duty to obey. He sketches a theory of volition that ultimately allows for voluntary adherence to natural law and for voluntary agreement as the definition of consent, at least when the mind can suspend some pressing uneasiness. And he suggests that consent is in harmony with natural law and rights because that law and those rights make all men morally equal and necessitate the voluntary creation of superiors who are not superior. As Richard Aaron put the matter nearly fifty years ago: "The [Lockean] social contract theory was closely linked with that of the law of nature. In one sense the former is the corollary of the latter. In nature all men are equal, but in political society some are rulers and others are ruled. This difference needs to be explained and is explained by the theory of the social contract" (Aaron 1936, 272).<sup>10</sup> If Locke had more carefully preserved the equilibrium between the criteria of right that he had set out to keep in balance, consent and contract would be a more obvious corollary of the only true touchstone of moral rectitude. At least the defects of Locke's system of right can be remedied with his own concepts, and in a Lockean spirit.

<sup>10</sup> Cf. Dunn 1986, 29–52, in which he argues that consent and contract in Locke are usually misunderstood by those (such as Plamenatz) who wrench the *Second Treatise* out of "its seventeenth century context" in order to graft it onto the "contemporary shibboleth" of "government by consent."

## Chapter 5

# THE LEGAL THEORY OF PUFENDORF

### 5.1. Introduction: The Influence of Stoicism, Grotius, and Hobbes

Samuel Freiherr von Pufendorf (1632–1694)<sup>1</sup> was the most celebrated German legal philosopher of the second half of the 17th century, in virtue of three widely disseminated jurisprudential works: *De Jure Naturae et Gentium* (1670), *De Officio Hominis et Civilis* (1682), and the so-called *Eris Scandica* (Palladini 1996, *passim*). He was (within certain limits) admired by his exact contemporary John Locke (1632–1704), who often referred his correspondents to Pufendorf's works (when Locke himself declined to write “a book of offices”) (Dunn 1969, 38ff.); he was made even better known by the contempt of Leibniz, who styled Pufendorf “not much of a lawyer and even less of a philosopher,”<sup>2</sup> and who provoked Jean Barbeyrac and Christian Thomasius into spirited defenses of Pufendorfism. What Pufendorf's defenders most admired (as will be seen later) was his total separation of natural law from both moral theology and revealed divine law: In this “secularization” of natural law Pufendorf followed in one way Hugo Grotius (*etiamsi daremus*), in another way Hobbes (who had usually made natural law only a set of rational “theorems” concerning self-preservation) (Hobbes 1957, chap. 14).<sup>3</sup> To be sure, in his eclectic, synthetic fusion of Grotius and Hobbes, Pufendorf brought together Hobbesian rational self-conservation and Grotian “natural” sociability—not an easy or obvious task, given Hobbes's grim notion of “nature” as a moral vacuum in which “force and fraud are cardinal virtues” (Hobbes 1957, chap. 13), indeed as a state of war in which *natural* sociability is painfully absent—and he defended this eclectic fusion of the two greatest jurisconsults of the first half of the 17th century with extensive quotations from Roman jurisprudence, and above all from Cicero and Seneca.<sup>4</sup> What matters most in Pufendorf is his expounding of a so-called “modern” natural law in which God and Scripture (and any notion of a “confessional” state)<sup>5</sup> are kept safely away from a natural law and natural justice grounded simply in reason and natural sociability (and hence equally available to adherents of all religions whatsoever).

<sup>1</sup> On Pufendorf's legal theory, see above all Fassò 1966–1970, vol. 2: 173ff., and Haakonssen 1996, the Pufendorf chapter.

<sup>2</sup> See the superb chapter on Leibniz and Pufendorf in Hochstrasser 2000, 72ff., and Riley's review (Riley 2003).

<sup>3</sup> On the Hobbes-Pufendorf rapport, see especially Palladini 1990.

<sup>4</sup> On this point see Hochstrasser 2000, 40ff.

<sup>5</sup> See Hunter 2001, 52ff. Hunter offers a finely sympathetic reading of Pufendorf (and his school), but is unreasonably hostile to Leibniz (and the entire Platonic “metaphysical” tradition).

Pufendorf's eclectic fusion of Grotius and Hobbes (later buttressed with Roman defenses) is to be found above all in *De Jure Naturae et Gentium* II, 3, xv—which begins with Hobbism and then gently folds in Grotian-Ciceronian “natural” sociability:

Man is an animal extremely desirous of his own preservation, of himself exposed to many wants, unable to secure his own safety and maintenance, without the assistance of his fellows and capable of returning the kindness by the furtherance of mutual good [...]. Now in order that such a creature may be preserved and supported, it is necessary that he be social [...]. This will then appear a fundamental law of nature, [that] every man ought, as far as in him lies, to promote and preserve a peaceful sociableness with others, agreeable to the main end and disposition of the human race in general. (Pufendorf 1749, II, 3, xv, 34; translation slightly altered)

As Hochstrasser argues in his excellent *Natural Law Theories in the Early Enlightenment*, Pufendorf goes on to back up this paragraph from *De Jure Naturae et Gentium* “with a long quotation from Seneca’s *De Beneficiis*, the theme of which is that ‘man is by nature weak on every side, [so that] society fortifies him and arms his nakedness’” (Hochstrasser 2000, 40). But even more importantly, Pufendorf at this point lengthily quotes three works by Cicero—above all *De Finibus*, with its crucial notion that *caritas naturalis* or natural affection holds together not just families and friends but even (by extension) the whole human race (Cicero, *De Natura Deorum*, I, xiv ff.).

If one stands back from these extraordinarily innovative and brilliantly synthetic pages of *De Jure Naturae et Gentium* II, 3, xv, one can appreciate the sheer ingenuity of Pufendorf’s jurisprudential accomplishment. He begins (but merely begins) with Hobbesian self-preservation; but he does not go on to Hobbes’s “Epicurean” argument that only through artificial “covenants” (grounded in fear) can we hope to escape a fatal “state of nature” (Hobbes 1957, chap. 13). As against Epicurean “artifice,” Pufendorf now insists on Grotian “natural” sociability—so that, in Pufendorf’s own words, “self-love and sociableness ought by no means to be made opposites” (Pufendorf 1749, 137). Hobbes, of course, *had* made them “opposites,” and fought his way out only with artificial “covenants”; Pufendorf by contrast keeps Hobbesian self-love and Grotian “natural sociability” in equilibrium. And he does this partly by relying on Ciceronian “natural affection”—which Cicero himself had conceived as an anti-Epicurean doctrine (in *De Natura Deorum*, I, xivi ff.). So by a judicious combination of Hobbesian “theorems” concerning self-preservation, Grotian natural sociability, and Ciceronian anti-Epicureanism, Pufendorf arrives at a completely secular natural law resting on *ratio*, *socialitas*, and “Roman” *jurisprudencia*. And this modern-ancient synthetic fusion was the perfect antidote to the religious and confessional horrors which had nearly destroyed Pufendorf’s Germany during the Thirty Years’ War (Hunter 2001, *passim*). (It is no wonder, then, that a later legal-political philosopher of gigantic stature, Jean-Jacques Rousseau—who was torn throughout his life between

inherited Genevan Calvinism and a Pelagian version of latitudinarian Catholicism—should have thought that Pufendorf was the best—or least bad—of “natural lawyers,” even if Rousseau, after the *Économie politique*, of 1756 [Rousseau 1998b, 273ff.], increasingly abandoned natural-law theorizing altogether.)

In his three-part eclectic fusion of Hobbesian “theorems,” Grotian *socialitas*, and Ciceronian “natural affection” as the underpinning of natural law and natural justice, Pufendorf cites *in extenso* not just the great Roman lawyer himself, but also ancient Stoic writers who had tried to fuse *ratio*, *socialitas*, and *jurisprudencia*—most notably Epictetus. In *De Jure Naturae et Gentium* II, 3, xvi, Pufendorf approvingly quotes Epictetus’s insistence that “God has disposed the nature and constitution of rational beings after such a manner that they cannot advance their private [interests] without contributing something to the public interest. Community does not exclude the pursuit of private advantage” (Hochstrasser 2000, 60ff.). (It is characteristic of Pufendorf to deploy Epictetus to defeat Epicurus—to use *ratio* and *socialitas* to turn back the Epicurean/Hobbesian view that there is no “natural” justice in advance of artifice-crafted covenants; Epicurus, *Principal Doctrines*, nos. 43–6.)

But above all, in his mediation between Hobbesian “self-preservation” and Grotian “natural sociability,” Pufendorf leans most heavily (and understandably) on Cicero. In *De Jure Naturae et Gentium* he cites at length a famous surviving passage from Cicero’s lost *De Republica* (a passage preserved in Lactantius) (Hochstrasser 2000, 63ff.), to show that “human beings are able as individuals, irrespective of external [legal] sanctions, to feel a sense of sociability for their neighbors, and at the same time to make the prudential Hobbesian calculation of the need for social co-existence as a necessary precondition of the attainment of any minimal set of objectives in life” (ibid.). And Pufendorf also admires the universalism of Cicero’s insistence that natural law and natural justice “will not be different at Rome and at Athens [...] but will eternally and unchangeably affect all persons in all places” (ibid.). For if *ratio* and *socialitas* are indeed “universal” and “eternal,” then they will (if sufficiently cherished) keep religious sectarians from each other’s throats. (One cannot overstress Pufendorf’s anxiety to find a nonsectarian natural law which can be universally embraced by rational beings as such: Hence the huge weight which he accords to “pagans” such as Cicero and Epictetus. While Pufendorf was himself some sort of not-too-orthodox Lutheran, he had no sympathy for Leibniz’s fusion of Platonic metaphysics and attenuated Lutheranism—as will be seen later on.)<sup>6</sup>

Even if Pufendorf gives very important weight to Cicero (and to Seneca, Epictetus, and Marcus Aurelius), saying at one point that “the view of the Stoics” concerning natural law and natural justice “was my view too,” his con-

<sup>6</sup> For a defense of Pufendorf contra Leibniz, see Hunter 2001, 52ff.

ciliatory eclecticism was not merely “Roman” but (in equal measure) ancient and modern; hence the secular trinity of Cicero, Grotius, and Hobbes in Pufendorfian *ius naturale*. In the long essay called “De Origine et Progressu Disciplinae Juris Naturalis,” published in the collection *Eris Scandica* Pufendorf (1744, 163ff.) argues that before Grotius, no one had really succeeded in separating “natural” from “positive” law—even though natural law “is as old as the human race” (and therefore, by unstated implication, well understood by the ancients before there were Lutherans, Calvinists [and Catholics] anxious to kill each other in “religious” wars). In Section II of “De Origine,” Pufendorf praises Grotius’s celebrated *etiamsi daremus* (the claim that natural law would be as universally valid as mathematics even if God were left out of account); and Pufendorf goes on to urge (in Hochstrasser’s words) that “neither Christian texts nor commentaries on them are useful sources for the jurist because they do not formulate a theory of natural law that is common to all human beings irrespective of religion” (Hochstrasser 2000, 163–5)—hence Pufendorf’s quite radical claim that “natural law is neither found in the authentic books of the New Testament nor in the commentaries on it” (*ibid.*, 165). (For a Roman Catholic, that would have constituted a shocking deviation from Thomist orthodoxy—from Thomas’s doctrine in the *Summa Theologica* is that natural law is the *part* of divine law which is known by reason alone (*Summa Theologica* II, ii, pars 57, “On Justice,” in Aquinas 1953; see also Q. 97 “On Law.” Pufendorf keeps just *ratio* and *socialitas*, and divine law has no role or place in “the human forum.”)

Pufendorf’s “De Origine” praises not just Grotius, however, but—within clear limits—Hobbes as well. “Among many bad arguments” made by Hobbes, he insists (apparently thinking of the “Epicurean” notion that there is no natural justice or *socialitas*), there are also “to be found very many excellent ones of outstanding value.” And even the bad arguments have their use: “Those very false [Epicurean] arguments which he expounds offered an opportunity of perfecting moral and political science, just as several points that assisted in its completion would scarcely have occurred to anyone without Hobbes’s contribution” (Pufendorf 1744, 167ff.). And finally, having praised the ancients, Grotius, and (guardedly) Hobbes, Pufendorf ends the essay “De Origine” in the following way:

In it [i.e., the preface to *De Jure Naturae et Gentium*] my particular purpose was, so far as my abilities allowed, to embrace all those topics that related to the discipline of natural law and arrange them in an order that was neither loose nor rough. Next my intention was to abolish in natural law all theological controversies, and adapt it to the understanding of the whole of mankind, who disagreed in many different ways over religion: I note that this was also done by Richard Cumberland, who was however a theologian by profession. (*Ibid.*, 169)

Having secularized, rationalized, universalized, detheologized, and “Romani-  
zed” natural law—as something freed from “all theological controversies” and

hence available to “the understanding of the whole of mankind”—Pufendorf now goes on, most clearly and succinctly in *De Officio Hominis et Civis*, to redefine the “branches” of law which had first been set out in Roman *jurisprudentia*; and those branches are “the light of reason, the civil laws, and the particular revelation of divine authority” (Pufendorf 1927, “Preface,” v–vi) (i.e., natural law, civil law, and divine law—as utterly distinct). From the “light of reason” or natural law “stem the commonest duties of man, especially those which make him sociable with other men” (ibid.); here, as expected, *ius naturale* is a fusion of *ratio* and *socialitas*. From the civil laws derive man’s duties to the particular state in which he lives; and from divine law “appear the duties of a man who is a Christian, which is the realm of moral theology” (ibid.). But it is clearly natural law which is Pufendorf’s concern as a jurist: “The end and aim of natural law is included only in the circuit of this [earthly] life [...] but moral theology moulds a man into a Christian [...] who especially hopes for the fruit of piety after this life [...] while here he lives merely as a way-farer or sojourner” (ibid., vii). Despite that Augustinian closing sentence, Pufendorf is very far (as has been seen) from traditional Catholic natural law. “Piety” comes into play “after this life,” and in the “human forum” every man is accountable “for all such actions, the performance of which were in his own choice.” That is Aristotle’s definition of legal accountability in *Nicomachean Ethics*, III, 1106b—but in that definition God and theology have no place whatsoever. For *spes* and *fides* refer to “another” life, and only *ratio* and *socialitas* shape *ius naturale* in our present terrestrial forum.

## 5.2. Pufendorf’s Hobbesian Theory of Legal Obligation

Even though, as has been seen, Pufendorf was only demi-Hobbesian or semi-Hobbesian in his theory of natural law—since Hobbesian self-concern is counterbalanced by Grotian *socialitas* and Ciceronian *caritas naturalis* in Pufendorf’s complete concept of *ius naturale*—he was a much more thoroughgoing and complete “Hobbist” in his theory of legal obligation (within some particular state). Thus Pufendorf insists in a key paragraph of *De Officio Hominis et Civis* that

obligation is properly introduced into the mind of a man by a superior, that is, a person who has not only the power to bring harm at once upon those who resist, but also just grounds for his claim that the freedom of our will should be limited at his discretion. For when these conditions are found in anyone, he has only to intimate his wish, and there must arise in men’s minds a fear that is tempered with respect [...] for whoever is unable to assign any other reason why he wishes to impose an obligation upon me against my will, except mere power, can indeed frighten me into thinking it better for a time to obey him, to avoid a greater evil; but, once that fear is removed, nothing further remains to prevent my acting according to my will rather than his. Conversely, if he has indeed the reasons which make it my duty to obey him, but lacks the power of inflicting any power on me, I may with impunity neglect his commands, unless a more powerful person comes to assert the authority upon which I have trampled. Now the reasons



why one may rightly demand that another obey him are: in case some conspicuous benefits have come from the latter to the former; or if it be proved that he wishes the other well, and is also better able than the man himself to provide for him, and at the same time actually claims control over the other; and finally, if a man has willingly subjected himself to another and agreed to his control. (Pufendorf 1927, vii)

To be sure Pufendorf, while beginning with the more-or-less Hobbesian notion that legal obligation is imposed downwards, *de haut en bas*, by a “superior,” then retreats a little from the author of *Leviathan* by saying that legal obligation rests not just on (bare) power and fear, but also on “just grounds” and “reasons” for legally limiting human freedom (ibid.). Even in Pufendorf’s own day, the juriconsult Alberti (*Compendium Juris Naturae*, 1678, *passim*, especially 54.), however, had complained that Pufendorf never really shows *how* sovereignty and “superiority” are to be combined with “reasons” and “just grounds”—that Pufendorf simply eclectically throws together “Hobbesian” superiority and *justitia/ratio*, without showing how the former can be limited and shaped by the latter: How, in short, *ratio* and *justitia* (and *socialitas*) can make Hobbesian “Epicureanism” more palatable. But the classic version of this worry about the *coherence* of Pufendorf’s fusion of “superiority” and “reasons” is to be found in a slightly later work by Leibniz, the greatest philosopher of the German *Frühaufklärung*—in a 1706 essay called *Opinion on the Principles of Pufendorf*, which acquired a European reputation through the French translation of Barbeyrac. In the *Monitè* on Pufendorf, Leibniz insists that:

whoever examines carefully what he says, will not fail to notice that he is neither consistent, nor resolves the difficulty. Indeed, if either coercion without reasons, or the latter without force is sufficient, why—I ask—when force ceases and reason alone remains, shall I not return to that liberty which it is said I had when, before the application of force, reason alone was present? What the author says, in fact—that, failing fear, no one can stop me from behaving according to my own will rather than according to someone else’s—would be valid even if reasons existed. On the other hand, if reasons restrain even by themselves, why did they not already restrain by themselves, before fear arose? And what force, I pray you, can fear give to reasons, except itself—which it would not itself provide even without reasons? Or will this not this very durable sentiment impress some indelible character on unwilling minds? (Leibniz 1768d, iii, 270ff.)

And finally Leibniz exclaims, with some exasperation, “One or the other, then: either reasons oblige prior to force, or they do not obligate any longer when force fails” (ibid.).

But this passage from Leibniz’s *Monitè*, which in effect charges Pufendorf with mere syncretism (or *failed* synthesis), with not showing how “superiority” (Hobbes) and “reasons” (Plato) are to relate, is only a part of Leibniz’s more general onslaught against Pufendorffian legal voluntarism. For what really bothers Leibniz is the notion that obligation and duty come from sovereign “superiority” *tout court*:

So much for what regards the end and the object [of natural law]; it remains now to treat the efficient cause of this law, which our author does not correctly establish. He, indeed, does not find it in the nature of things and in the precepts of right reason which conform to it, which emanate from the divine understanding, but (what will appear to be strange and contradictory) in the command of a superior. Indeed, Book I, Chapter 1, Part 2, defines duty as “the human action exactly conforming to the prescriptions of the law in virtue of an obligation.” And soon Chapter 11, Part 2, defines law as “a command by which the superior obliges the subject to conform his actions to what the law itself prescribes.” If we admit this, no one will do his duty spontaneously; also, there will be no duty when there is no superior to compel its observance; nor will there be any duties for those who do not have a superior. And since, according to the author, duty and acts prescribed by justice coincide (because his whole natural jurisprudence is contained in the doctrine of duty), it follows that all law is prescribed by a superior. This paradox, brought out by Hobbes above all, who seemed to deny to the state of nature, that is [a condition] in which there are no superiors, all binding justice whatsoever (although even he is inconsistent), is a view to which I am astonished that anyone could have adhered. Now, then, will he who is invested with the supreme power do nothing against justice if he proceeds tyrannically against his subjects; who arbitrarily despoils his subjects, torments them, and kills them under torture: Who makes war on others without cause? (Ibid.)

Pufendorf, as Leibniz of course knew, was no partisan of “tyranny” or “torment”; but Pufendorf’s eclectic desire to keep (acceptable) Hobbism led to an incoherence in which “superiority” might rise above (and trample on) “just grounds” and “reasons.”

For Leibniz the antidote to this possibility was to give absolute priority to “reasons” and “natural justice” within an inherited Christian-Platonic (or early-Augustinian) tradition (see Riley 2002b)—in which “mere” superiority, as something rejected by Plato’s annihilation of Calicles and Thrasymachus (in *Gorgias*, 253b ff. and *Republic*, I), would be carried into the modern world by saying (with Leibniz himself) that natural justice is “the charity of the wise” (which fuses Platonic “wisdom” and Pauline “charity” [“the greatest of these is charity”]); St. Paul, I *Corinthians* xiii). What is really, finally wrong with Pufendorffian jurisprudence, for Leibniz, is that it fails to embrace Christian Platonism through its fear of both religious excess and “Greek” metaphysics, imagining that *ratio* and *socialitas* are sufficient for “natural law.” But for Leibniz that cannot be right:

Indeed, not to mention that which Grotius rightly observed, namely that there would be a natural obligation even on the hypothesis—which is impossible—that God does not exist, or if one but left the divine existence out of consideration; since care for one’s own preservation and well-being certainly lays on men many requirements about taking care of others, as even Hobbes perceives in part (and this obligatory tie bands of brigands confirm by their example, who, while they are enemies of others, are obliged to respect certain duties among themselves—although, as I have observed, a natural law based on this source alone would be very imperfect); to pass over all this, one must pay attention to this fact: that God is praised because he is just. There must be, then, a certain justice—or rather a supreme justice—in God, even though no one is superior to him, and he, by the spontaneity of his excellent nature, accomplishes all things well, such that no one can reasonably complain of him. Neither the norm of conduct itself, nor the essence of the just, depends on his free decision, but rather on eternal truths, objects of the divine intellect, which constitute, so to speak, the essence of divinity itself;

and it is right that our author is reproached by theologians when he maintains the contrary; because, I believe, he had not seen the wicked consequences which arise from it. Justice, indeed, would not be an essential attribute of God, if he himself established justice and law by his free will. And, indeed, justice follows certain rules of equality and of proportion [which are] no less founded in the immutable nature of things, and in the divine ideas, than are the principles of arithmetic and geometry. So that no one will maintain that justice and goodness originate in the divine will, without at the same time maintaining that truth originates in it as well: an unheard-of paradox by which Descartes showed how great can be the errors of great men; as if the reason that a triangle has three sides, or that two contrary propositions are incompatible, or that God himself exists, is that God willed it so. It would follow from this, too, that which some people have imprudently said, that God could with justice condemn an innocent person, since he could make it such that precisely this would constitute justice. Doubtless those who attain to such aberrations do not distinguish justice from unaccountability [ἀντιπευθυναί]. God, because of his supreme power over all things, cannot be made to submit his accounts [ἀντιπεύθυνος], inasmuch as he can be neither constrained nor punished, nor is he required to give reasons to anyone whomsoever; but, because of his justice, he accomplishes all things in a way which satisfies every wise man, and above all himself. This has also not a little relevance for the practice of true piety: It is not enough, indeed, that we be subject to God just as we would obey a tyrant; nor must he be only feared because of his greatness, but also loved because of his goodness: which right reason teaches, no less than the Scriptures. To this lead the best principles of universal jurisprudence, which collaborate also with wise theology and bring about true virtue. Thus he who acts well, not out of hope or fear, but by an inclination of his soul, is so far from not behaving justly that, on the contrary, he acts more justly than all the others, imitating, in a certain way, as a man, divine justice. Whosoever, indeed, does good out of love for God or for his neighbor, takes pleasure precisely in the action itself (such being the nature of love) and does not need any other incitement, or the command of a superior; for that man the saying that the law is not made for the just is valid. (Leibniz 1768d, iii, 270ff.)

Here, to be sure, there is a large irony: Leibniz appeals to the very Grotius who had been Pufendorf's jurisprudential hero. But for Leibniz Grotius is a Platonist who thinks that natural law is as certain as mathematics, while for Pufendorf Grotius is (mainly) a latter-day Stoic-Ciceronian theorist of *socialitas*. In a sense, both Leibniz and Pufendorf are right; but Leibniz's view seems to have been that if Pufendorf had been a good enough mathematician to appreciate Plato's geometrizing rationalism (and the theory of "higher" love in *Symposium*, 202a ff.), then he wouldn't have thrown together, syncretistically, Hobbesian, Grotian, and Stoic fragments which failed to cohere in a *stable* theory of "natural law." For Leibniz, Pufendorf had failed to go far enough in subordinating Hobbesian "Epicureanism" to "Epictetan" Stoicism.

It is worth noting that Leibniz's deep doubts about Pufendorf's (lack of) success in arriving at a stably synthetic theory of law seem to be shared by a very distinguished modern historian of the philosophy of law—namely, Guido Fassò, in Volume 2 of his magisterial *Storia della filosofia del diritto* (1968). After saying, in his Pufendorf chapter, that "it cannot well be understood" how Pufendorf's legal theory (a "strictly voluntaristic" theory) can be coherently "conciliated" with the other element of his eclecticism (*ratio, socialitas, Stoicism*), Fassò goes on to urge in his superb chapter on Leibniz that the great Hanoverian philosopher

accuses Pufendorf of driving a wedge into traditional moral Christianity, by “enticing” some jurists and philosophers, however much “*vir parum jurisconsultus et minime philosophus,*” with the thesis—rejected by the old philosophers and by jurists who “at one time had been more serious (*olim graviores*)”—according to which natural law is only concerned with external actions. In fact this charge, made in the name of tradition, strikes not just at Pufendorf but at the whole of modern natural-law theory, on account of the latter’s tendency to distinguish law from morality and theology; and through this charge, Leibniz arguably gives himself away as a conservative and a traditionalist, considering not just how law (as constructed by him) is undistinguishable from morality, but also how morality must, in his view, necessarily be connected with religion. (Fassò 1966–1970, vol. 2: 232–3)

And then, in his usual helpful way, Guido Fassò goes on to point out that

there is another point on which Leibniz pointedly criticizes Pufendorf in such a way that Leibniz comes across as a member of the theologizing rear guard fighting Pufendorf’s “modern” laic theory of natural law: Natural law had been claimed by Pufendorf to be entirely driven by an earthly aim, and so to have nothing in common with theology, and to this Leibniz objected that “setting aside any consideration of the afterlife [...] amounts to depleting science of its best part, and making it so that many duties in this life are suppressed.” Leibniz ultimately found that “no doctrine of natural law is more sublime and complete than that which is set out according to the doctrine of the Christians,” a doctrine of which he even provided an outline, and whose significance in truth lies mainly in its title, *Tabulae duae disciplinae juris naturae et gentium secundum disciplinam christianorum*.

Leibniz thus sets himself against the dominant tendency of the 1600s (from Grotius on) that Pufendorf expressed—however much contradicting some of his other theses—saying that natural law must be valid among all men “not just as Christians but as men.” By contrast, the basic inspiration for Leibniz’s legal philosophy was essentially Christian, and even though there is ultimately no connection he makes with any of the positive religions, his legal philosophy doubtless rests on the idea of a transcendent principle of law. (Ibid., 233–4)

And then finally, in a splendid summary paragraph which captures exactly (and far better than any other history of legal philosophy) what is at issue in the great Pufendorf-Leibniz contestation, Fassò insists that

Leibniz, with the firm anti-voluntarism and ethical rationalism characterizing the works of his maturity, falls right along the line of what by convention has come to be regarded as modern natural-law theory. It would therefore be vain to classify him, as a philosopher of law, under this or that current or school: Leibniz cannot be catalogued under any of the worn-out schemes of traditional legal philosophy; he instead shares in the various ethico-legal positions of his time, and little does it matter that they should come into contrast, for he responds to them in an entirely personal way, which in truth is a much deeper way than that of the various “natural-law theorists” of the time. It is not so much to theology that he reduces law as to a universal metaphysical principle which does amount to supreme Love but which is also supreme Reason: He does so giving himself to a properly philosophical cause that neither Pufendorf nor, in the same period, Thomasius, [...] could really be invested in.

Certainly, Leibniz, concerned as he was to reduce to unity the whole of human knowledge and action, absorbs justice into religiosity (albeit distinguishing three forms, two of which function as the logical place of law). Still, this does not mean that he absorbs justice into *positive* religion, or theology: The God who is the aim and source of justice is God understood as subject to supreme rational knowledge; this God is rationality itself, the rational universal. Leibniz does indeed, on more than one occasion, welcome a treatment of natural law and of peoples according to a Christian doctrine, but this law “issuing from the divine source” is “the eternal

law of rational nature.” Just like Grotius, he keeps this distinct from positive divine law, which he classifies as voluntary, and so keeps it distinct from *positive* law, which instead originates with custom or with a superior’s command. Natural law according to Christian doctrine is largely a law imbued with the Christian spirit of charity, which Leibniz identifies with justice; and apart from what belongs to his youth, there is no concession that he makes to theological voluntarism, which even the natural-law theorists considered to be laic, such as Pufendorf, indulged in generously. (Ibid., 234–5)

No one has ever expressed the strong tension between Pufendorf’s voluntarizing secularization of natural law, and Leibniz’s “Christian Platonism” in *jus naturale*, more beautifully and precisely than Guido Fassò in his *Storia della filosofia del diritto*—a wonderful accomplishment.

### 5.3. Christian Thomasius

Even if Leibniz, in the so-called *Frühaufklärung*, and Guido Fassò, in the 20th century, revealed deep doubts and worries about Pufendorf’s eclectic drawing together of Hobbes, Cicero, *ratio*, *socialitas*, and Stoicism—and their (shared) worry was that Pufendorf simply threw elements together, without finding really coherent *rappports* between those elements—it nonetheless remains true that Pufendorf’s version of law (and especially natural law) was profoundly influential in Germany, and especially in the thought of Christian Thomasius (1655–1728) (see Schneiders 1971). As Guido Fassò (again) urges, Thomasius carried to an “extreme” the Pufendorfian “separation of law from theology and morality” (Fassò 1966–1970, vol. 2: 247).

Though Christian Thomasius (who is especially famous for his enlightened legal reforms in Prussia; Hochstrasser 2000, 111ff.) was the son of Jacob Thomasius, the traditionalist teacher of Leibniz at Leipzig University, he early broke from the Christian-Platonic traditionalism of his father and of Leibniz, and as early as the 1680s allied himself strongly with Pufendorf’s version of natural law (Thomasius 1691, *passim*). In the 1685 dissertation, “De Crimine Bigamiae” (*On the Crime of Bigamy*), Christian Thomasius’s secularizing Pufendorfism is immediately evident. As Hochstrasser has shown in his valuable *Natural Law Theories in the Early Enlightenment*, Thomasius

sought to establish whether bigamy could be declared a crime in natural law as well as in divine positive law. Thomasius argued here that while sacred scripture clearly prohibited men taking more than one wife, nevertheless there was no crime in natural law, since human sociability and procreation were unimpinged upon:

“But we judge that bigamy by a man is not contrary to a natural law *a priori*, because human sociability is not disrupted by it, and it does not directly conflict with the goals of marital bonds; neither is it wrong *a posteriori*, because God allowed polygamy in the Old Testament for the Jewish people, and indeed, by arrangement, to the Fathers.”

For Thomasius, human nature was the sufficient tribunal before which the issue was to be placed, since human beings possessed with both rational independence and innate sociability as

the mark of the exercise of that rational faculty: “But human nature is at the same time rational and social, and has been without doubt since the Fall, for I cannot conceive human reason without society and sociability.” Here, therefore, was a clear instance of a separation of content between divine positive law and natural law, where natural law could be derived narrowly from human capacities and needs without divine intervention.

This example was the first indication of how Thomasius was to proceed to a detailed description of the distinctive functions and sources of divine and natural law in the *Institutiones*; but it is important to stress the degree to which he saw himself at this stage as merely an interpreter of Pufendorf to a hostile academic public. His arguments in his dissertation are in reality only an extrapolation of the opinions expressed by Pufendorf himself in book six of *De Jure Naturae*. This is clear not only from a comparison of the texts, but also from the first surviving letter of Pufendorf to Thomasius of June 1686, where in response to a request for comments on “De Crimine Bigamiae,” Pufendorf confirms that it embodies in bolder terms his own view that “the rational norms of human nature” are sufficient for a solution to this issue in natural law. (Hochstrasser 2000, 115)

Over the next thirty years, Christian Thomasius wrote a number of additional works in this same Pufendorffian vein—adding to inherited Pufendorffism one further secularizing notion, namely, that of *decorum* (in the Roman-Stoic sense) (*ibid.*, 111ff. cf. Thomasius 1705, *passim*). What matters above all in the case of Christian Thomasius is that he openly broke with the Christian Platonism in which he had been steeped (like Leibniz) by his father, Jacob Thomasius; Christian Thomasius explicitly abandoned a powerful tradition to take up and extend Pufendorf’s radically secular theory of natural law grounded just in Hobbes, Grotius, *ratio*, and *socialitas*. And he then deployed this radically secularized “natural justice” to show that bigamy, and still more “heresy,” should not be *civilly* prosecuted at all (Hochstrasser 2000, 111ff.). In Christian Thomasius’s hands, Pufendorffian natural law actually entered into the teaching of jurisprudence in the Prussian universities. Of all Pufendorf’s disciples, Christian Thomasius had by far the greatest immediate and practical effect.

## Chapter 6

# LEIBNIZ ON JUSTICE AS “THE CHARITY OF WISE”

Though G. W. Leibniz (1646–1716) is thought of mainly as a theologian, metaphysician, logician and mathematician (the co-discoverer of calculus), his academic degrees were in jurisprudence and law (Cairns 1949, chap. 8), and he served both the king of Prussia in Berlin and the Emperor in Vienna as “intimate counselor of justice.” It is therefore Leibniz the “universal juriconsult” who will be stressed in the pages that follow.

### 6.1. Christian-Platonist<sup>1</sup> Foundations of Leibniz’s Universal Jurisprudence

In 1693<sup>2</sup> Leibniz revealed the outlines of his *jurisprudence universelle* in the *Codex Iuris Gentium*:

a good man is one who loves everybody, so far as reason permits. Justice, then, which is the virtue which regulates that affection which the Greeks call philanthropy, will be most conveniently defined [...] as the charity of the wise man, that is, charity which follows the dictates of wisdom [...] Charity is a universal benevolence and benevolence the habit of loving or of willing the good. Love then signifies rejoicing in the happiness of another [...] the happiness of those whose happiness pleases us turns into our own happiness, since things which please us are desired for their own sakes. (Leibniz 1988a, Praefatio, 118; cf. original ed. in Dutens IV, 3, 287ff.: Leibniz 1768a)

And slightly later, in *La véritable piété*, Leibniz indicated what this view of justice entails:

Those who [...] reduce justice to [legal] rigor, and who fail altogether to understand that one cannot be just without being benevolent [...] in a word, not only those who look for their profit, pleasure, and glory in the misery of others, but also those who are not at all anxious to procure the common good and to lift out of misery those who are in their care, and generally those who show themselves to be without enlightenment and without charity, boast in vain of piety which they do not know at all, whatever appearance they create. (Leibniz, *La véritable piété*, Grua II, 500: Leibniz 1948e)

The central idea of Leibniz’ universal jurisprudence, which aims to find quasi-geometrical eternal moral verities equally valid for all rational beings, human or divine, is that justice is “the charity of the wise (*caritas sapientis*),”<sup>3</sup> that it is not mere conformity to sovereign-ordained positive law given *ex plenitudo*

<sup>1</sup> See Rutherford 1995, “Conclusion.”

<sup>2</sup> Leibniz began work on the *Codex* in ca. 1690.

<sup>3</sup> The official statement of this doctrine is to be found in the *Codex Iuris Gentium* (Leibniz 1988a, Praefatio, sec. xi). See also Robinet 1994, 94–5 and Grua 1956, 168–80.

*potestatis* (in the manner of Hobbes), nor mere “refraining from harm” or even “rendering what is due” (*the neminem laedere* and *suum cuique tribuere* of Roman law)<sup>4</sup>. The equal stress on charity and on wisdom suggests that Leibniz’ practical thought is a kind of fusing of Platonism—in which the wise know the eternal truths such as absolute goodness (Plato, *Phaedo*, 75d), which the gods themselves also know and love (*Euthyphro*, 9e–10e), and therefore deserve to rule (*Republic*, 443d–e; Book IV, 686)—and of Pauline Christianity, whose key moral idea is that charity or love is the first of the virtues (“thought I speak with the tongues of men and of angels, and have not charity, I am become as sounding brass or a tinkling cymbal”; St. Paul, 1 Corinthians 13). There is, historically, nothing remarkable in trying to fuse Platonism and Christianity; for Augustine’s thought (particularly the early *De Doctrina Christiana*) is just such a fusion<sup>5</sup>. But Leibniz was the last of the great Christian Platonists, and left the world just as Hume, Rousseau, and Kant were about to transform and secularize it.

If one decomposes *caritas sapientis* into its parts, charity and wisdom, the provenance of both elements is clear enough—charity or love is the very heart of Christian ethics (St. Paul’s “the greatest of these is charity” or St John’s “a new commandment I give until you, that ye love one another”; *Gospel according to St. John* 13.34), and the notion that justice requires the rule of the wise is famously Platonic (*Republic*, Books IV–VII). How charity and wisdom relate, how they might modify each other, is not just an historical but a philosophical problem—since love is affective, wisdom cognitive; but the really grave difficulties in Leibniz’ universal jurisprudence lie elsewhere. For it is not clear that a wisely charitable God would create a world which, thought it may be best, is not simply good; an *être infiniment parfait* might sooner contemplate his own perfection, *ad infinitum*.<sup>6</sup> And whether Judas or Pontius Pilate could have acted better, been more benevolent, is notoriously problematical given Leibniz’ ideas of substance (or monad) and of preestablished harmony (Leibniz 1898a, props. 85–95; on pages 267–71). Since however, Leibniz is a supremely architectonic thinker who wants to relate everything to first philosophy, one cannot just cordon off his moral, legal, and political thought from his metaphysics and theology: That is precisely what he himself did not do.

It was characteristic of Leibniz to try to reconcile apparently conflicting ideas, to take from each kind of thought that which was soundest and to synthesize it with the seemingly incommensurable truths of other systems; thus

<sup>4</sup> See Leibniz 1988b, sec. ix, 45ff. Original title “*Observationes de Principio Iuris*,” in Dutens IV, 3: 270–95; Leibniz 1768e.

<sup>5</sup> The Platonism is clearest in Book I (c. 395 A.D.) of this early work.

<sup>6</sup> This would seem to be the natural conclusion of Aristotle’s *Ethics*, 1178b, in which contemplation is the sole activity left to a divinity.



he struggled throughout his life to fuse Platonism, Cartesianism, Augustinian voluntarism, Christian charity, Scholasticism, Hobbesian mechanist materialism, and a number of other doctrines into a plausible whole whose apex would be a rational theology—indeed a theodicy (*theos-dike*) or justification of God.<sup>7</sup> Given this desire for reconciliation, for harmony, for synthesis—which he applied to political, legal, and moral philosophy as much as to any other philosophical question—it should come as no surprise that Leibniz wanted to establish, or rather discover, a “universal jurisprudence,” a system of justice and law common to God and man (and generally to any rational substances); anticipating Kant, Leibniz urged that justice and injustice “do not depend solely on human nature, but on the nature of intelligent substances in general” (*Letter to Thomas Burnett*, May 1706; in Leibniz 1875–1890, III, 307). As substances linked by intelligence, God and man exist for Leibniz in a “society or universal republic of spirits” which is “the noblest part of the universe,” a moral realm within physical nature, a realm in which “universal right is the same for God and for men” (Leibniz 1952, pt. 35, on page 94). Or, as Leibniz put it near the end of his life, in the *Monadology*:

[...] the totality of all spirits must compose the City of God, that is to say, the most perfect state that is possible, under the most perfect of monarchs. This city of God, this truly universal monarchy, is a moral world in the natural world, and the most exalted among the works of God. (Leibniz 1898a, props. 85–6, on pages 267–8)<sup>8</sup>

For Leibniz, the difference between divine and human justice was one of degree, not of kind; God’s justice is simply infinitely more perfect than men’s, and “to say [...] that god’s justice is different from men’s is like saying that the arithmetic or the geometry of men is false in heaven” (Leibniz 1847, 232). It is erroneous, Leibniz insisted, to say that we must not judge God in terms of the common concept of justice, for it must be the case that one has “an idea or notion of justice when one says that God is just, otherwise one would only attribute a word to him” (*Letter to Landgraf Ernst*, ca. 1690: *ibid.*; cf. Leibniz 1948d, I, 238–9). Just as the arithmetic and geometry of men and of God differ only in the degree of their perfection, so too “natural jurisprudence and every other truth is the same in heaven and on earth” (*ibid.*). “As for the order of justice,” Leibniz wrote in 1696, “I believe that there are universal rules which must be valid as much with respect to God as with respect to intelligent creatures.” Intelligible truths “are universal, and what is true here below with respect to us is also such for the angels and for God himself” (*Letter to Electress Sophie*, 1696; Leibniz 1948d, I, 379). The eternal truths “are the fixed and immutable point on which everything turns,” such as “the truth of

<sup>7</sup> Leibniz 1952, II, 181ff. See also Hans Poser’s excellent *Die Beste der möglichen Welten?*: Poser 1992.

<sup>8</sup> See also Schneiders 1977.

numbers, of arithmetic, and those of motion or weight in mechanics and in astronomy" (ibid.).

What is important is that Leibniz used the notion of objectively certain eternal verities legally and morally to attack the idea of justice as bare superior power; the formal notion of justice, he observed in a commentary on Hobbes, has nothing to do with the mere "sovereign" command of authorities: "[I]t does not depend on the arbitrary laws of superiors, but on the eternal rules of wisdom and goodness, in men as well as in God" (Leibniz 1952, "Reflections on ... Hobbes' Liberty, Necessity and Chance," 403).

For Leibniz it was merely an empiricist prejudice to see justice as unreal if it did not consist of tangible commands backed by power and threats. "The qualities of mind are not less real than those of body," he wrote in a Platonizing passage in the *New Essays*. "It is true that you do not see justice as you see a horse, but you understand it no less, or rather you understand it better; it is no less in actions than directness or obliqueness is in motions" (Leibniz, *New Essays* III, 1, 12, in Akademie VI, VI, 303 [in Leibniz 1923–2004]). And if justice were simply derivative from the possession of power, "all powerful persons would be just, each in proportion to his power" (*Observationes de Principio Iuris*, sec. ix, in Dutens IV, 3, 270ff. [Leibniz 1768e]); if an evil genius somehow seized supreme universal power, Leibniz insisted, he would not cease to be "wicked and unjust and tyrannical" simply because he could not be successfully "resisted" (ibid.). Those who derive justice from irresistible power, he thought, simply confuse right and law: The concept of right cannot (by definition) be unjust, but law can be because it is "given and maintained by power"; only in God is there an absolute coincidence of right and power which produces just law (Leibniz 1988b, 50).

Perhaps the finest mature statement of Leibniz' view is contained in the *Opinion on the Principles of Pufendorf* (1706), which gained a European reputation through Barbeyrac's translation:

Neither the norm of conduct itself, nor the essence of the just, depends on [God's] free decision, but rather on eternal truths, objects of divine intellect [....] Justice follows certain rules of equality and of proportion which are no less founded in the immutable nature of things, and in the divine ideas, than are the principles of arithmetic and of geometry [....] divine justice and human justice have common rules which can be reduced to a system; and they must be taught in universal jurisprudence. (Leibniz 1988d, 66ff., original ed. in Dutens IV, 3, 275 [Leibniz 1768d])<sup>9</sup>

Leibniz understood justice, however, not just in terms of wisdom and of Platonic eternal verity (which is known without being taught) but in terms of charity and benevolence as well. And this is why he always defined justice as

<sup>9</sup> For Leibniz' critique of Pufendorf, see Sève 1989, 101ff.



Gottfried Wilhelm Leibniz (1646–1716)

“the charity of the wise.” “The proper treatment of justice and that of charity cannot be separated,” he urged in one of his earliest writings,

Neither Moses, nor Christ, nor the Apostles nor the ancient Christians regulated justice otherwise than according to charity [...] (and) I, too, after having tried countless definitions of justice, finally felt myself satisfied only by this one; it alone I have found universal and reciprocal. (*Elementa Iuris Naturalis*, in *Akademie V, I*, 481 [in Leibniz 1923–2004])

Charity is “a universal benevolence, which the wise man carries into execution in conformity with the measure of reason, to the end of obtaining the greatest good” (Leibniz 1976b, 360). Charity, a “habit of loving” (with love defined as a “feeling of perfection” in others), necessitated voluntary action; it was to be regulated by wisdom, which could provide a knowledge of what men deserved through their “perfections” (Leibniz 1988b, 57).

What is essential, for Leibniz, is that Christian charity and Platonic wisdom be in equilibrium:

General benevolence is charity itself. But the zeal of charity must be directed by knowledge so that we do not err in the estimation of what is best: since in consequence wisdom is the knowledge of the best or of felicity, we cannot perhaps better capture the essence of justice than if we define it as the charity which resides in the wise. (Leibniz, *De Justitia et Novo Codice*; Grua II, 621–2 [Leibniz 1948d])

In the history of philosophy the idea that the concept of justice, as an eternal verity, is not a mere adjunct of power, that it is an idea whose necessary truth is at least analogous to the truths of mathematics and logic—which are elicited rather than learned—is commonly associated with Plato. Now while it is not true that Leibniz was a Platonist in any doctrinaire sense—his clinging to Pauline charity and to Augustinian good will would have made that difficult<sup>10</sup>—nonetheless he did agree with Plato on many points of fundamental importance. “I have always been quite content, since my youth,” he wrote to Rémond in 1715 (in a letter describing his own early self-education), “with the moral philosophy of Plato, and even in a way with his metaphysics; for those two sciences accompany each other, like mathematics and physics” (*Letter to Rémond*, 1715, Leibniz 1875–1890, III, 637). Leibniz indeed, was Platonic not only in the way he conceived the concept of justice, but even in some of his more practical political opinions: He always urged, for example, that “following natural reason, government belongs to the wisest” (*Letter to Thomas Burnett*, 1699, Leibniz 1875–1890 III, 264). With the possible exception of the *Republic*, the Platonic work which Leibniz admired most was the *Euthyphro*, which he paraphrased almost literally in his most important work on justice, the *Meditation on the Common Notion of Justice*. In the *Euthyphro*, which deals with the question whether “the rules of goodness and of justice

<sup>10</sup> See footnote 5 and St. Paul, 1 Corinthians 13 (cited *supra*).

are anterior to the decrees of God" (in Leibniz' words), Plato "makes Socrates uphold the truth on that point" (Leibniz 1952, II, 182, on pages 240–1). And that truth is, as Ernst Cassirer puts it, that the good and the just are "not the product but the objective aim and the motive of his will" (Cassirer 1902, 3; 1980, 428–95). That Leibniz was much affected by Plato is evident in his *Meditation on Justice*, which merely converts Platonic dialogue into straightforward prose:

It is agreed that whatever God wills is good and just. But there remains the question whether it is good and just because God wills it or whether God wills it because it is good and just: In other words, whether justice and goodness are arbitrary, or whether they belong to the necessary and eternal truths about the nature of things, as do numbers and proportions. (Leibniz 1988b, 45)

Given Leibniz' visible devotion to Plato and Platonism, which runs like a red thread through his whole moral and political philosophy, early and late, it is worthwhile to consider a little more fully the exact sense in which Leibniz was (and was not) a Platonist. For among Leibniz' intellectual ancestors, the one who comes closest to the Leibnizian project of establishing a universal jurisprudence which is (like mathematics) equally valid for finite and infinite minds in any logically possible cosmos is surely Plato. For in the *Euthyphro* (as was just seen), Socrates makes it clear that even the gods themselves revere (and do not arbitrarily create or change) the eternal and necessary moral truths: and at *Phaedo*, 75d, it is urged that even finite minds can know (or rather recall the "absolute ideas"—whether of mathematics of ethics—which the God also "see" and which cannot be derived from nature (*Phaedo*, 74b–75d, on page 57–8).

It is a standard Platonic method (and one much appreciated by Leibniz) to throw light on morally problematical and elusive notions, such as justice and virtue, by attempting to relate them to (or sometimes indeed to equate them with) the necessary truths of mathematics and geometry which all rational beings see in the mind's eye, and certainly do not learn from the empirical observation of mere phenomena. That is clearest in *Phaedo*, where all absolute ideas are placed on a footing of logical equality: "absolute goodness," "absolute beauty," and "absolute [mathematical] equality" are mentioned in one single breath.

If we obtained (knowledge) before our birth, and possessed it when we were born, we had knowledge, both before and at the moment of birth, not only of equality and of relative magnitudes, but of all absolute standards [...] (such as) absolute beauty, goodness, uprightness, holiness, and, as I maintain, all those characteristics which we designate in our discussion by the term "absolute." (Ibid., 75d)

(Here, to be sure, Leibniz rejects the notion of knowledge "obtained before our birth," but defends "absolute standards" which are as eternal and necessary as geometrical truths.)

But in some ways the most striking example of the Platonic method is in the *Meno*, where a discussion between Socrates and Meno over the nature of virtue gets bogged down until Socrates takes aside Meno's utterly uneducated slave and shows (in effect) that any rational being has within him what we would now call *a priori* knowledge of mathematical and geometrical truth which cannot be learned, but which can be drawn out and brought to full consciousness by Socratic probing.

Socrates: "What do you think Meno? [...] These (geometrical) opinions were somewhere in him, were they not?"

Meno: "Yes."

Socrates: "[...] At present these opinions, being newly aroused, have dreamlike quality. But if the same questions are put to him on many occasions and in different ways, you can see that in the end he will have a knowledge on the subject as accurate as anybody's [...] This knowledge will not come from teaching but questioning; he will recover it for himself ." (Plato, *Meno* 85b-d, on page 370)

After Socrates draws this pure rational knowledge from Meno's slave, the conversation turns from geometry back to virtue; and we now learn (*Meno*, 89a ff.) that virtue is wisdom—much as mathematics and geometry are knowledge. The structure of the *Meno*—first virtue, then geometry, then virtue again—makes no sense at all unless Plato is trying to suggest that moral knowledge is logically like mathematical-geometrical knowledge: necessary, universal, eternal, not subject to Heraclitean flux, loved by the gods (who do not cause it in time), and so on. And if the first of the virtues is justice, and if justice is a psychic-cosmic harmony or equilibrium, and if harmony is (in effect) mathematics made audible, than justice will be a kind of participation in the beautiful mathematical order, known *a priori*, which links the well-tuned, consonant psyche to an equally non-dissonant *polis*, or *psyche*, and then to the harmony of the spheres—as in *Republic*, 443d-e:

Justice [...] means having first attained to self-mastery and beautiful order within oneself, and having harmonized these three principles (reason, spirit, appetite), the notes or intervals of three terms quite literally the lowest, the highest and the mean and having [...] made of oneself a unit one man instead of many, self-controlled and in unison. (Plato, *Republic*, IV, 443d-e, on page 686)

Leibniz' Platonism—his tendency to say, in the manner of the *Phaedo*, that all absolute ideas are on a plane of logical equality (reason-provided, not learned from phenomena, universal, changeless)—is clear from the earliest period of his life to the latest; it is evident for example in the *Elements of Law and Equity* which he wrote in 1669–1670 (at the age of twenty-three).

The doctrine of law belongs to those sciences that are not built on experiments but on definitions, not on the senses but on the demonstrations according to reason; it deals with questions, as we say, of law and not of fact (*juris non facti*). Since justice consists in a certain harmony and

proportion, its meaning remains independent of whether anybody actually does justice to others, or conversely, is treated justly. The same holds of numerical relationship [...] Hence it is not surprising that the proposition of these sciences possess eternal truth. (Leibniz 1951b, 1; original in Akademie VI, I, 459 [in Leibniz 1923–2004])

And these mathematical jurisprudential “sciences,” he adds, “also do not take their point of departure from the senses, but from a clear and distinct intuition or, as Plato called it Idea, a word which itself signifies discernment or definition” (ibid.).

This notion of an intellectual intuition which yields ethics as well as mathematics Leibniz traces not just to *Phaedo* (and *Euthyphro*), but to *Meno* as well; and he makes it plain in Proposition 26 of the *Discourse on Metaphysics* (1686) that the doctrine of *Meno* is fundamentally correct if that dialogue is purged of certain Pythagorean extravagances.

The mind at every moment expresses all its future thoughts and already thinks confusedly of all that of which it will ever think distinctly. Nothing can be taught us of which we have not already in our minds the idea. This idea is as it were the material out of which the thought will form itself. This is what Plato has excellently brought out in his doctrine of reminiscence, a doctrine which contains a great deal of truth, provided that it is properly understood and purged of the error of pre-existence, and provided that one does not conceive of the soul as having distinctly known at some other time what it learns and thinks now. (Leibniz 1976a, sec. 26, 320)

Plato, Leibniz goes on to say, has confirmed what is true in his position by a “beautiful experiment”: He introduces a boy, Meno’s slave, “whom he leads by short steps to extremely difficult truths of geometry bearing on incommensurables, all this without teaching the boy anything, merely drawing out replies by a well-arranged series of questions.” A purged and chastened version of the *Meno* shows, Leibniz concludes, “that the soul virtually knows those things, and needs only to be reminded (animadverted) to recognize the truths” (ibid.).<sup>11</sup>

In his *Art of Discovery* (1685), to be sure, Leibniz laments, demi-Platonically, that reason and truth are not as triumphant in ethics and jurisprudence as they are in mathematics and geometry: “[T]he reason why we make mistakes so easily outside of mathematics (where geometers are so felicitous in their reasonings) is only because in geometry and the other parts of abstract mathematics,” we can submit to tests or trials “not only the conclusion but also, at any moment, each step made from the premises, by reducing the whole to numbers.” But in “metaphysics and ethics” matters are “much worse” because we can test conclusions only in “a very vague manner” (Leibniz 1951c, 50–1).

<sup>11</sup> Cf. Leibniz’ *Observations on King’s The Origin of Evil*, in Leibniz 1952, 428–9.

The only way to “rectify our reasonings” in the practical sphere, Leibniz then suggests, is to make them “as tangible as those of mathematics,” so that “we can simply say: Let us calculate, without further ado, to see who is right.” Such a procedure could work “if words were constructed according to a device that I see as possible”—namely, using “characters,” as mathematicians do, to “fix our ideas” by “adapting to them a numerical proof.” For by this means “after reducing reasoning in ethics [...] to these terms or characters, we shall be able at any moment to introduce the numerical test in such way that it will be impossible to make a mistake except willfully” (Leibniz 1951c, 51, C 176).

How could this *calculemus* work best in ethics? Plainly if the gap between ethics and mathematics were as small as possible, or even successfully bridged: If (for example) justice were a matter of proportion, order, and (mathematics-based) harmony, or if at least our love, the basis of *caritas sapientis*, were truly “proportional” to the degree of perfection found (and felt) in the loved object or subject. Hence Leibniz uses the mathematical language of degree and proportion whenever he can, and bemoans the fact—in the *True Method in Philosophy and Theology* (1686)—that others do not do so as well.

Geometry clarifies configurations and motions; as a result we have discovered the geography of lands and the course of the stars, and machines have been made which overcome great burdens, whence civilization and the distinction between civilized and barbaric people. But the science which distinguishes the just man from the unjust [...] is neglected. We have demonstrations about the circle, but only conjectures about the soul [...] the source of human misery lies in the fact that man devotes more thought to everything but the highest good in life. (Leibniz 1951a, 59; original in Leibniz 1959, 109)

Why, then, given so much Platonism in Leibniz’ thought—including what he says about knowing and learning—should Leibniz not be, more than any modern philosopher, a footnote to Plato? Simply because Leibniz, as a Christian descended partly from Augustine, needs to place good will or *bona voluntas* somewhere in his universal jurisprudence; not only does he place it, however, he makes it equal to wise charity itself.<sup>12</sup> And a pure Platonist would never equate the sublimated *eros* of the *Phaedrus* (which wisely ascends to *philosophia*; *Phaedrus*, 256b, on page 501) with *will*, whether good or not. For Plato’s *Protagoras* rules out a will which is independent of knowledge and wisdom (*Protagoras*, 325b–353a, on page 344). There are simply parts of Leibniz’ ethics that Platonism cannot accommodate at all; for *caritas sapientis* contains Plato and St. Paul, Athens and Jerusalem.

Nevertheless Leibniz’ thought is quite inconceivable without its almost-dominant Platonic component; he does insist, after all, that “the doctrine of

<sup>12</sup> For example in the *Codex Iuris Gentium*, Praefatio sec. xi; translation in Leibniz 1988a.



Plato concerning metaphysics and morality [...] is holy and just,” and that “everything he says about truth and the eternal ideas is truly admirable” (*Letter to Huet*, 1679, Dutens V, 458ff. [Leibniz 1768b]). If Pauline charity and Augustinian *bona voluntas* are also crucial (not to mention the whole of modern science and mathematics), that just helps to prove the synthetic quality of Leibniz’ thought (which he himself insisted on) (*New Essays*, Preface, in Akademie VI, 6 [in Leibniz 1923–2004]).

## 6.2. Leibniz on Justice as an “Ascent” to Charity and Benevolence

Leibniz was precisely too well trained a lawyer and too good a jurisconsult not to be well aware that charity might be viewed as “beyond” justice, as something supererogatory: as something meritorious, indeed, but not strictly “due.” His answer to this charge is in the *Meditation on the Common Notion of Justice*, and rests on the idea of a *continuum*: If you grant, as even Hobbes does, that evil ought not to be done—harming others, refusing to give what is due—you can be brought to be positively benevolent or charitable, since there is no absolute break between the negative and the positive.

Some people, Leibniz argues in the “Meditation,” aim for a very restricted and negative notion of justice:

Now I observe that some people restrict, and that others extend the reasons for human complaints. There are those who believe that it is enough that no one does them harm, and that no one deprives them of anything they possess, and that one is not at all obliged to procure the good another, or to arrest evil, even if this would cost us nothing and would not cause us any pain. Some who pass for great judges in this word, keep themselves within these limits; they content themselves with not harming anybody, but they are not at all of a humor to improve people’s conditions; they believe, in a word, that one can be just, without being charitable. (Leibniz 1988b, 53–4)

But there are (fortunately) others, he goes on, “who have larger and finer views,” who would not wish that anyone complain of their lack of positive goodness.

They would approve what I have put in my preface to the *Codex Iuris Gentium*, that justice is nothing else than the charity of the wise, that is to say goodness toward others which is conformed to wisdom. And wisdom, in my sense, is nothing else than the science of felicity. It is permitted that men vary in their use of terms, and if someone wishes to insist on limiting the term *just* to oppose it to that of *charitable*, there is no way of forcing him to change his language, since names are arbitrary. However, it is permitted that we inform ourselves of the reasons which he has for being what he calls just, in order to see whether the same reasons will not bring him also to be good, and to do good. (Ibid., 54)

It is fairly widely agreed, Leibniz thinks, that “those who are charged with the conduct of another, like tutors, directors of societies and certain magistrates,” are “obligated not only to prevent evil but also to procure the good”:

One will perhaps wish to doubt whether a man free of commitments or a sovereign of a state has these same obligations [...] but has one not reason to fear that men will hate us if we refuse them aid which does not inconvenience us at all, and if we fail to arrest an evil which is going to overwhelm them? Someone will say: I am content that others do not harm me, I do not ask at all their aid or their beneficence and I do not want to do or to claim more. But can one hold to this language sincerely? Let him ask himself what he would say and hope for if he should find himself actually on the point of falling into an evil, which another could make him avoid by a turn of his hand. Would one not hold him for a bad man and even for an enemy, if he did not want to save us in this situation? (Ibid., 55)

Leibniz then answers his own question with a striking and picturesque “Oriental” tale:

I have read in a travelogue of the East Indies that a man being chased by an elephant was saved, because another man in a neighboring house beat on a drum, which stopped the beast; supposing that the former had cried to the other to beat [the drum], and that he had not wanted to out of pure inhumanity: Would he not have had the right to complain? (Ibid., 54–5)

But even if, Leibniz thinks, most people “will grant to me [...] that one must prevent evil for another, if one can do so conveniently,” still some will not agree “that justice orders us to do positive good to others”:

I then ask whether one is not obliged at least to relieve their ills? And I return again to the proof, that is to say to the rule, *quod tibi non vis fieri* [what you do not wish to have done to you]. Suppose that you were plunged into misery; would you not complain of him who did not help you at all, if he could do it easily? You have fallen into the water; he does not wish to throw you a rope to give you a means of getting out: Would you not judge that he is an evil man, and even an enemy? (Ibid., 55)

Leibniz then imagines an even more striking case, which he thinks might inspire a reasonable person to move from *neminem laedere* to *honeste vivere*:

Let us suppose that you are suffering from violent pains, and that another person had in his house, under lock and key, a healing-fountain capable of relieving your ills: What would you not say and what would you not do, if he refused to give you some glasses of [this] water? (Ibid.)

At this point Leibniz falls back on the notion of a *continuum*, with no radical breaks or leaps:

Led by degrees, one will agree not only that men should abstain from wrongdoing, but also that they should prevent evil from happening and even relieve it, when it is done; at least insofar as they can without inconveniencing themselves (and I do not examine now how far this inconvenience may go). However, some will perhaps still doubt whether one is obliged to secure the good of another, even if one can do it without difficulty [...] But I wish to propose an intermediate case once again. A great good is going to come to you; an impediment appears; I can remove that impediment without pain: Would you not believe yourself to have a right to ask it of me, and to remind me that I would ask it of you, if I were in a similar position? If you grant me this point, as you can hardly help doing, how will you refuse the only remaining re-

quest, that is, to secure a great good for me, when you can do so without inconveniencing yourself in any way, and without being able to allege any reason for not doing it, except for a simple "I do not want to?" (Ibid.)

"You could you make me happy and you do not do it," Leibniz finally says; "you would complain in the same situation—thus I complain with justice."

This gradation, this moral *continuum* in which there is no break between negative forbearance and positive benevolence,

makes it clear that the same reasons for complaining subsist always; whether one does evil or refuses to do good is a matter of degree, but that does not change the species and the nature of things. One can also say that absence of good is an evil and that the absence of evil is a general good. Someone makes a request of you, be it to do or to omit something. If you refuse the request, he has reason to complain, since he can judge that you would make the same request if you were in the place of him who makes it. And it is the principle of equity, or, what is the same thing, of equality or the identity of reasons [*de la même raison*], which holds that one should grant [to others] whatever one would wish in a similar situation without claiming to be privileged, against reason, or [without claiming] to be able to allege one's will as a reason. (Ibid., 55–6)

Here, of course, for Leibniz, one cannot use one's will as a sufficient reason for conduct, any more than God can act willfully: Nonrational will is "tyranny" in a finite or infinite being. Having appealed to "reason," Leibniz now makes his way back to the terminology of Roman law, urging that

perhaps one can say, then, that not to do evil to another, *neminem laedere*, is the precept of law which is called *ius strictum*, but that equity demands that one do good as well, when it is fitting, and that it is in this that the precept consists which orders that we give each his due: *suum quique tribuere*. But this fitness, or what is due, is determined by the rule of equity or of equality: *quod tibi non vis fieri* [...] this is the rule of reason and of our Master. Put yourself in the place of another, and you will have the true point of view for judging what is just or not. (Ibid.)

These passages make it abundantly clear that in redefining justice as *caritas sapientis*, Leibniz was not unaware of usual ideas about justice, such as "strict law" and "rendering what is due." He keeps those, as the lowest and middle degrees of received "Roman" justice; but his continuum-ism (as it were) leads him higher and higher until justice and charity are virtually indistinguishable. But charity is introduced, in the *Meditation*, with great shrewdness: Leibniz relies not so much on Christian exhortation as on the notion of what reasonable people would ask for or complain of in everyday moral experience. It is not just "Rome" and "reason" that are appealed to, but garden-variety practice as well.

Leibniz' insistence that justice is a *continuum* stretching from the negative (*neminem laedere*) to the positive (*honeste vivere*), and that such justice is bound up with a variety of Platonic notions—"higher love," quasi-mathematical harmonious order, and "eternal verity"—is unusual in a seventeenth century dominated by English contractarianism, but not absolutely unprecedented: For there is a key passage in Augustine's *City of God* which strongly

foreshadows Leibnizian universal jurisprudence in its drawing together of Pauline, Platonic, and Roman jurisprudential ideas. The Bishop of Hippo Regius urges that:

Peace between human beings and God comes from ordered obedience in faith to the eternal law, which peace between human beings is ordered harmony [...] [It is] the more ordered and harmonious society of those who enjoy God and each other in God [...] God the teacher gives us two major precepts: the love of God and the love of our neighbor, through which we find three things to love: God, ourselves, and our neighbors. Thus when we love God we do not err in loving ourselves, and, in addition, we advise our neighbor, whom we are ordered to love as ourselves, to love God. And we would want our neighbor—be it wife, son, servant or whoever is able—to do the same for us if we are in need. In this way we will be at peace, as far as we are capable, with all people. This is the harmony whose order is, first of all, never to harm anyone, and, secondly, to aid whomever we can. (Augustine, *De Civitate Dei*, XIX, 13–5)

If this passage were interpolated into Leibniz' *Meditation on Justice* or *Codex Iuris Gentium*, it would not greatly obtrude: For while Augustine speaks of "peace" more than does Leibniz, almost everything else in this part of the *City of God* is "proto-Leibnizian." The stress on "harmony" and "eternity" descends to both Augustine and Leibniz from Plato's *Phaedo*, *Republic*, *Philebus*, and *Timaeus*; the stress on "enjoyment" (*delectio*) is as strong in Leibniz as in the Bishop of Hippo; in both Augustine and Leibniz a measure of self-love is permitted (in contrast to the self-abnegation of Fénelonian "quietism"); the "place of others" is acknowledged by Augustine ("we would want our neighbour [...] to do the same for us") in a way that Leibniz could approve; and finally the Platonic "harmony" and "order" which Augustine and Leibniz equally cherish turns out to dictate the very maxims of Roman law ("never to harm anyone," "to aid whomever we can") which Leibniz called *la raison écrite*. Small wonder, then, that in *De Religione Magnorum Vivorum* (ca. 1687–1694), Leibniz could praise the *City of God* for the "*sententia S. Augustini*" that "*Deus omnia faevat optimo modo* [God does everything in the best way" (Leibniz, *De Religione Magnorum Virorum*, Grua I, 39 [in Leibniz 1948d]). (This is not to say, however, that Leibnizian optimism is congruent with the darker, proto-Jansenist side of late Augustinianism: Though Leibniz himself was both a juriconsult and a judge, he seems never to have reflected, at least in writing, on the harrowing passage in which Augustine—speaking of the well-meaning judge who tortures the innocent to death in search of the truth—finally says that "though we acquit the judge of all malice, nonetheless we must admit that human life is miserable"; *De Civitate Dei*, XV.)

To be sure, one can always ask whether Leibniz thought that "higher" justice, wise charity, and benevolence (Augustinian "aid") were legally enforceable (or even capable of being "institutionalised"). Here, however, the fact that Leibniz did not place the main stress on mere legal constraint makes this less problematical than it would be in one who (all but) equates justice with law and then views law as authoritative sovereign command backed by sanctions—

such as Hobbes. (On this point Schneewind is right when he says that law is not as central for Leibniz as it is for a demi-Hobbesian such as Pufendorf Schneewind 1987, 150–2.) In the end, then, Leibniz finally said about justice as wise charity what he had said as early as 1670, in the *Juris et aequi elementa*:

There are two ways of desiring the good of others, the one when we desire it on account of our own good, the other when we desire it as if it were our own good. The first is the way of him who esteems, the second of him who loves; the first is the feeling of a master to his servant, the second that of a father to his son; the first is the feeling of a man towards the tool he requires, the second that of friend to friend; in the first case the good of others is sought for the sake of something else, in the second for its own sake. (Leibniz 1885, *Juris et aequi elementa*, 30)

### 6.3. A Provisional Overview

Obviously a social world fully and completely governed by the Leibnizian principle of justice as “wise charity” would be a good one, and certainly better than our present social world: If wise charity (*caritas sapientis*) or “universal benevolence” actually shaped private social relations, the domestic policies of states, and international conduct between states, that would constitute not just getting beyond chaos and violence, but also the transcendence of the merely legalistic justice that Hume deplored but thought inescapable. (“If every man had a tender regard for another,” Hume says in the *Treatise of Human Nature*, “[then] the jealousy of interest, which justice supposes, could no longer have place [...] Increase to a sufficient degree the benevolence of men [...] and you render justice useless”: Hume 1951b, Book III, pt. ii, chap. 4. Leibniz’ “solution,” famously, is to *equate* justice and benevolence.)

A final concluding word: Leibniz’ insistence that justice is *caritas sapientis*, and that wise charity is coextensive with “universal benevolence,” would not have astonished ancient and early-Christian writers who linked justice with friendship, love, affection—Plato, Aristotle, Cicero, St. Paul, St. John, Augustine. (Much of Book VIII of Aristotle’s *Nicomachean Ethics*, for example, treats the close relationship of justice and friendship; and his *Politics* insists that “community depends on friendship”; *Politics*, III, 1270b ff. )

But in modernity all of this has become unfamiliar at best, and alien at worst: Machiavelli urges that in politics it is more important to be feared than loved, and says that a new prince must be ready to act “against charity” in the pursuit of historical greatness; Hobbes treats charity as thinly veiled lust masquerading as principle, and argues that “the passion to be reckoned upon its fear”; Rousseau views Christian ethics of universal love as worthy but as inimical to Spartan-Roman, civic virtue (“Christianity creates men rather than citizens”); Nietzsche interprets Christian ethics (and even Socratic morality as attacked by Callicles in *Gorgias*) as weakness and plebeian resentment, “rationalized” into charity and humility; Freud views love as a “libidinal” tie which cannot be stretched beyond a small commu-

nity, and which in any case is just “aim-inhibited” sexuality (whose repression leads to neurosis and violence). Even a supreme early modern Christian such as Pascal, who gives absolute primacy to charity in the *Pensées*, views that love as transcendent and supernatural (“of another order”), with no bearing whatever on an earthly politics which is only “fleshly” and force-governed—the realm of illusion and *divertissement*. (For Leibniz, by contrast, “true politics cannot be distinguished from charity, and a great prince cannot be better served than when the happiness of the people makes up his own”; cited in Robinet 1994, 309; original (1695 ca.) in Akademie I, xi, on page 166 [in Leibniz 1923–2004].) In many ways Leibnizian “wise charity” is the last flowering (or last gasp) of a long and distinguished Graeco-Roman-Christian tradition which was to be definitively overturned by Hume, Rousseau, and Kant no more than a half-century after Leibniz’ death. (Voltaire’s *Candide* shows that by the 1750s it was wise and witty to say that only an *idiot savant* such as Dr. Pangloss could possibly imagine that this is the “best” possible world and that a justice of charity and benevolence regulates it. (Leibniz epitomized a world view which was on the edge of extinction; Hegel might have been thinking of Leibniz’ effort to reanimate Christian Platonism when he said that “the owl of Minerva takes flight only with the falling of dusk”; Hegel 1942, Preface, xii–xiii).

And yet who can doubt that the world would be better if Leibnizian universal jurisprudence were in place—if every rational substance in the universe not only refrained from harm but rejoiced in the “perfection” of others? Who can doubt that the world would be best if wise charity and universal benevolence actually prevailed? Only an ungenerous heart would fail to be moved by so generous a moral vision.

#### **6.4. Justice as Wise Charity: Leibniz contra Hobbes, Locke and (Especially) Pascal**

The distinctiveness of Leibniz’s highly original insistence that justice is “the charity of the wise” can be brought out by contrasting his notion of *caritas sapientis* (or “general benevolence”) with the way in which three of his celebrated contemporaries (Hobbes, Pascal and Locke) relate justice and charity. Put briefly: Hobbes views charity as falling beneath justice because it is really “lust” masquerading as a moral principle (Hobbes 1928, 34); Pascal views charity as soaring above justice because justice is mere positive law on “one side of the Pyrenees” or the other (Pascal 1961a, 83); Locke views charity as merely modifying legal justice in cases of extreme “want” (Locke 1967, *First Treatise*, Parts 41–2, 187–99). (Here Locke, as ever, is most cautious and traditional.)

And here, too, as ever, Hobbes is most radical: An examination of his notion of love or charity (in *The Elements of Law*) immediately makes it clear

why he could not have viewed justice as *caritas sapientis*. For while the idea of “sapience” survives in Hobbes (as knowledge of causes, not of Leibnizian “sufficient reason”), love or charity is reduced not just to lust but to homosexual lust—scarcely a promising foundation for celebrating “the charity of the wise.” (And then Augustinian *bona voluntas* suffers as hard a fate as *caritas*: two pillars of orthodox Christianity totter simultaneously.)

Beginning by equating good will with charity, Hobbes observes that “there can be no greater argument to a man, of his own power, than to find himself able not only to accomplish his own desires, but also to assist other men in theirs: and this is that conception wherein consisteth charity” (Hobbes 1957, chap. 5, on page 30). For Hobbes charity or good will is a kind of generosity *ex plenitudo potestatis*: It is what one can spare out of one’s superfluous power. Hobbes goes on to discuss the most famous case of alleged charity or good will—Socrates’ “assisting” of Alcibiades—in a way that turns that good will into something of near-Shakespearean bawdiness, mainly by playing with the words “conception” and “conceive” in the same way that he later shaped his ribald definition of sense-perception in *Leviathan*: “There is no conception in a man’s mind which hath not [...] been begotten upon the organ of sense” (ibid.). The opinion of Plato concerning good will or “honorable love,” Hobbes argues, “delivered according to his custom in the person of Socrates,” is that

a man full and pregnant with wisdom and other virtues, naturally seeketh out some beautiful person, of age and capacity to conceive, in whom he may, without sensual respects, engender and produce the like. And this is the idea of the then noted love of Socrates wise and continent, to Alcibiades young and beautiful [...]. It should be therefore this charity, or desire to assist and advance others. But why then should the wise seek the ignorant, or be more charitable to the beautiful than to others? There is something in it savouring of the use of that time: in which matter though Socrates be acknowledged for continent, yet the continent have the passion they contain, as much and more than they that satiate the appetite; which maketh me suspect this Platonic love for merely sensual; but with an honourable pretence for the old to haunt the company of the young and beautiful. (Ibid.)

So much for charity or good will in this uncharitable parody or Plato’s *Symposium*; in *The Elements of Law* the concept is closer to that in Lucian’s *Philosophies for Sale* (on pages 322–3) than to that in the Gospel according to St. John. (Thus it is not surprising that Hobbes should define justice not as wise charity but as law made by an “authorized” sovereign; Hobbes 1957, chap. 13, on page 83.)

If Pascal is saved for slightly later, it remains for the moment only to refer to Locke; and what he says about the relation of justice to charity is that “as justice gives every man a title to the product of his honest industry,” so too “charity gives every man a title to so much out of another’s plenty as will keep him from extreme want, where he has no means to subsist otherwise.” Locke insists that the plentiful man is required by God “to afford the wants of his

brother,” and goes on to complain of those who are “cruel and uncharitable”: God has “given his needy brother a right to the surplusage of his goods, so that it cannot be *justly* denied him, when his pressing need calls for it” (Locke 1967, 42–3). In the first passage, justice defined as “a title to the product of honest industry” is merely modified by charity to relieve “extreme want”—an extreme want which may not exist at all, if everyone manages to gather sufficient plums and nuts without letting anything go to waste, and leaves “as much” which is “as good” for future appropriators (*ibid.*, “Second Treatise,” parts 28ff., on pages 306ff.). Justice as an earned “title” to property is the Lockean rule, and charity modifies that rule if unfavorable circumstances so dictate. But if those circumstances never arise, if plums are universally plentiful, then charity will not even modify justice—much less become the core of justice, as in Leibniz.

Interesting as may be the comparison of Leibniz’s notion of *caritas sapientis* with the love-conceptions of Hobbes and Locke, the most important comparison must be with Pascal: For Pascal in the *Pensées* gives absolute primacy to *la charité*, but absolutely denies it any place at all in mere earthly politics. He agrees with Leibniz about the central moral weight of *caritas*, but walls that supreme “order” off from contamination by *la politique*. For Pascal men live in three “orders” simultaneously: the lowest order, that of the “flesh,” is miserable and requires constant *divertissement* to allay reflection and despair; the middle order, that of mind or *esprit*, encompasses intellectual activities (including Pascalian geometry); the highest order is that of charity or *la volonté* and is “infinitely” separated not just from “mind” (which at least knows its infinite misery) but even more decisively from the flesh (which is mindless matter).

The infinite distance between body and mind is a symbol of the infinitely more infinite distance between mind and charity; for charity is supernatural [...]. All bodies, the firmament, the stars, the earth and its kingdoms, are not equal to the lowest mind; for mind knows all these and itself; and these bodies are nothing. All bodies together and all minds together, and all their products, are not equal to the least feeling of charity. This is of an order infinitely more exalted. From all bodies together, we cannot obtain one little thought; this is impossible, and of another order. From all bodies and minds, we cannot produce a feeling of true charity; this is impossible, and of another and supernatural order. (Pascal 1961a, no. 792, on pages 326–7)

Now what is characteristic of Pascal is that he consigns politics and law wholly to the lowest, fleshly order: It is simply a matter of power, force, and useful illusions (“three degrees of latitude overturn the whole of jurisprudence”); but love is saved for the saved, a body “full of thinking members” held together by the spiritual gift of *la charité* (*ibid.*). Jurisprudence can hardly be “universal,” à la Leibniz, if three degrees of latitude “overturn” it altogether. Pascal drives to brilliant extremes fleshly politics and supernatural *caritas*: They are separated by a fearful infinity (“the eternal silence of these infinite spaces terrifies me”; *ibid.*, nos. 483ff., on pages 258ff.), and Christian love has no effect on a carnal sphere



in which “force is Queen”; *ibid.*, no. 206, on page 211). Politics is part of a fallen nature, but supernatural grace is needed for the infinite ascent to charity: When Pascal called himself an “Augustinian,” as did all Jansenists, he knew whereof he spoke (Sellier 1963, *passim*).

By contrast Leibniz strives to close up the “infinite distance” separating politics and charity: Politics, “mind,” and *caritas* converge in a kind of synthetic middle. No doubt this accounts for Leibniz’s collapsing of everything that Pascal tried to keep infinitely distanced, as one of Leibniz’s letters to Thomas Burnett (from ca. 1696–1697) shows clearly:

The fine accomplishments of M. Pascal in the most profound sciences [mathematics and geometry] should give some weight to the *Pensées* which he promised on the truth of Christianity [...] [But] besides the fact that his mind was full of the prejudices of the party of Rome [...] he had not studied history or jurisprudence with enough care [...] and nonetheless both are requisite to establish certain truths of the Christian religion. (Leibniz, *Letter to Thomas Burnett*, in Leibniz 1875–1890, III, 196)

Evidently Leibniz either missed Pascal’s point altogether, or (more likely) thought it wholly misconceived. For Leibniz universal, latitude-crossing jurisprudence and universal religion are grounded in the same rational eternal verities, while for Pascal the impotence of reason (as revealed by Montaigne in the *Essais*) drives one to fideism: “God of Abraham, God of Jacob, God of Isaac, not of the philosophers and the theologians” (cited in Sellier 1963, 217). For Pascal, St. Paul was right to ask, “Where is the wise” and to cling to “faith, hope, charity, these three.” Leibniz had an equal reverence for Greek philosophy and for Pauline charity, but his synthetic moderation made him incapable of appreciating Pascal’s tortured extremism. Indeed Leibniz, who maintained that “men usually hold to some middle way” (Leibniz, *Caesarinus Fürstenerius*, chap. 11, in Akademie IV, 2, on pages 58ff. [in Leibniz 1923–2004]), would have approved Apemantus’s remark to the protagonist of Shakespeare’s *Timon of Athens*: “The middle of humanity thou never knewest, but the extremity of both ends” (*Timon of Athens*, act 4, scene 3, on page 300–1). The Leibnizian fusion of Greek *philosophia* and Christian *caritas*, linking Athens and Jerusalem, comes out in a characteristic paragraph which Leibniz wrote for the *Journal des Savants* in 1696:

Our perfection consisting in the knowledge and in the love of God, it follows that one advances in perfection in proportion as one penetrates the eternal verities, and as one is zealous for the general good. Thus those who are truly enlightened and well intentioned work with all their power for their own instruction for the good of others; and if they have the means they strive to procure the increase of human enlightenment, Christian virtue, and the public happiness. This is the touchstone of true piety. (For *Journal des Savants*, 1696, in Akademie I, 13, 232 [in Leibniz 1923–2004])

That final Leibnizian fusion of “human enlightenment,” “Christian virtue,” and “the public happiness” would be, for Pascal, an obvious collapsing of

“the three orders” into one another: For Christian virtue is isolated in the charitable sphere of *la volonté*, the “public happiness” is just gratified “flesh,” and enlightenment is simply *esprit*. It is as if Leibniz were consciously knocking out the supporting walls that sustain Pascal’s ascending hierarchy.

In the *Pensées* (Pascal 1961a, no. 481, on page 257), indeed, Pascal deliberately distances *la charité* even from “good” politics by saying that while the deaths of the “noble Lacedaemonians” (the Spartans fighting under Leonidas against the invading Persians) “scarcely touch us,” the deaths of the Christian martyrs do touch us—because the martyrs are “our members” (members of the spiritual body of Christ). Leibniz, by contrast, would never try to dig a gulf between social benefactors such as self-sacrificing Leonidas (saving Greek civilization from Persian “barbarism”) and Christian “martyrs”: On the contrary, Leibniz tries to find and encourage charity everywhere (for example, in Peter the Great of Russia); and there is as little room for martyrs in Leibniz’s thought as there had been for Malebranchian blood, crosses, and “perfect victims.” Pascal is simply too sectarian for Leibniz, as is clear in his complaint about the “prejudices of the party of Rome” in Pascalianism. For Leibniz “we” is a much broader concept than in Pascal: It is universal, and for Leibniz “our members” are all the rational substances or monads who are citizens of the divine monarchy of the “best” world. There is a sense, to be a sure, in which Pascal is a more authentic “Pauline” thinker than Leibniz: For Pascal always relates charity (from I Corinthians 13) to be body and its members (from I Corinthians 12)—the spiritual body of Christ (“imagine a body full of thinking members”; Pascal 1961b, Letter 6). Leibniz does not exactly secularize charity, but he makes it a universal moral-political-legal-scientific principle, and then often settles for rather attenuated forms of it. Pascal’s radicalism has no room for such latitudinarian accommodativeness.

Then, too, the attitudes of Leibniz and Pascal toward the Jesuits are very revealing: Pascal views Jesuits precisely as “Jesuitical,” and in the *Provincial Letters* treats them as opportunistic hypocrites who try to destroy the charitable maxim, “Give to others out of your superfluity”—by showing that one cannot be absolutely certain that future poverty will never come about. By contrast Leibniz corresponded with Jesuits such as Grimaldi and des Bosses, and tried to accommodate his own views to theirs (insofar as he could without actually capitulating) (Leibniz, *Letter to des Bosses*, in Leibniz 1875–1890, II, 435–7). To be sure, Pascal’s personal practice of charity went well beyond Leibniz’s “benevolence”: Pascal gave up not just superfluity but the essential when, near the point of death, he moved out of his own house in order to help a needy family. Leibniz’s “general benevolence” never reaches that point—the point of true saintliness.

## 6.5. The Legal Philosophy of Christian Wolff

### 6.5.1. Introduction

The thought of Christian Wolff (1679–1755) is often said to be “Leibnizian”; indeed the phrase, “Leibnizian-Wolffian philosophy” is frequently found in histories of philosophy, and as late as the 1790s Kant’s new “critical” philosophy was sometimes attacked as “a degenerate product of Leibnizian-Wolffian thought” (Latta 1989, xxi–xxii). While Wolff and Leibniz certainly have some affinities—both can reasonably be called “rationalists” and “perfectionists,” and both strongly oppose Pufendorf’s legal “voluntarism”<sup>13</sup>—it is especially unhelpful to view Wolff as fundamentally Leibnizian in the field of law and jurisprudence. For the central idea in Leibniz’ *jurisprudence universelle* is that justice (rightly conceived) is *caritas sapientis seu benevolentia universalis* (“the charity of the wise, that is, universal benevolence”), and that through demi-Platonic “wise” love one should “ascend” (in the manner of Plato’s *Symposium* and *Phaedrus*) from mere negative forbearance from harm and violence to positive, other-aiding *caritas* and *benevolentia*.<sup>14</sup> (Leibniz, indeed, characterized Platonic ethics as not merely “just” but *holy* (Leibniz, *Letter to Huet*, 1679: Leibniz 1768b), making the great Athenian a kind of proto-saint *avant la lettre*.) But it is precisely any trace of neo-Platonism or demi-Platonism which is visibly missing in Wolff’s thought; as will be seen, Wolff owes more (especially in the philosophy of law) to Aristotelian-Thomistic “scholasticism” than to the Christian Platonism of Leibniz. To make this clear, a brief recollection of Leibnizianism will be helpful; one can then move on to Christian Wolff himself, and show that his intellectual debt to Leibniz has much exaggerated—above all when *iurisprudentia universalis* is at issue.

### 6.5.2. Wolff and Leibniz

Leibniz’ moral-political-jurisprudential universe is justly ordered, because God gives the monads their direction; it is the perfections of God to which the monads are drawn where “the apex of metaphysics and that of ethics are united in one” (Leibniz 1976c, 676). We have seen earlier how Leibniz defined justice in demi-Platonic terms as “the charity of the wise”; but if we move behind this central concept, then we see that *caritas* is no more than the “wise” love of the perfections we recognise *in others* [“la place d’autrui”] which are themselves pale reflections of the perfections of God to which we all aspire and tend: “[S]ince the divine happiness is the confluence of all per-

<sup>13</sup> For Leibniz’ anti-voluntarism, see his Leibniz 1988d, 74ff.; original in Dutens IV, iii, 275ff. (Leibniz 1768d).

<sup>14</sup> See Leibniz 1988a, 165ff.; original in Dutens IV, 4, iii. (Leibniz 1768a)

fections, and pleasure is the feeling of perfection, it follows that the true happiness of a created mind is in its sense of the divine happiness” (Leibniz 1976d, 966). The correlate of this principle within the theory of monadology was the natural propensity of substance to strive actively for perfection.

This striving for perfection was seen in a distinctly neo-Platonic light as the struggle for reunion of the created with its Creator, God, “as to our Master and the final cause which must constitute the *whole end of our will, and which alone can constitute our happiness*” (Leibniz 1989, prop. 90, on page 194). Leibniz could say that:

One cannot know God as one ought without loving him above all things, and one cannot love him without willing what he wills. His perfections are infinite and cannot end. This is why the pleasure which consists in the feeling of his perfections is the greatest and most durable which can exist. That is, the greatest happiness, which causes one to love him, causes one to be happy and virtuous at the same time [...] This knowledge should make us envisage God as the sovereign monarch of the universe whose government is the most perfect state that one can conceive [...] where all right becomes fact. (Leibniz 1988b, 42ff)

As T. J. Hochstrasser has rightly said in his superb *Natural Law Theories in the Early Enlightenment*:

The doctrine of pre-established harmony acts within this system as a gloss which attempts to meet outstanding dualist objections. Leibnizian rationalism required that there be some account of cause and effect within his system, but this seemed difficult to demonstrate given the axiomatic independence of the monads that left each as its own *infima species*. It was therefore necessary for Leibniz to argue that it is part of the divine purpose to establish a pre-programmed harmony that itself provides the explanation for the “concomitance” between cause and effect. Monads express their own unique characteristics, but in a perfect harmony that has the appearance of causal interactions.

Imagine two clocks or watches which are in perfect agreement. This agreement can come about in three ways. The first consists of a natural influence [...] The second method [the way of assistance] would be to have the clocks continually supervised by a skilful craftsman who constantly sets them right. The third method is to construct the two clocks so skilfully and accurately at the outset that one could be sure of their subsequent agreement. (Hochstrasser 2000, 160–1)<sup>15</sup>

And Hochstrasser goes on to add, very helpfully, that

For Leibniz, metaphysics, theology and ethics were intimately linked and even interdependent. Neo-Platonism was the means by which these apparently disparate elements were reconciled. The doctrine of pre-established harmony, and the theory of monadology in general, could not in Leibniz be held to lead towards a “Spinozistic” atheism since at all points one comes up against “divine anticipatory artifice [...] as if, over and above his general concurrence, God were for ever putting in his hand to set them right.” But were this neo-Platonic framework to be removed, and the focus upon God to be shifted, then these accusations would immediately begin to have purchase and force. (Ibid., 161)

<sup>15</sup> See also Riley’s review of Hochstrasser: Riley 2000.

This neo-Platonic dimension was lacking in Wolff's account, for Wolff produced a much more limited definition of substance striving merely for *self-perfection* instead of seeking "reunion" with the divine. This was much closer to Aristotle's teleological theory of potentiality; and this dependence may loosely be attributed to the fact that these Aristotelian traditions were more readily assimilable within Wolff's strictly deductive overall framework, whereby he sought to generate a systematic philosophy from a few basic logical principles. It may also be attributed even more directly and particularly (as Hochstrasser especially has stressed) to the results of his early reading and to this failure, even in the course of a lengthy correspondence, to engage fully with the metaphysics of Leibniz (Wolff 1860, 20ff.).

Wolff's abandonment of this aspect of Leibniz' God-embracing doctrine of substance led correspondingly to a sundering of the links between natural theology and practical philosophy. If the monad's pursuit of *Vollkommenheit* is seen not as a movement towards a higher order of perfection, the divine nature, but as a form of "perfecting" the human species, then the links between the monads and God are broken: once man's task is seen as that of self-perfection, then it swiftly follows that man's reason is erected as a self-sufficient guide to the nature and characteristics of that perfection.

Hochstrasser has once again got this exactly right in his *Natural Law*:

In his first published dissertation of 1703, *Philosophia Practica Universalis methodo scientifica pertractata*, Wolff had attempted to show that private good, public good and the glory of God were all related under the formula of means to end, a stance that was certainly compatible with Leibnizian metaphysics. But in the course of a correspondence with Leibniz initiated when the latter had been sent Wolff's dissertation for an opinion, this formula was replaced by a relationship of part to whole in which each creature's striving to perfection is now seen as a matter of self-realisation: God not only directs all his actions toward the summit of his own perfection within himself, and outside of himself to the perfection of any and every creature in its own way; but he also wishes man to direct his action to this end.

But this striving to perfection of the individual increases general perfection, and does not harm the development of the whole. Leibniz commented that Wolff seemed not to have fully appreciated the meaning of his theory of pre-established harmony; but the correspondence indicates that at this stage in his development Wolff saw more hope for the reformation of German philosophy in mathematical enquiry than in metaphysics: "There is nothing I desire more than that the study of mathematics and of sound philosophy should flourish in our Germany. For sure, so far as I am concerned I shall not let slip anything I shall have judged advantageous to promote the public good, as far as it lies within my power."

Leibniz' system was more of a quarry of ideas for this purpose than a finished self-sufficient model worthy only of reverence and a more popular exposition. (Hochstrasser 2000, 162)

The consequences of these Aristotelian scholastic principles for Wolff's account of human ethics may be seen immediately in his doctrine of natural law. Wolff starts from the position that the principles of ethics are presupposed by those of metaphysics: "ethics can be directly linked to metaphysics" (Wolff 1973a, *Ausführliche Nachricht* # 6, on page 11). In ethics, therefore, it is the principle of perfection (*Vollkommenheit*) that must be carried over and ap-

plied in the context of morals: “Therefore the concept of perfection is the source of my practical philosophy” (Wolff 1973b, *Philosophia Moralis sive Ethica*, vol. 5, Praefatio). If one grants that all substances are active, purposive forces, then it must follow that all human actions pursue the goal of perfection or its negation imperfection for man’s external and internal condition: “The free actions of men promote either the perfection or imperfection of his inner and outer condition” (Wolff 1976, *Vernünfftige Gedancken*, # 6–7, on pages 7–8). Man then has the power of free will to follow perfection or imperfection as he chooses according to the light of his own reason (Wolff 1965–1996, vol. 3: 219–20). Actions are not good or bad because God has legislatively ordained them so, but because they are intrinsically good or bad to the extent that they have assisted the perfection or imperfection of the individual (ibid.). Natural law consists, therefore, not in the arbitrary will of a superior, but in the ability of unaided human reason to make acts of moral discrimination automatically. Reason’s capacity for deductive thought gives access to natural law.

On this very point Hochstrasser goes on to add, very helpfully, that

Wolff acknowledges that he shares the scholastic belief in a *moralitas intrinseca et objectiva*, which stems from the *fons* of human reason. This scholastic principle is defended as *sententia communis* also by neoscholastic theologians such as Scherzer and Alberti, who maintain that there is an *intrinseca honestas actionum*. Wolff willingly aligns himself alongside all these predecessors: “It has been known for a long time that the reason why an action is good or bad, is to be found in the nature and essence of men: Not only have the scholastics defended this truth in the name of moral objectivity, but our theologians as well have fought for it with great zeal.”

He clearly sees current disputes over the source and obligation of natural law as akin to the quarrel between realists and nominalists in the Middle Ages. To the “realist” position outlined above he counterposes the “nominalist” position which he associates with the argument of the Pufendorian voluntarist tradition that good and evil cannot exist prior to their promulgation as law: “For sure the same doctrine has been taught amongst us from the beginning until gradually some people come along who accepted Pufendorf’s opinion that before law [was created] no action was good or bad, but only became so through law.”

Although Wolff himself wrote no “history of morality,” it is evident from his description here of his contemporaries, and his own strong identification with the scholastics, what its main conservative contours might have been. When Buddeus vehemently criticised him for reviving the *hypothesis impossibilis athei* of Grotius in his rectoral address at the University of Halle, Wolff riposted that he was simply highlighting the existence of *actiones per se honestae* that did not wholly rely upon a higher lawgiver, a doctrine with an impeccable pedigree which he had simply restated: “Enough that the thesis has good uses.” (Hochstrasser 2000, 164–5)

Wolff’s redeployment of the Grotian *etiamsi daremus*, however, was not as innocuous and conventional as he made it appear. It is true that in the context where he declares that the obligations of natural law “would take place in the same way if there were no God” he is doing no more than denying that any social consequences flow from the atheist’s rejection of the existence of God (Wolff 1976, *Vernünfftige Gedancken*, 7ff.). But in broader terms it is very difficult to see what role there is for God to play at all in Wolff’s theory of natu-

ral law. While he may stress that God is in some sense the original source of natural law, he can have little scope to intervene after planting the capacity to reason in man's mind (*ibid.*, 8ff.). The question is not whether God actually retains legislative power now that man can define laws for himself; but rather, whether God can even logically make such moves. For if man's goal is to seek *his own* perfection, and he has the means, as active rational substance, to identify that goal, how can God intervene to interfere with man's self-assessment? The impulse behind God's original gift of reason to man was a desire for greater perfection. On this principle he has already chosen the best of all possible outcomes.

The same God who created men who could reason independently to final natural law, must, by his very nature be basis of all real and possible things; and therefore the unalterable nature of natural law must be assumed. Beyond his initial act of Creation, however, God has been left little to do within the system: This is the direct result of Wolff's departure from the metaphysics of Leibniz which had kept the relationship between God and men close at every level of metaphysics and ethics; under a system grounded on self-perfection instead of "reunion with the divine" (through demi-Platonic "ascent"), God is redundant beyond the first postulates. Wolff thus narrows the scope of ethics to be simply the art of governing relations among men through agreed fundamental principles of human reason; he sees no connection between human conduct and man's teleological goal in Leibniz of harmony with the divine—something achieved at the end of a process in which man gradually comes to more and more clear representations of the truth of the universe that is contained in every substance (Wolff 1971, *Philosophia Practica*, vol. I, on page 178).

"If man's goal is self-perfection," Hochstrasser argues,

and his reason may provide him with the means to attain that aim, then Wolff's fundamental ethical doctrine of mutual furtherance quickly follows. Personal perfection cannot be obtained by one man's own selfish endeavours, and therefore it is entirely rational to assist the perfection of other men in the hope of gaining their assistance where it is needed: "Nature so entrusted every man to himself that by this commendation it at the same time commended every other man to him." There is therefore a second principle of natural law which can be enunciated to follow the first: "Man shall do what tends to the perfection of the world and omit to do what disturbs it." Thus by use purely of truths of reason accessible to every man, Wolff can promulgate a doctrine of unsocial sociability, that does not have to rely on belief in any innate sociability common to the human race. The twin goals of self-perfection and the perfection of the world are not in conflict. (Hochstrasser 2000, 166–7)

### 6.5.3. *Leibniz vs. Wolff*

The best way to appreciate the limitation of Wolff's "perfectionism" is to contrast it with the infinitely fuller and broader perfectionism of Leibniz; for Wolff's perfectionism (as has been shown) confines itself mainly to the earthly

self-perfection of finite human beings, while Leibniz' perfectionism by radical contrast views human self-perfection in the light of ascent to the "divine" and the "eternal." (From a Leibnizian perspective, Wolffian perfectionism is unnecessarily truncated and unreasonably attenuated.)

Leibniz was a "perfectionist" in ethics, law and politics as well as in metaphysics and theology: he took over and refined the Alseman argument that a perfect being exists necessarily (Leibniz, *Discours de métaphysique*, in Akademie VI, 4, 427 [Leibniz 1999]); he argued that that divine being creates the most nearly perfect ("best") world that is possible (Leibniz 1952, *passim*); he urged that essences have a "claim" to exist in proportion to the degree of their perfection (Leibniz 1989, prop. 54, on page 247); he said that love is a "feeling of perfection" in others, and that charity should be regulated by wisdom (which shows how much each person deserves to be loved because of his perfection)—and this notion of wise charity or *caritas sapientis* then becomes Leibniz' definition of justice itself: *justitia est caritas sapientis seu benevolentia universalis* ("Justice is the charity of the wise, that is, universal benevolence; Leibniz 1988a, 164ff.). Indeed for Leibniz the most general of all moral notions, "the good," is defined through perfection in his most important contribution to political philosophy, the *Meditation on the Common Notion of Justice*: "One may ask what the true good is. I answer that it is nothing else than that which serves in the perfection of intelligent substances: from which it is clear that order, contentment, joy, wisdom, goodness and virtue are good things essentially, and can never be evil" (Leibniz 1988b, 42ff.). Moreover Leibnizian wisely charitable rulers should "perfect" the state (and their subjects) by alleviating poverty and misery ("the mother of crimes"), by improving education through the founding of academies of arts and sciences, and by avoiding war (see Sève 1994, 221ff.; see above all Robinet 1994, 180ff.).

Leibniz' moral and political perfectionism, then, flows from (or at least is congruent with) his metaphysical and theological perfectionism: There is no gap between the theoretical and the practical—whereas by contrast in Kant finite rational beings know "the moral law" as an "apodeictic certainty" (the "fact of reason") but will never attain scientific knowledge of "things in themselves" (hence the primacy of "practical" over theoretical reason in Kant; Kant 1963, A592/B620). (It is not surprising, then, that Kant should urge in the *Tugendlehre* that we have a knowable duty to advance "our own perfection," even while he thought that the ontological argument deducing God's real existence from his "perfection" was indemonstrable and that the alleged "perfection" of the cosmos remained inaccessible to finite beings; Kant 1922d, 311ff.) It is right to insist on Leibniz' "perfectionism" as something that links every facet of his thought: metaphysical, theological, moral, legal, political, psychological. Leibniz at least aims at a harmonious unity in his own thinking, theoretical and practical, and sees it as an echo of the *harmonia rerum*. The proof that this view is right, indeed, can be found in Leibniz' own



words, in the *Memoir for Enlightened Persons of Good Intention* from 1692: "I put forward the great principle of metaphysics as well as of morality, that the world is governed by the most *perfect* intelligence which is possible, which means that one must consider it as a universal monarchy" (Leibniz, *Memoir for Enlightened Persons of Good Intention*, Akademie IV, 4 [in Leibniz 1923–2004], translation in Leibniz 1988a, 130ff.). There perfection both describes what is and prescribes what ought to be.

What is crucial, then, is to see now Leibniz' central moral-political convictions flow reasonably, and possibly irresistibly, from his "pure philosophy." The radically fundamental question in Leibniz is: "Why is there something rather than nothing?" (*Principles of Nature and Grace*, 1714); but to that he also returns a moral-political answer, or set of answers: God is there, *ex necessitatis*, because perfection (which includes moral perfection above all) entails automatic existence, and then that necessary being creates everything and everyone else in time by the moral principle of what is "best" (Leibniz 1952, 7ff.). The whole of Leibnizianism is one huge "theodicy," one vast "universal jurisprudence"—but theodicy is an account of what ought to be, what deserves to be, what has "sufficient reason" for being. To state it another way, it hardly matters whether one calls Leibniz a "theodicist" or a "monadologist," because God as creator of the "best" world is the just monarch of substances or persons or monads. At bottom Leibniz, like all the greatest philosophers, is a moralist (Kant 1963, A592ff., and the "Canon of Pure Reason").

This practical perfectionism emerges most plainly in Leibniz' *Observationes de Principio Iuris* from 1700, in which the claim that "God is the supremely perfect Being, and the supremely perfect distributor of goods" glides into the moral-jurisprudential assertion that "the intrinsic perfection or badness of acts, rather than the will of God, is the cause of justice," and that "the basis on which a certain action is by its nature better than another comes simply from the fact that a certain other action is by its nature worse, such that it destroys perfection, or produces imperfection" (*Observationes de Principio Iuris*, Dutens IV, iii [Leibniz 1768e]).

What matters for Leibniz the philosopher is not dozens of occasional pieces and *Flugschriften*, however accomplished: what matters is the metaphysics and theology of "perfectionism." And his moral-political philosophy is a crucial part of that perfectionism: God exists because perfection entails necessary existence, and the one necessary Being creates a best world justly—where justice itself is "wise love," and love in its turn is a "feeling of perfection." So Leibniz' universal jurisprudence of *caritas sapientis* is an integral part of his first philosophy; his political and moral ideas are not just a collection of *dissecta membra*, but true members of a philosophical *corpus* of weight and substance.

Certainly Leibniz understood himself to be a moralist above all, and was willing to say so in the *New Essays* of 1704: "You [Locke] were more conver-

sant with speculative philosophers, and I was more inclined toward ethics” (Leibniz, *Nouveaux essais*, in Akademie VI, 6 [in Leibniz 1923–2004]). Reflecting on this passage, Robert Mulvaney correctly reminds us that “Leibniz’ legal training, his preference for a career in the world rather than in the academy, his anxiety over the direction of European history, and, above all, his conviction, in the Platonic tradition, that broadly moral principles have ontological primacy should have led scholars all along to appreciate the central moral animation of Leibniz’ effort” (Mulvaney 1975, 61–82).

Leibniz will remain incomprehensibly strange, will perhaps even be thought guilty of “category mistakes,” if one fails to see that for him theory and practice, God and men, theology and justice, are welded together by perfection: The perfect Being, who exists *ex necessitatis*, must govern the created world as well as is possible (in the “best” way), and we (finite) beings must recognize and indeed feel that perfection (which leads to love as a feeling of perfection), and that love or *caritas* spreads from the perfect Being to those finite creatures whom he had “sufficient reason” to translate into existence. This incredibly ambitious universal jurisprudence, valid for any “mind” in any logically possible universe, must seem extravagant in our present moral-political world—in which a Rorty argues that political principles have (and can have) no metaphysical-theological “foundations” (Rorty 1982, 160ff.), and in which a Rawls wants to use only “thin” and widely shared assumptions to underpin his theory of justice (Rawls 1971, 15ff., 39ff). Leibniz’ universal jurisprudence is, by contrast, “thick”: It aims to deduce moral-jurisprudential perfectionism from metaphysical-theological perfectionism. It aims to present earthly justice as an outgrowth of universal justice, as the limb of a tree is the outgrowth of the trunk.

#### 6.5.4. *Leibniz’s Summary of His “Universal Jurisprudence”*

Leibniz drew together his reflection on justice as wise charity (linking up justice, *caritas*, *sapientia*, and “feelings of perfection”) in two crucial texts: the first, *Felicity*, from ca. 1694–1698, is more secular and psychological; the second, *True Piety*, from ca. 1710, is more conventionally Christian. But both serve to fix his final moral-political-legal ideas.

Leibniz’ most effective late effort to link up his metaphysics, psychology, and charitable ethics through the idea of “perfection” is contained in his notes on *Felicity*, in which he says that

Virtue is the habit of acting according to wisdom. It is necessary that practice accompany knowledge.

Wisdom is the sciences of felicity, [and] is what must be studied above all other things.

Felicity is a lasting state of pleasure. Thus it is good to abandon or moderate pleasures which can be injurious, by causing misfortunes or by blocking better and more lasting pleasures.

Pleasure is a knowledge or feeling of perfection, not only in ourselves, but also in others, for in this way some further perfection is aroused in us.

To love is to find pleasure in the *perfection* of another.

Justice is charity or a habit of loving conformed to wisdom. Thus when one is inclined to justice, one tries to procure good for everybody, so far as one can, reasonably but in proportion to the needs and merits of each: and even if one is obliged sometimes to punish evil persons, it is for the general good. (Leibniz, *La félicité*, Grua II, 579ff. [in Leibniz 1948d])

Love of others must be an extension of one's worthiest pleasure: an expansion of oneself, a generous taking in of others, not a Fénelonian negation of self, is required. Men must scale the continuum of pleasures; near the top, just beneath the love of God, they will find love of neighbor, on which justice turns. Leibniz' most eloquent summary of this view, in his letter concerning *True Piety*, 1710, urged that

Practice is the touchstone of faith. And it is not only what many people practice themselves, but what they make God practice, which betrays them.

They depict him as limited in his views, deranging and refashioning his own work at every moment, attached to trifles, formalistic, capricious, without pity with respect to some, and without justice toward others, gratifying himself groundlessly, punishing without measure, indifferent to virtue, showing his greatness through evil, impotent with respect to the good and willing it only half-heartedly, using an arbitrary power, and using it inappropriately; finally weak, unreasonable, malignant, and in a word such as they would show themselves when they have the power or when they think about having it: for they imitate only too much the idol which they adore. (Leibniz, *La véritable piété*, in Grua II, 499–500 [Leibniz 1948e])

*Idola tribus* take the place of the *imitatio Dei*: Perfectly unjust people fantasize a perfectly unjust God. By contrast with those people who “talk enough about the goodness of God while they destroy the idea of it,” true piety shows us that “one cannot love God who is invisible when one does not love his neighbor who is visible.”

Those who [...] reduce justice to [legal] rigor, and who fail altogether to understand that one cannot be just without being benevolent [...] in a word, not only those who look for their profit, pleasure, and glory in the misery of others, but also those who are not at all anxious to procure the common good and to lift out of misery those who are in their care, and generally those who show themselves to be without enlightenment and without charity, boast in vain of a piety which they do not know at all, whatever appearance they create. (Ibid.)

The sincerity of that heartfelt passage is impossible to mistake: It echoes Leibniz' defense of God's justice in the *Theodicy*, and reasserts the fundamental Leibnizian conviction that “universal right is the same for God and for men.” And the notion of “lifting out of misery” recalls Leibniz' ascent from *neminem laedere* to *caritas sapientis* by a flowing continuum of infinitely small degrees. *True Piety* represents the whole of Leibnizian ethics as surely as each monad expresses the whole of the “best” world.

### 6.5.5. Conclusion

Especially in the field of legal philosophy and jurisprudence, then, there is finally little reason to describe Wolff as a disciple of Leibniz. Despite their shared aversion to Pufendorfian legal voluntarism (even in its Thomasian reincarnation), despite their overlapping perfectionism (so much broader and richer in Leibniz than in Wolff), in the end their philosophies of law and justice are radically different. In Wolff's *iurisprudentia* there is no trace of neo-Platonic "wise-charity"; indeed there is (ironically) much more of *caritas sapientis* in Spinoza<sup>16</sup> than in Wolff (though Wolff and Leibniz were officially strongly anti-Spinozist). Although Wolff worked out a few concepts which Kant later used in different senses (above all "asocial sociability" and "perfect/imperfect duty"), it seems best to view the *jurisprudential* Wolff as a kind of demi-scholastic neo-Thomist. He simply abandons too much of Leibnizianism—above all the neo-Augustinian "Christian Platonism"—to count as a disciple of the great Hannoverian. In that sense, "Christian" Wolff was somewhat mis-named.

<sup>16</sup> See Nadler 1999, chaps. 4 and 5.

## Chapter 7

# MALEBRANCHE AND “CARTESIANIZED AUGUSTINIANISM”

### 7.1. Introduction

Nicolas Malebranche (1638–1715)<sup>1</sup> is, by general agreement, the greatest French philosopher between Descartes and Rousseau. And Malebranche’s *central* argument is that God (the only “necessary” being) governs the universe through simple constant “general laws” (*lois générales*) and “general wills” (*volontés générales*) which are constant, not through arbitrary, *ad hoc*, miraculous “particular wills.” In this sense Malebranche makes the constant rule of “general law” not just a legal-moral principle but a metaphysical-theological one: No-one ever, indeed, gave a more “divine” weight to law than Malebranche. And since Malebranche’s *general law* and *general will* shaped first Montesquieu and then (more crucially) Rousseau (“the general will is always right”), his *centrality* in French jurisprudence can hardly be overstated. Malebranche’s *Recherche de la généralité* dominates the 18th century jurisprudence of Montesquieu and of Rousseau.

One doesn’t normally think of Nicolas Malebranche as a “natural law” theorist, and indeed his main work on moral, legal, and political philosophy, the *Traité de morale* (1684), uses the term *loi naturelle* only a handful of (non-crucial) times. For this there is a reason: Malebranche began his philosophical life as a Cartesian,<sup>2</sup> and his efforts in practical philosophy put forward the (more-or-less) “Cartesian” argument that God governs the universe, justly, through simple, constant, uniform “general wills” and “general laws” (which should be imitated by human beings striving to avoid arbitrary, *ad hoc* “particular wills”; Malebranche 1958b<sup>3</sup>, 188ff.). But later in his life, possibly under the influence of his friend Leibniz, Malebranche increasingly weakened or abandoned Cartesian lawful *généralité* in favor of an “eternal” law (reason-given, changeless, universal) which had absorbed many of the attributes of traditional natural law—though here Malebranche follows Leibniz’s collapsing of “natural” and “eternal” law into each other (Leibniz 1965, 192ff.; see Robinet 1955, *passim*), deviating thereby from Thomistic orthodoxy (as will be seen). Since Malebranche was a Catholic priest who revered Augustine equally with Descartes, it is perhaps surprising that “natural law” should make only a *belated* appearance in his practical philosophy; he loved not Au-

<sup>1</sup> The best general treatments of Malebranche are Gouhier 1978 and Robinet 1965.

<sup>2</sup> See Alquié 1974, a magisterial study.

<sup>3</sup> Hereafter cited as *TNG*.

gustine less, however, but Descartes more. Only as he took on Leibnizian doubts about Cartesian moral thought—especially the Cartesian view that God *creates* moral (and all other) truth *ex nihilo*—did he move toward an unorthodox “natural/eternal” law which tried to fuse a Platonic notion of “eternity” with some surviving Cartesian remnants.

To make all of this clear, the wise course will be to begin with an account of Malebranche’s semi-Cartesian practical thought (in the 1670s and 1680s), then to move on to his increasingly Leibniz-colored “natural/eternal” law in the early years of the 18th century—above all in the *Réflexions sur la prémotion physique* (1715), in which “natural” and “eternal” law fully collapse into each other.

## 7.2. Malebranche’s “Legal” Theology

Given the radical theocentrism of Malebranche’s philosophy—in which God is the only “true” good and “true” cause, in which “we see all things in God,” in which God “moves our arm on the occasion” of our willing it (Malebranche 1958a, *passim*), in which existence is only “continual creation” by God, and in which nature is “nothing but the general laws which God has established” (TNG, 196)—it is to be expected that a theodicy (“the justice of God”) will be the central and governing moral-legal notion, in an almost Leibnizian way, and that this quasi-*Theodiceé* will then shape (say) the meaning of Christian love, the Pauline notion that “the greatest of these is charity” (I Corinthians xiii). And this expectation is borne out: for Malebranche a “love of union” should be reserved for God alone (the true good, the true cause) while finite creatures should receive only a “love of benevolence.” As he says in the *Traité de morale*,

The word love is equivocal, and therefore we must take care of it [...] [we must] love none but God with a love of union or conjunction, because he alone is the cause of happiness [...] we must not love our neighbour as our good, or the cause of our happiness, but only as capable of enjoying the same happiness with us [...]

We may join ourselves to other men; but we must never adore them within the motion of our love, either as our good, or as capable of procuring us any good; we must love and fear only the true cause of good and evil; we must love and fear no one but God in the creatures [...] The creatures are all particular beings, and therefore cannot be one general and common good. (Malebranche 1960, II, 6, 195)

The God-centeredness of Malebranche’s thought determines everything he says about morality and justice—not least when he finally turns to “natural/eternal” law late in life.

Malebranche wrote a whole book on practical philosophy—on moral, legal, and political ideas, on divine and human justice, on virtue and duty, on “order” and “relations of perfection,” on the various kind of “love” (ibid.,

*passim*). And this is the *Traité de morale*, from 1681. But the *Treatise on Morality*, for the most part, simply draws out the practical implications of Malebranche's metaphysics, theology and epistemology. And it is well to begin with a preliminary sketch of these implications before turning to a fuller treatment of Malebranche's moral-legal texts.

(1) In what amounts to a theodicy or God-justification in works beginning with *Traité de la nature et de la grâce* (1680), the early Malebranche urges that just as God governs the universe, justly, through constant, simple, uniform "Cartesian" general laws and "general wills" (*volontés générales*) which are "worthy" of him, and not through an *ad hoc* patchwork of arbitrary particular wills (*volontés particulières*) and "miracles," so too wise statesmen should will and legislate generally—and even ordinary men should subordinate their "particular" passions and self-love to a general love of "order" (TNG, 118–27). This is the proto-radical side of Malebranchian practical thought—a *recherché de la généralité* which leads finally to Rousseau's "the general will is always right,"<sup>4</sup> and even (in a transmogrified form) to Robespierre's claim to incarnate the *volonté générale* of the French nation (*ibid.*, 9–12). In this part of Malebranche's moral-political thought, *theodicée=généralité*, and it is precisely the generality of God's willing that incidentally throws up particular evils (such as "monsters")—evils which are justifiable because God did not translate them into existence by a positive *volonté particulière* (TNG, 118–22). (At this early point traditional "natural law" is scarcely present.)

(2) Since God is the "true" cause, and finite created beings are mere "occasional" causes, we should reserve a love of "union" for God (our true good), and practice toward men only a well-wishing love of "benevolence" (a limited love for those who enjoy God with us). Hence for Malebranche the Pauline saying, "the greatest of these is charity" is (ironically) over-general, needs to be nuanced, turned into what Augustine had called "regulated" or "ordered" love (in *De Doctrina Christiana*).<sup>5</sup> (Indeed Malebranche sympathizes with Leibniz's definition of charity as ordered *caritas sapientis*, "the charity of the wise," not as a flood of undifferentiated emotion.<sup>6</sup>)

(3) Malebranche's "occasionalism" leads, not surprisingly, to difficulties in his moral philosophy, inasmuch as human beings are not "true" causes but must nonetheless "suspend" their consent to "particular" motives arising out of self-love, while they seek out and will "order" and *le bien général*. (But this "suspension" and "will" must involve "nothing *physical* [*rien de physic*]," as Malebranche insists in the *Reflexions sur la prémotion physique* from 1715; Malebranche 1970a, 49–50.)

<sup>4</sup> See Riley 1986, especially chap. 5.

<sup>5</sup> See Augustine, *De Doctrina Christiana*, I, xxvii, 28: "He lives in justice [...] who has an ordinate love."

<sup>6</sup> See Riley 1996, especially chap. 4.

Despite these difficulties the notion of “will” is central in Malebranche’s conception of God and of man: unless God has a will (*en général*) he cannot have a “general will” (*en particulier*) to rule the universe through simple, constant, uniform “Cartesian” natural laws which he creates (avoiding all *ad hoc* “particular wills” and lawless miraculous intervention in nature); unless man has a will he cannot freely and meritoriously determine himself to embrace *le bien général*, “order,” and “relations of perfection,” while shunning deceptive *biens particuliers*. Both God and man must will the general and flee the particular in Malebranche: God does so “naturally” (as it were), since *généralité* is “worthy” of him; men must strive to do so, with the help of Christ-distributed grace. What this means is that “will” is nearly as important to Malebranche as to more celebrated voluntarists such as Augustine or Kant (with their notions of *bona voluntas* and “good will”<sup>7</sup>); and though Malebranche’s occasionalism (which deprives finite creatures of true causality) is problematical for human free will, real self-determination, it remains true that *Malebranchisme* contains an important voluntarist strand. God simply has a *volonté générale*, and men ought to strive to have one.

(4) The Malebranchian notion that “we see all things in God” is (*inter alia*) a quasi-Platonic view of the status of moral ideas which descends to Malebranche through Augustinianism—and it is quasi-Platonic in two sense: (a) the idea of the good and the right cannot be derived from mere natural phenomena (“I prefer being called a visionary [...] to agreeing that bodies might enlighten us”; Malebranche 1958a, 131); and (b) the moral idea of “relations of perfection” can only be “expressed” in mathematical “relations of size” (Malebranche 1964, VIII, 13, on page 190). (This “descent” from Plato to Malebranche comes mainly from the *Phaedo*, in which moral and mathematical “absolute” ideas—equally universal, necessary, and free of Heraclitean flux—are summoned up by reminiscence, not “seen” in observed phenomena.<sup>8</sup>) And all of this demi-Platonism is finally aimed (in the *Dialogues on Metaphysics*) against the English “empiricism” of Hobbes and Locke; Malebranche’s view is that neither English philosopher can account for *conceivability* of “moral necessity” (Malebranche 1970a, 84ff.). (Here Leibniz, and then later Kant, would agree with Malebranche.)

(5) For Malebranche “grace” is an integral and necessary part of moral philosophy and moral activity, given his view in the *Traité de morale* that “charity does not always operate in the just themselves,” that “men cannot [...] persevere in justice, if they are not often aided by the particular grace of Jesus Christ, which produces, augments and sustains charity against the continual effects of concupiscence” (Malebranche 1960, I, 4, vii–xv, on pages 118–24). This doctrine is just “late-Augustinian”; but without this

<sup>7</sup> See Riley 1982, chaps. 1 and 5.

<sup>8</sup> Plato, *Phaedo*, especially 75d; cf. *Meno*, 82bff.



(unmeritable) “particular” grace one can’t be just or charitable. To doubt that incapacity constitutes Pelagian criminal pride—the illusion/delusion of self-sufficiency (in mere created beings) which *should* be ruled out by occasionalism, by God’s being the only “true” cause, the only real wielder of power. Even Leibniz, for all his ecumenical rationalism in the *Theodicée* and *Nouveaux Essais*, couldn’t dispense with grace entirely (Riley 1996, 118–24); much less can Malebranche do so, since the Malebranchian cosmos is not populated by autonomous Leibnizian monads, but rather by the dependent creatures described by St. Paul in the *Acts of the Apostles* (17: 28): in God “we live, move, and have our being.”

### 7.3. Malebranche’s Critics

In the “Premier Eclaircissement” of the *Traité de la nature et de la grâce*, one sees at once that Malebranche is not going to treat divine *volonté généralé* as something confined to theology, to moral questions of grace and merit; one sees that he intends to treat general will as something that is manifested in *all* of God’s operations—as much in the realm of nature as in that of grace. Malebranche argues that “God acts by *volontés généralés* when he acts as a consequence of general *laws* which he has established.” Nature, he adds, “is nothing but the general laws which God has established in order to construct or to preserve his work by the simplest means, by an action [that is] always uniform, constant, perfectly worthy of an infinite wisdom and of a universal cause.” God, on this view, does not act by *volontés particulières*, by lawless *ad hoc* volitions, as do “limited intelligences” whose thought is not “infinite.” Thus, for Malebranche, “to establish general laws, and to choose the simplest ones which are at the same time the most fruitful, is a way of acting worthy of him whose wisdom has no limits.” On the other hand, “to act by *volontés particulières* shows a limited intelligence which cannot judge the consequences or the effects of less fruitful causes” (*TNG*, 1st Illustration, 195–211).

Even at this point, Malebranche’s argument contains some points that could be read “legally” (though not yet as “naturally” lawful), as elements of a theodicy: Divine general will manifests itself in general laws that are “fruitful” and “worthy” of infinite wisdom, whereas particular will is “limited,” comparatively unintelligent, and lawless. Indeed Malebranche himself occasionally “legalizes” his argument, particularly in his effort to *justify* God’s acting (exclusively) through *volontés générales*. If “rain falls on certain lands, and if the sun roasts others [...] if a child comes into the world with malformed and useless head [...] this is not at all because God wanted to produce those effects by *volontés particulières*; it is because he has established [general] laws for the communication of motion, whose effects are necessary consequences.” Thus, according to Malebranche, “one cannot say that God acts through caprice or ignorance” in permitting malformed children to be born or unripe

fruit to fall. "He has not established the laws of the communication of motion for the purpose of producing monsters, or of making fruits fall before their maturity"; he has willed these laws "because of their fruitfulness, and not because of their sterility" (ibid., I, xviii–xix, on pages 118–9). Those who claim that God *ought*, through special, *ad hoc volontés particulières*, to suspend natural laws if their operation will harm the virtuous or the innocent, or that he ought to confer grace only on those who will actually be saved by it, fail to understand that it is not worthy of an infinitely wise being to abandon general rules in order to find a suppositious perfect fit between the particular case of each infinite being and a *volonté particulière* suited to that case alone. (Here "natural" laws are purely *physical* ones.)

By this point, evidently, the theological (and physical) notion of *volonté générale* is becoming "legalized." *Volonté générale* originally manifested itself in general laws that were wise and fruitful; now that will, expressed in those laws, is *just* as well, and it is quite wrong to say that God ought to contrive a *volonté particulière* suited to each case, even though the generality of his will and of his laws will mean that grace will occasionally fall on a hardened heart incapable of receiving it. God, Malebranche urges, loves his wisdom more than he loves mankind ("c'est que Dieu aime davantage sa sagesse que son ouvrage"; ibid., I, xix, "Addition," on page 47), and his wisdom is expressed in general laws, the operation of which may have consequences (monstrous children, unripened fruit) that are not *themselves* willed and that cannot therefore give rise to charges of divine injustice, caprice, or ignorance.

If Malebranche, in pleading the "cause" of God (to use Leibniz's legal phrase; Leibniz 1710, Preliminary Dissertation), views divine *volonté générale* as issuing in wise and just laws, the *Traité de la nature et de la grâce* is further (and quite explicitly) legalized by an analogy that Malebranche himself draws between a well-governed earthly kingdom and a well-governed Creation. He begins with an argument about enlightened and unenlightened will: "The more enlightened an agent is, the more extensive are his *volontés*. A very limited mind undertakes new schemes at every moment; and when he wants to execute one of them, he uses several means, of which some are always useless." But a "broad and penetrating mind," he goes on, "compares and weighs all things: He never forms plans except with the knowledge that he has the means to execute them." Malebranche then moves to his legal analogy: "A great number of laws in a state"—presumably a mere concatenation of many *volontés particulières*—"often shows little penetration and breadth of mind in those who have established them: It is often the mere experience of need, rather than wise foresight, which has ordained them." God *qua* just legislator has none of these defects, Malebranche claims: "He need not multiply his *volontés*, which are the executive laws of his plans, any further than necessity obliges." He must act through *volontés générales* "and thus establish a constant and regulated order" by "the simplest means." Those who want God to

act, not through “les loix ou les volontés générales,” but through *volontés particulières*, simply “imagine that God at every moment is performing miracles in their favor.” This partisanship for the particular, Malebranche says, “flatters the self-love which relates everything to itself,” and “accommodates itself quite well” to ignorance (*TNG*, I, xix, on page 118ff.).

Malebranche certainly believed that those who imagine a God thick with *volontés particulières* will use that alleged divine particularism to rationalize their own failure to embrace general principles. Indeed, he appeals to the notion of *particularisme* in attempting to explain the lamentable diversity of world’s moral and legal opinions and practices. In the *Traité de morale* (1684) Malebranche argues that although “universal reason is always the same” and “order is immutable,” nonetheless “morality changes according to countries and according to the times.” Germans think it virtuous to drink to excess; European nobles think it “generous” to fight duels in defense of their honor. Such people “even imagine that God approves their conduct,” that, in the case of an aristocratic duel, he “presides at the judgment and [...] awards the palm to him who is right.” Of course, one can only imagine this if one thinks that God acts by *volontés particulières*. And if even he is thought to operate particularly, why should not men as well? The man who imputes particular wills to God by “letting himself be led by imagination, his enemy,” will also have his own “*morale particulière*, his own devotion, his favorite virtue” (Malebranche 1960, I, vii–x, on pages 31–3). What is essential is that one abandon *particularisme*, whether as something ascribed to God or as something merely derived from human “inclinations” and “humors.” It is “immutable order” that must serve as our “inviolable and natural law,” and “imagination” that must be suppressed. For order is general, while imagination is all too particular.

Malebranche’s notion that those who believe that they are beneficiaries of a miraculous *Providence particulière* are suffering from acute egomania—in effect a “love of union” with themselves—is strongly reinforced in the 1683 *Méditations chrétiennes*. In the eighth *méditation* Malebranche insists that “the New Testament [*la nouvelle alliance*] is in perfect conformity with the simplicity of natural laws,” even though those general laws “cause so many evils in the world.” (Here, once again “natural” = “physical.”) The New Testament promises *des biens éternels* to the just as compensation for their patience in enduring monstrous children and unripened fruit; therefore, it is “not at all necessary that God perform miracles often” in order to deliver the just from their “present evils.” To be sure, Malebranche concedes, under the Old Testament, miracles—or at least, “what are called miracles”—were more necessary; the ancient Jews, who lacked Christ’s salvific grace and who were “un peu grossier et charnels,” asked for exceptions in their favor from general and simple laws. This, according to Malebranche, led God, “at least in appearance,” to “trouble the simplicity of the laws” in Biblical times. But Chris-

tians, Malebranche insists, should know better, and must live with the simplicity of (occasionally ruinous) laws; Malebranche condemns those who, “failing to respect the order of nature,” imagine that on all occasions God should “protect them in particular way [*d’une manière particulière*].” Is some people’s reliance on God, Malebranche asks rhetorically, a sign of “the greatness of their faith,” or rather a mark of “a stupid and rash confidence” that makes them claim to be under “une protection de Dieu toute particulière”? They can often “sincere,” but that sincerity is “neither wise nor enlightened,” but rather “filled with *amour-propre* and with secret pride.” Some people, Malebranche adds, fancy that God is only good insofar as he applies himself to making exceptions to the rules of wisdom; but it should be remembered that “God constantly follows the general laws which he has very wisely established” (Malebranche 1968b, VIII, 5, on page 84). Here, then, *particularisme* is identified with self-love, rashness, stupidity, and making exceptions to just general laws.

So wise, constant, and just are God’s *volontés générales*, in Malebranche’s view, that it is often a moral wrong on man’s part not to accept and respect these general wills and to make them the measure of human conduct. In one of his numerous defenses of *Nature et grâce*, Malebranche argues that “if God did not act in consequence of general laws which he has established, no one would ever make any effort. Instead of descending a staircase step by step, one would rather throw himself out of the windows, trusting himself to God.” Why should it be sin as well as folly to hurl oneself from a window? “It would be sin,” Malebranche answers, “because it would be tempting God: it would be claiming to obligate him to act in a manner unworthy of him, or through *volontés particulières*”; it would amount to telling God “that his work is going to perish, if he himself does not trouble the simplicity of his ways.” In addition to sin, of course, hurling oneself would be folly, for one must be mad to imagine that “God must regulate his action by our particular needs, and groundlessly change, out of love for us, the uniformity of his conduct” (Malebranche 1963b, 43). (If, at this point, there is any “natural law” in Malebranche, it is literally “natural” physical law as understood by 17th century science).

#### 7.4. Bossuet *contra* Malebranche

For Malebranche’s orthodox and conservative critics (most notably Bossuet) perhaps the most distressing aspect of Malebranche’s theory of divine *volonté générale* was the much-diminished weight and value given to literally read Scripture. In *Nature et grâce* Malebranche urges that “those who claim that God has particular plans and wills for all the particular effects which are produced in consequences of general laws” ordinarily rely not on philosophy but on the authority of Scripture to “shore up” their “feeling.” (The verb and

noun are sufficiently revealing.) But, Malebranche argues, “since Scripture was made for everybody, for the simple as well as for the learned, it is full of *anthropologies*.” Scripture, continues Malebranche, endows God with “a body, a throne, a chariot, a retinue, the passions of joy, of sadness, of anger, of remorse, and the other movements of the soul”; it even goes beyond this and attributes to him “ordinary human ways of acting, in order to speak to the simple in a more sensible way.” St. Paul, in order to accommodate himself to everyone, speaks of sanctification and predestination “as if God acted ceaselessly” through *volontés particulières* to produce those particular effects; even Christ himself “speaks of his Father as if he applied himself, through comparable *volontés*, to clothe the lilies of the field and to preserve the least hair on his disciples’ head.” Despite all these “anthropologies” and “as ifs,” introduced solely to make God lovable to “even the coarsest minds,” Malebranche concludes, one must use the idea of God (*qua* perfect being), coupled with those non-anthropological scriptural passages that are in conformity to this idea, in order to correct the sense of some other passages that attribute “parts” to God, or “passions like our own” (*TNG*, I, i, vii, on pages 136–7).

The notion that Scripture represents God as a man who has “passions of the soul” and *volontés particulières* merely to accommodate the weakness of “even the coarsest minds” leads to a difficulty that an Augustinian, and certainly a Jansenist, would find distressing. Pascal had argued in his *Écrits sur la grâce* that God’s pre-lapsarian *volonté générale* to save all men is replaced after the Fall by the election of a few for salvation through *miséricorde*, or “pity” (though none merited it) (Pascal 1914a, 133–40); Antoine Arnauld, in the preface of the translation of Augustine’s *De correptione et gratia*, had also stressed an underserved divine *miséricorde*, which God might with perfect justice have withheld (Arnauld 1644, 4–7). “Pity,” of course, on a Malebranchian view, is a “passion of the soul,” but it is only through weakness and anthropomorphism that we imagine these passions to animate God. If an *être parfait* does not “really” have these passions, it cannot be the case that—as in Pascal—a *volonté générale* to save all is replaced by a pitiful *volonté absolue* to save a few. Indeed whereas in Pascal *volonté générale* comes first and gets “replaced” by *miséricorde*, in Malebranche divine general will justly governs the realms of nature and grace from the outset, once the world has been created by a *volonté particulière*.

Far from abandoning his position when he was accused of “ruining” Providence (in a work such as Jurieu’s *Esprit de M. Arnauld*; Jurieu 1687, 80ff.), Malebranche maintained it stoutly in the “Dernier Eclaircissement” of *Nature et grâce*, provocatively entitled “The Frequent Miracles of the Old Testament Do Not Show at All that God Acts Often by Particular Wills,” which he added to the fourth edition in 1684. The “proofs” that he has drawn from the idea of an infinitely perfect being, Malebranche insists, make it clear that “God executes his designs by general laws.” On the other hand, it is not easy

to demonstrate that God operates ordinarily through *volontés particulières*, “though Holy Scripture, which accommodates itself to our weakness, sometimes represents God as a man, and often has him act as men act” (TNG, “Dernier Éclaircissement,” 204). Here, as in the main text of *Nature et grâce*, the key notion is weakness, and any notion of divine *volonté particulière* simply accommodates that *faiblesse*. This is why Malebranche can maintain—this time in the “Troisième Éclaircissement” of 1683—that “there are ways of acting [that are] simple, fruitful, general, uniform and constant,” and that manifest “wisdom, goodness, steadiness [and] immutability in those who use them.” On the other hand, there are also ways that are “complex, sterile, particular, lawless and inconstant,” and that reveal “lack of intelligence, malignity, unsteadiness [and] levity in those who use them” (ibid., “Troisième Éclaircissement,” 180). Thus a very different heap of moral-legal execrations is mounded around any *volonté particulière*, which turns out to be complex, sterile, lawless, inconstant, unintelligent, malignant, and frivolous.

Indeed, for Malebranche it is precisely *volonté particulière*, and not *volonté générale*, that “ruins” Providence and divine justice. In his *Réponse à une dissertation de M. Arnauld contre un éclaircissement de la nature et la grâce* (1685), he argues that, if Arnauld’s insistence on miracles and constant divine *volontés particulières* does not “overturn” Providence, it at least “degrades it, humanizes it, and makes it either blind, or perverse.”

Is there wisdom in creating monsters by *volontés particulières*? In making crops grow by rainfall, in order to ravage them by hail? In giving to men a thousand impulses of grace which misfortunes render useless? In making rain fall equally on sand and on cultivated ground? But all this is nothing. Is there wisdom and goodness in making impious princes reign, in suffering so great a number of heresies, in letting so many nations perish? Let M. Arnauld raise his head and discover all the evils which happen in the world, and let him justify Providence, on the supposition that God acts and must act through *volontés particulières*. (Malebranche 1963a, 591–2)

It is Malebranche’s view, in fact, that the classical “theodicy problems” of reconciling a morally and physically imperfect world with God’s “power,” “goodness,” and “wisdom” can *only* be solved by insisting that God wills generally. “God loves men, he will to save them all,” Malebranche asserts, “for order is his law.” Nonetheless, God “does not will to *do* what is necessary in order that all [men] know him and love him infallibly,” and this is simply because “order does not permit that he have practical *volontés* proper to the execution of this design [...] He must not disturb the simplicity of his ways.”<sup>9</sup>

In his final work, published in the year of his death (1715), Malebranche reformulated this argument in an even stronger way—a way that Leibniz, among others, found excessive.

<sup>9</sup> Cited in the fine study by Ginette Dreyfus *La volonté selon Malebranche*: Dreyfus 1958, 114.

Infinity in all sorts of perfections is an attribute of the divinity, indeed his essential attribute, that which encloses all the others. Now between the finite and the infinite, the distance is infinite; the relation is nothing. The most excellent of creatures, compared to the divinity, is nothing; and God counts it as nothing in relation to himself [...] It seems to me evident, that God conducts himself according to what he is, in remaining immobile, [even while] seeing the demon tempt, and man succumb to the temptation [...] His immobility bears the character of his infinity [...] If God, in order to stop the Fall of Adam, had interrupted the ordinary course of his *providence générale*, that conduct would have expressed the false judgement that God had counted the worship that Adam rendered him as something with respect to his infinite majesty. Now God must never trouble the simplicity of his ways, nor interrupt the wise, constant and majestic course of his ordinary providence, by a particular and miraculous providence [...] God is infinitely wise, infinitely just, infinitely good, and he does men all the good he can—not absolutely, but acting according to what he is. (Malebranche 1970a, 104)

After this, Malebranche's insistence that, nonetheless, "God sincerely wills to save all men" rings a little hollow. It is no wonder that Leibniz, for all his general agreement with Malebranche, should complain that "I do not know whether one should have recourse to the expedient [of saying] that God, by remaining immobile during the Fall of man [...] marks [in that way] that the most excellent creatures are nothing in relation to him." For Leibniz, that way of putting the matter can be abused, and can even lead to "the despotism of the supralapsarians" (Leibniz, *Letter to Malebranche*, 1715, cited in Robinet 1955, 408).

According to Malebranche, the theodicy problems that generality and simplicity of will are meant to solve *must* have a resolution, because the radical imperfection and evil in the universe are all too real, not merely apparent. "A monster," he declares, "is an imperfect work, whatever may have been God's purpose in creating it."

Some philosophers, perverted by an extravagant metaphysics, come and tell me that God wills evil as positively and directly as the good; that he truly only wills the beauty of the universe [...] [and] [...] that the world is a harmony in which monsters are a necessary dissonance; that God wants sinners as well as the just; and that, just as shadows in a painting make its subjects stand out, and give them relief, so too the impious are absolutely necessary in the work of God, to make virtue shine in men of good will. (Cited in Robinet 1965, 104)

Those who reason along these lines, in Malebranche's view, are trying to resolve moral dilemmas and salvage divine justice by appealing to aesthetic similes; but the method will not serve. "Shadows are necessary in paintings and dissonances in music. Thus it is necessary that women abort and produce an infinity of monsters. What a conclusion!" He ends by insisting, "I do not agree that there is evil only in appearance" (*ibid.*, 105). Hence, *volonté générale* alone, which wills (positively) the good and only *permits* evil as the unavoidable consequence of general and simple laws, is the sole avenue of escape from theodicy problems if one calls evil "real."

### 7.5. Malebranche's *Réflexions sur la prémotion physique* (1715)

In his last work, the *Réflexions sur la prémotion physique*, published the year of his death (1715), Malebranche found an opportunity to show that his notions of *volonté générale* and general law have a general moral significance that can be used in refuting theories of justice that rely primarily on sovereign power, such as Hobbes'. And it is precisely in the *Réflexions* that he begins to use the vocabulary of "natural/eternal" law. The *Réflexions* were a commentary on Laurent Boursier's quasi-Jansenist *De l'action de Dieu sur les créatures* (1713)—a large section of which attempted to refute Malebranche's theory of the divine *modus operandi*. In *De l'action de Dieu* Boursier treats God as a "sovereign" whose will is unrestricted by any necessity to act only through general laws ("God has willed [the world] thus, because he willed it") and argues that Malebranche's notion of divine wisdom renders God "impotent." "The sovereign who governs," Boursier claims, whether God or a prince, "causes inferiors to act as he wills." He does this through "command: He interposes his power in order to determine them." And "inferiors," for their part, act only "because they are excited and determined by the prince [...] they act in consequence of his determination." Since God is a powerful sovereign who has willed the world to be what it is simply "because he has willed it," one cannot say that he prefers a Malebranchian generality or "the simplest means," or, indeed, that he prefers anything at all; the "greatness and majesty of the Supreme Being" must make us realize that "everything that he can will with respect to what is outside himself" is "equal" to him. Malebranche, Boursier complains, does not see that God can equally will whatever is in his power: "What an idea of God! He wishes, and he does not accomplish; he does not like monsters, but he makes them; he does not attain the perfection which he desires in his work: he cannot fashion a work without defects [...] his wisdom limits his power. A strange idea of God! An impotent being, and unskilful workman, a wisdom based on constraint, a sovereign who does not do what he wills, an unhappy God" (Boursier 1713, 36ff.).

In his response to Boursier's theory of sovereignty based on will, command, and power, Malebranche actually abandons the terms *volonté générale* and *volonté particulière* (conceivably because of the constant criticism of his critics); but he does not abandon the concepts for which the terms stood—thus *volonté générale* and general law become "eternal law," while *volonté particulière* becomes *volonté absolue et bizarre* (which is more striking still). "My present design," Malebranche says, "is to prove that God is essentially wise, just, and good [...] that his *volontés* are not at all purely arbitrary—that is to say that they are not wise and just simply because he is all-powerful [...] but because they are regulated by the eternal law [...] a law which can consist only in the necessary and immutable relations which are among the attributes and perfections which God encloses in his essence." The ideas that we have of



wisdom, justice, and goodness “are quite different from those that we have of omnipotence.” To say that the *volontés* of God are “purely arbitrary,” that “no reason can be given for his *volontés*, except his *volontés* themselves,” and that everything that he wills and does is just, wise, and good because he is omnipotent and has a “sovereign domain” over his creatures—is “to leave the objections of libertines in all their force” (Malebranche 1970a, xviii–xix, on pages 93–104).

The notion that God wills in virtue of “eternal” law, not simply through the bare possession of sovereign domain, leads Malebranche to a criticism of Hobbes (and Locke) that is an interesting expansion of his moral philosophy. “If,” Malebranche says, “God were only omnipotent, and if he were like princes who glory more in their power than in their nature,” then “his sovereign domain, or his independence, would give him a right to everything, or he would not act as [an] all-powerful being.” If this were true of God, then “Hobbes, Locke and several others would have discovered the true foundations of morality: authority and power giving, without reason, the right to do whatever one wills, when one has nothing to fear.” This legal-positivist view of either human or divine justice Malebranche characterizes as “mad,” and he urges that those who “attribute this mode of operation to God” apparently “prefer force, the law of brutes (that which has granted to the lion an empire over animals), to reason” (*ibid.*, 93–8).

However unfair this may be to Hobbes, and still more to Locke—though at least Hobbes does actually say, in Chapter 31 of *Leviathan*, that “irresistible power” carries with it a natural right to “dominion” (Hobbes 1957, chap. 31)—Malebranche’s last work shows that he thought that rule through *volontés* that are *particulieres* or *absolues* or (even) *bizarres* was wrong in either human or divine governance, and that rule through “eternal” natural laws that are of general validity is right. Of course, Malebranche was not alone in this; since Descartes’ time a controversy had raged over the question of whether there *are* any eternal laws that God “finds” in his understanding and “follows” in his volitions (Riley 1996, chaps. 1 and 4). Leibniz (following Plato’s *Euthyphro*) put forward a theory of general, non-arbitrary divine justice in his *Théodicée* (1710) that was very close to Malebranche’s and criticized Hobbes along (roughly) Malebranchian lines in his *Opinion on the Principles of Pufendorf* (1706) (Leibniz 1988d, 68–72; original: Leibniz 1768d, 270ff.). Thus arguments against Hobbism based on the notion that there are eternal laws of justice which keep divine will from being “wilful” were certainly not scarce at the turn of the eighteenth century; and Malebranche was in perfect accord with Leibniz in disputing Hobbes (and Descartes) on this point.

In connection with his doctrine that God never operates through a *volonté* that is *absolue* or *bizarre*, but only through love of the eternal law, which is “co-eternal” with him, Malebranche designs one of the strikingly imaginative stage settings that even Voltaire found impressive:

If God were only all-powerful, or if he gloried only in his omnipotence, without the slightest regard for his other attributes—in a word, without consulting his consubstantial law, his lovable and inviolable law—how strange his plans would be! How could we be certain that, through his omnipotence, he would not, on the first day, place all the demons in heaven, and all the saints in hell, and a moment after annihilate all that he had done! Cannot God, *qua* omnipotent, create each day a million planets, make new worlds, each more perfect than the last, and reduce them each year to a grain of sand? (Malebranche 1970a, xviii, on page 100)

Fortunately, according to Malebranche, though God is in fact all-powerful and “does whatever he wills to do,” nonetheless he does not will to do anything except “according to the immutable order of justice.” This is why Malebranche insists, in four or five separate passages of the *Réflexions sur la prémotion physique*, that St. Paul always said “O altitudo divitiarum Sapientiae et Scientiae Dei” and never “O altitudo voluntatis Dei.” Will can be willful, if its only attribute is power, and that attribute is the one that Boursier (and Hobbes) wrongly endow with excessive weight.

Despite some disagreements with Malebranche, Leibniz could send a copy of the *Théodicée* to the Oratorian in the confident belief that most of it would prove congenial, and Malebranche’s acknowledgment of Leibniz’s present (“you prove quite well [...] that God [...] must choose the best”; *Letter to Leibniz*, 1711, cited in Robinet 1955, 407) showed Leibniz to be right. A shared Augustinian Platonism and love of eternal mathematical “order,” a shared concern to “justify” God, formed the *rapport* between Malebranche and Leibniz; and, if Malebranche was a more nearly orthodox Cartesian than his Hannoverian correspondent, even the Oratorian shared Leibniz’s distaste for the Cartesian notion that God wills to create mathematical, logical, and moral truth *ex nihilo*.

On this point, indeed, Malebranche is almost certainly following Leibniz’s total conflation of “eternal” and “natural” law in the *Elements of Perpetual Justice* (1695)—though Leibniz, even more radically than Malebranche, also equates the “eternal” and the “natural” with the perfections of Roman law (Leibniz 1965, 192ff.; see Robinet 1955, *passim*).

The really bold and striking thing in Leibniz’s 1695 manuscript is that he says that “the precepts of the eternal law, which are called ‘natural,’ are nothing other than the laws of the perfect state [...] The [Roman] principles in question are three: *neminem laedere, suum cuique tribuere, pie vivere*. The first [to injure no one] is the precept of peace, the second [to render to each his due] is that of commodious living, the third [to live piously] is that of salvation.” In this paragraph, which abandons Leibniz’s characteristically moderate caution, the “eternal,” the “natural,” and the Roman are made equivalent (as “perfect laws”), and that jurisprudential Trinity then governs not just the “human forum” but “the perfect state” of the best *kosmos*: The principles of Justinian’s law code are placed on a level with eternity and nature—at least once one transforms “live honorably” (*honeste vivere*) into the “live piously” (*pie*

*vivere*) of Christianity (Leibniz 1965, 196). No longer are *neminem laedere*, *suum cuique tribuere*, and *honeste vivere* just historical residues of a concrete legal and jurisprudential system; they have become the principles of “natural” (indeed of “eternal”) law. But this is not surprising in Leibniz, who could rank himself among those for whom “the Roman laws are not considered as laws, but simply as written reason [*la raison écrite*]” (Leibniz 1948c, 652). This “written reason” of Roman jurisprudence must of course be the same reason which prescripturally revealed goodness and justice to men even before Abraham and Moses appeared on the scene. (But that follows from Leibnizian jurisprudence: If charity is given by reason, and charity is the summit of “Roman” law, then Christian and Roman ethics flow from the same source: *la raison*, whether *écrite* or not.) And when Leibniz goes on to say, slightly later, that since “the love of God” or of the *summum bonum* “prevails over every other desire,” the “supreme and most perfect criterion of justice consists [...] in this third precept of true piety,” and that “human society itself must be ordered in such a way that it conforms as much as possible to the divine” (to “that universal society which can be called the ‘City of God’”), he has finally equated the eternal, the natural, the Roman, “written reason,” and the divine. And since universal justice is *caritas sapientis*, as has equated the eternal, the natural, the Roman, the reasonable, the divine, and the charitable (Leibniz 1965, 195–7).

Even for so very synthetic a mind as Leibniz’s, this is an amazing synthesis. Aquinas had kept the “eternal” and the “natural” quite distinct in the *Summa Theologica*, and had certainly viewed Roman law and jurisprudence as mere civil law (*ius civile*). And much of (revealed) Christianity would have counted for him as “divine positive law.” Leibniz compresses all of these Thomistic categories into one great undifferentiated justice-lump. To be sure, after first equating all three gradations of Roman law with the natural and the eternal, even with *la raison écrite*, he then somewhat downgrades the two lowest ones, *neminem laedere* and *suum cuique tribuere*: “it is not enough to act well toward others with a view to one’s own peace and commodious living, because he who does not have other motives for acting well [...] will be capable of great crimes.” And therefore piety or charity must shape even the lower degrees of justice: One must want peace and commodious living not just to enhance personal “interest” but for “the procuring of the greatest good for others (without prejudicing ourselves).” And that, of course, ties this 1695 work to Leibniz’s more general view that justice as wise charity will encompass both the perfection (felicity, happiness) of others and our delight or joy in feeling that perfection (Riley 1996, chap. 4).

If in the Preface to the *Theodicy* one learns that the duty of *wise* charity is given by “supreme reason” (as Christ himself saw), in the *Elements of Perpetual Justice* charity is the heart of “living piously,” and that pious living is a modified Roman *honeste vivere*—but Roman jurisprudence is now also “natu-

ral,” eternal, and divine: *la raison écrite*. In the end, then, Leibniz seems to want to say something like this: “Roman” justice = “Christian” *caritas sapientis* = reason = nature = eternity = divinity. The jurisprudence of Eternal City has become eternal *stricto sensu*: The Roman has become truly “catholic,” the justice of “the perfect state,” the law of the “best” world. For “after the writings of the geometers there is nothing that one can compare, for force and solidity; to the writings of the Roman juriconsults [...] never has natural law been so frequently interrogated, so faithfully understood, so punctually followed, as in the works of these great men.” (Leibniz, *Letter to Kestner*, 1716: Leibniz 1768c, 267ff.). Though Malebranche does not accept Leibniz’s radical *Romanism*, the rest of Leibnizian “natural law” seems to have great weight with him—especially the conflation of *natural* and *eternal*.

### 7.6. Beyond “General Law”

In treating Malebranche—particularly when *Nature et grâce* is the focus of attention—it is common enough to speak as if his whole philosophy confined itself to elevating *volonté générale* and execrating *volonté particulière*. But the notion of “general will” is not, for Malebranche, a complete or exhaustive doctrine; and even in *Nature et grâce* itself one finds, in addition to *généralité* and “Cartesian” simplicity, the notion of “order” (or “relations of perfection”) and of “liberty,” as well as the idea that men are merely the “occasional” causes of their own actions (while God the Father is *cause générale* of nature and grace), and that Jesus Christ *qua* man is the “occasional cause” of the distribution of grace to particular persons. Obviously, then, light needs to be thrown on those Malebranchian practical ideas which go beyond generality and simplicity—including, ultimately the idea of “natural/eternal law”; but one must also show the *rapport* between these “new” ideas and the *généralité* for which Malebranche was famous (or notorious). And for this one must consult not just *Nature et grâce*, but also—especially to gain a fuller idea of Malebranchian “order,” and of liberty as the “suspension” of consent—the *Traité de morale* (1684), the *Entretiens sur la métaphysique* (1688), and the *Prémotion physique* (1715).

The less-than-total importance of *volonté générale* in Malebranche becomes clear if one turns from the *Traité de la nature et grâce*, which is indeed mainly dominated by the notion of justifiable divine “general will,” to a work such as the *Traité de morale*, where one finds different but equally characteristic Malebranchian practical ideas. In the opening chapter of the *Première Partie* of the *Traité de morale*, indeed, Malebranche begins with the now familiar general-particular dichotomy, and only by a series of small steps arrives at the notion that there may be something of philosophical value *beyond* the “constancy” and “uniformity” of *volonté générale* and *loi générale*: and this something beyond he calls “order” or “relations of perfection.”

“If,” Malebranche begins by observing, “God moved bodies by *volontés particulières*, it would be a crime to avoid by flight the ruins of a collapsing building; for one cannot, without injustice, refuse to return to God the life he has given us, if he demands it.” If God positively willed everything in particular, “it would be an insult to God’s wisdom, to correct the course of rivers, and turn them to places lacking water: One would have to follow nature and remain at rest.” Since, however, God acts, not through *volontés particulières* but through *des lois générales*, “one corrects his work, without injuring his wisdom; one resists his action, without resisting his will; because he does not will positively and directly everything that he does.” He permits disorder, but he loves order (Malebranche 1960, I, I, on page 25).

The case is quite different, however, in Malebranche’s view, if one “resists” or “corrects” the action of men. “What is true of God is not so of men, of the general cause as of particular causes.” When one resists the action of men, one “offends” them: “[F]or, since they act only by *volontés particulières*, one cannot resist their acts without resisting their plans.” But in “resisting” God’s general laws, manifested in something like the collapse of a building, one not only offends “not at all,” one even favors God’s plans. And this is simply because the general laws which God follows do not always produce results which “conform” to order, or to “the best work” (*ibid.*, 26). (After all, as Malebranche remarks in *Nature et grâce*, “if one drops a rock on the head of passers-by, the rock will always fall at an equal speed, without discerning the piety, or the station, or the good or evil dispositions of those who pass by”: *TNG*, I, i, vii, on page 137. And he gives this same thought a complacent cast in the *Méditations chrétiennes*, where he urges that God, by permitting general laws to operate, lets “the ruins of a house fall on a just person who is going to the aid of an unfortunate, as well as on a villain who is going to cut the throat of an *homme de bien*”; Malebranche 1968b, VII, 19, on page 77.) Hence there is no moral obligation, in Malebranche’s opinion, to allow *les lois générales* to “cause death,” or even to let their operation “inconvenience” or “displease” us. Our duty, Malebranche concludes, “consists then in submitting ourselves to God’s law, and to following order”; and we can know this order only through “union” with “the eternal Word, with universal reason”—the one thing all men share, whatever their “particular” disposition (Malebranche 1960, I, i, on page 26–7). (Here, in stressing “order,” “eternity,” and “universal reason,” Malebranche at least intimates his ultimate notion of “natural/eternal” law in the *Réflexions* of 1715.)

But what does Malebranche mean in calling this “order”—something that transcends the lawful *généralité* of *Nature et grâce*—a “relation of perfection”? “In supposing that man is reasonable,” the *Traité de Morale* argues, and even that he belongs to a *société spirituelle* with God, which “nourishes” all “minds,” one cannot deny that man “knows something of what God thinks, and of the way in which God acts.” For “in contemplating the intelligible sub-

stance of the Word, which alone makes me reasonable," Malebranche continues, "I can clearly see the relations of size [*rappports de grandeur*] which exist between the intelligible ideas which it [the Word] encloses"; and these relations are "the same eternal truths that God sees." For God sees, as does a man, that "two times two makes four." A man can also discover, Malebranche insists, "at least confusedly," the existence of "relation of perfection [*rappports de perfection*]" which constitute the "immutable order that God consults when he acts—an order which ought also to regulate the esteem and love of all intelligent beings" (ibid., I, i, vi, on page 19). (Here one finds the *beginnings* of "eternal" law in Malebranche—even if the actual term arrives later.)

This is, perhaps, more eloquent than clear; but in a succeeding passage Malebranche fleshes out the notion of "relation of perfection." The reason that it is true that "a beast is more estimable than a stone, and less estimable than a man" is that "there is a greater relation of perfection from the beast to the stone, than from the stone to the beast," and that there is "a greater *rapport de perfection* between the beast compared to the man, than between the man compared to the beast" (ibid., I, i xiii–xiv, on pages 21–2). Or, in simpler language, men enjoy a greater measure, a greater degree, of "perfection," than beasts, and beasts more perfection than stones. Plainly Malebranche envisions a hierarchy of more or less "perfect" beings—their "perfection" defined in terms of their capacity for "union" with "the Word" or "universal reason"—and holds that one should "regulate his esteem" in view of degrees of perfection. Thus, for Malebranche, whoever "esteems his horse more than his coachman" does not really "see" the *rapport de perfection* "which he perhaps thinks he sees." And, linking this up with his familiar general-particular distinction, Malebranche adds that the unreasonable horse-lover fails to see *la raison universelle*, that he takes his own *raison particulière* for his rule. But, Malebranche goes on, to abandon *la raison universelle* and "order for *la raison particulière*" is to manifest *amour-propre*, "error," and "lawlessness": Thus the language of *Nature et grâce* reappears, and begins to color "order" and "relations of perfection" themselves.

From all of this, in any case, Malebranche concludes—following St. Augustine's following of Plato—that "it is evident that there is a true and a false, a just and an unjust," and that this holds "with respect to all intelligences." Just as what is true for God is true for angels and men, so too "that which is injustice or disorder with respect to man is also such with respect to God himself." Just as "all minds" discover the same mathematical *rappports de grandeur*, so those same minds discover "the same truths of practice, the same laws, the same order," when they see and love the *rappports de perfection* enclosed in the Word (ibid., I, i, v–vii, on page 18–9). (Here again the substance of a natural-law view is present—even if the words are not.) (It is Platonic, but also especially Augustinian, to "relate" mathematics and morality: As Augustine says in *De Doctrina Christiana*, XXVII, 28, "He lives in justice and

sanctity [...] who has an ordinate love [...] He neither loves more what should be loved less, loves equally what should be loved less or more, nor loves less or more what should be loved equally." Here love and mathematical order fuse in a Malebranche-anticipating way.)

The "love of order," then, according to Malebranche, is "our principal duty": It is "mother virtue, universal virtue, fundamental virtue." (This order, these "related" perfections, actually *exist* only in God; hence the love of God, of perfection, and of order are equivalent, and together constitute Malebranche's version of "charity"—a charity which is extended to men [in the limited form of "love of benevolence"] as citizens of God's *société spirituelle*.) "Speculative truths" or *rappports de grandeur* do not "regulate" our duties; "it is principally the knowledge and the love of relations of perfection, or of practical truths, which constitute our perfection." Hence Malebranche's closing peroration: "Let us then apply ourselves to know, to love, and to follow order; let us work for our perfection" (*ibid.*, I, i, xix, on page 24).

Is there a "relation" between *rappports de grandeur* and *rappports de perfection*? In Malebranche's great contemporary and correspondent Leibniz, the answer is plainly "yes," for Leibniz argues (in a 1696 letter) that "order and harmony are [...] something mathematical and which consist in certain proportions"; and he adds in *Opinion on the Principles of Pufendorf* (1706) that "justice follows certain rules of equality and of proportion which are no less founded in the immutable nature of things, and in the ideas of the divine understanding, than the principles of arithmetic and geometry" (Leibniz 1988d, 71). In Malebranche himself, the initial answer appears to be "no," for he calls *rappports de grandeur* "quite pure, abstract, metaphysical," while *rappports de perfection* are "practical" and serve as "laws." But one might object that the notion of *rappports de perfection* and of "order" are also "quite abstract": As Jeremy Bentham later observed, "the worst order is as truly order as the best" (Bentham 1838–1843a, 441).

In fact Malebranche finally abandons the abstractness of "order," and his less-than-concrete characterization of "relations of perfection"; and, in the work commonly accounted his masterpiece—the *Entretiens sur la métaphysique* (1688)—he moves in the direction of Leibniz's (virtual) identification of "proportion" and "equality" in mathematics and in notions of rightness. Malebranche begins the thirteenth section of *Entretien VIII* by calling *rappports de grandeur* "speculative" and *rappports de perfection* "practical" (as in *Traité de morale*), but then goes on to say that "relations of perfection cannot be known clearly unless they are *expressed* in relations of size." That two time two equals four, Malebranche continues, "is a relation of equality in size, is a speculative truth which excites no movement in the soul—neither love nor hate, neither esteem nor contempt." But the notion that man is "of greater value than the beast," he goes on, is "a relation of inequality in perfection, which demands not merely that the soul should accept it, but that love and

esteem be regulated by the knowledge or of this truth." Since, for Malebranche, we ought to love perfection, we ought to love beings closer to divinity in the scale of being, in preference to "lower" beings and things. Here the unfamiliar notion of *rappports de perfection* is assimilated to the much more familiar idea of a "great chain of being"; if this makes Malebranchism more ordinary, it also makes it more concrete and intelligible.

To be sure, this concreteness had already been intimated in the tenth "Éclaircissement" of *Recherche de la vérité*, where Malebranche argues that "if it is true, that God [...] encloses in himself all beings in an intelligible manner, and that all of these intelligible beings [...] are not in every sense equally perfect, it is evident that there will be an immutable and necessary order between them." And he adds that "just as there are necessary and eternal truths, because there are *rappports de grandeur* between intelligible beings," so too "there must be an immutable and necessary order, because of the *rappports de perfection* which exist between these same beings." It is thus in virtue of "an immutable order that minds are nobler than bodies, as it is a necessary truth that two times two makes four" (Malebranche 1958a, VIII, 13, on pages 190–1). "Order," then require respect "or love of "benevolence" for the degree of perfection attained by every created being in the great chain of being. This is at its clearest in the *Traité de morale*, where "order" gives new meaning to traditional Pauline Christian "charity":

The charity which justifies [men], or the virtue which renders just and virtuous those who possess it, is properly a ruling love of the immutable order [...]. The immutable order consists of nothing else than the relations of perfection which exist between the intelligible ideas that are enclosed in the substance of the eternal Word. Now one ought to esteem and love nothing but perfection. And therefore our esteem and love should be conformable to order [...]. From this it is evident that charity or the love of God is a consequence of the love of order, and that we ought to esteem and love God, not only more than all things [...]

Now there are two principal kinds of love, a love of benevolence, and a love which may be called a love of union [...]. One loves persons of merit through a love of benevolence, for one loves them even though they are not in a condition to do us any good [...]. Now God alone is [truly] good, he alone has the power to act in us [...] thus all love of union ought to incline towards God. (Malebranche 1960, 1)

Even in these passages which stress the notions of love, charity, order, and perfection, and which seems to have left the general-particular dichotomy far behind, Malebranche finds an occasion for animadversions against *particularisme*. Just as everyone can see that twice two are four, Malebranche urges, so too everyone can see that "one ought to prefer one's friend to one's dog"; the mathematical *rappport de grandeur* and the moral *rappport de perfection* both rest in "a universal reason that enlightens me and all intelligences whatever." This "universal" reason, which is "coeternal" and "consubstantial" with God, and which all intelligences "see" (in God), is to be strictly distinguished from "particular reasons"—the not very reasonable reasons that "a passionate man follows." And the passionate man turns out to be the familiar horse-lover:



When a man prefers the life of his horse to that of his coachman, he has his reasons, but they are particular reasons that every reasonable man abhors. They are reasons that fundamentally are not reasonable, because they are not in conformity with the sovereign reason, or the universal reason, that all men consult. (Malebranche 1958a, vol. 3: 1)

Malebranche, then, will not countenance any *raison que la raison ne connaît point*. If in this passage he appeals to what is “universal” and not merely “general,” he still finds time to lump *des raisons particulières* with “passion” and the “abhorrent.” And toward the end of the tenth “*Éclaircissement*,” even the notion of the “universal” yields, and *le général* makes its way back in: One can finally see, Malebranche urges, “what the immutable order of justice is, and how this order has the force of law through the necessary love that God has for himself.” Since men ought to love the order that God loves, “one sees how this law is general for all minds, and for God himself”; one sees that to abandon the idea of “eternal” and “immutable” order, common to all intelligences, is to “establish *pyrrhonisme* and to leave room for the belief that the just and the unjust are not at all necessarily such.” (ibid., 140). Thus even the treatment of “relations of perfection” manages to hold on to Malebranche’s anti-particularism, and to reflect his equation of generality with justice in *Nature et grâce*.

But what, finally, is the “relation” between these relations of size and perfection—the latter constituting “order”—and the rule of divine “general will” in the realms of nature and grace? One cannot simply say that “nature” is to *rappports de grandeur* as grace is to *rappports de perfection*, because the created world is not “orderly”: It contains monsters and hardened hearts. “The present world is a neglected work,” Malebranche insists. “Man [...] inhabits ruins, and the world which he cultivates is only the *débris* of a more perfect world.” The main passage in which Malebranche tries to “relate” moral relations to the “general will” is to be found in the *Méditations chrétiennes et métaphysiques*—this time *Méditation VII*:

God has two kinds of laws which rule him in his conduct. The one is eternal and necessary, and this is order; the others are arbitrary, and these are the general laws of nature and of grace. But God established the latter only because order required that he act in that way. (Malebranche 1968b, VII, xii, on page 73.)

This “works,” of course, only if “order” entails the simplicity (of divine action) that makes general laws better than a multiplicity of particular ones. In any case the formulation of *Méditation VII* contains a great tension: “Order” or “perfection” is “eternal” and “necessary” (ibid., V, xviii, on page 76)—prefiguring the qualities that Malebranche will later find in quasi-Leibnizian “natural law”—while the *volontés générales* which govern nature and grace are “arbitrary.” But the burden of *Nature et grâce* is to show that *volontés générales* are, unlike *volontés particulières*, precisely not “arbitrary”—instead, that they are wise, constant, and just. “Arbitrary,” perhaps unfortunately, calls to mind Malebranche’s characterization of the *volonté particulière* of some

earthly sovereigns: “une volonté aveugle, bizarre et impérieuse.” But “arbitrary” may simply mean “not necessary” and “not eternal”; after all, the world itself is neither necessary nor eternal (this would be a “Spinozistic” denial of creation, in Malebranche’s view), and therefore the “general wills” which govern the world’s realms, nature and grace, cannot be necessary or eternal either.

Even if, however, the “arbitrariness” of *volonté générale* simply means non-eternity and non-necessity, one can still ask: Why, if *volonté générale* and *lois générales* are inferior to “order” and to *rappports de perfection*—as must necessarily be the case—should God have “realized” a world which can have nothing more than a shadow of a “relation” to order and perfection (or perhaps *no* intelligible relation, unless order generates simplicity and simplicity then yields generality)? Malebranche himself, of course, asks this radical question at the very beginning of *Nature et grâce*; and he concludes that there is no “relation” between God and the world, between infinity and finitude (*TNG*, 112ff.). He realizes throughout *Nature et grâce* that he must show that it is in some sense “better” that a sin-disordered world, now governed by *volontés générales* which permit monsters and grace falling uselessly on hardened hearts, should exist rather than never have been. His “solution” is of course Christian, indeed drastically Christocentric: The ruined world as *redeemed* by Christ is of greater worth than the non-existence (or never-existence) of that world (*ibid.*, 1st “addition,” 11–2). Since the Incarnation constitutes philosophical “salvation” for Malebranche, quite literally “saves” his system, and gives a perfect being a motive for creating a “ruined” world, a great deal-everything-turns on the advent of Christ; for Malebranche *culpa* is not simply *felix*, but essential. “The world as saved by Jesus Christ,” Malebranche insists in the *Entretiens sur la métaphisique*, “is of greater worth than the same universe as at first constructed, otherwise God would never have allowed his work to become corrupted.”

Man [...] is a sinner, he is not such as God made him. God, then, has allowed his work to become corrupt. Harmonize this with his wisdom, and his power, save yourself from the difficulty without the aid of the man-God, without admitting a mediator, without granting that God has had mainly in view the incarnation of his son. I defy you to do it even with the principles of the best philosophy. (Malebranche 1964, IX, vii, on page 207)

It is in view of this that Malebranche can insist that while it is true that “everything is in disorder,” this is the consequence of “sin”: “[O]rder itself requires disorder to punish the sinner.” This, then, would be the “relation” between *rappports de perfection* and a very imperfect (thought still generally governed) world: Order necessitates disorder, and so *mere* “general will” is justifiable. Even so, one can ask: is “disorder” the unintended, unwanted, unwilled upshot of God’s “simplicity” and “generality” of operation (as *Nature et grâce* insists), or is the intended, wanted, and willed divine punishment of human sin? Or is it precisely human sin—divinely previewed—which justi-

fies God in creating a disordered world which can be no *more* than “simple” and “general”? This final version—in which “Cartesian” generality is fused with something much more specifically Christian—might seem to be the most comprehensive and adequate: For, particularly in the *Méditations chrétiennes*, Malebranche suggests that the (generally governed but) “ruined” world expresses or symbolizes human depravity. He makes this suggestion in a wonderfully imaginative descriptive passage:

The present world is a neglected work. It is the abode of sinners, and it was necessary that disorder appear in it. Man is not such as God made him: thus he has to inhabit ruins, and the earth he cultivates can be nothing more than the debris of a more perfect world [...] It was necessary that the irregularity of the seasons shorten the life of those who no longer think of anything but evil, and that the earth be ruined and submerged by the waters, that it bear until the end of all centuries visible marks of divine vengeance. (Malebranche 1968b, VII, xii, on page. 7)

Though divine wisdom does not appear in the ruined world “in itself,” Malebranche adds, none the less in “relation” to both “simplicity” *and* the punishment of “sinners,” the world is such that only an “infinite wisdom” could comprehend all its “beauties” (*ibid.*).

At least this argument, whatever its implausibilities, is more successful than Leibniz’s demi-Christian one: Demi-Christian in the sense that Leibniz insists that “universal justice”—for God and men alike—consists in the “charity of the wise” (*caritas sapientis*), but then is hard-pressed to explain why a “charitable” God would create an imperfect world which can be (at best) “best” (the “best of all possible worlds”), though not good (absolutely). In explaining God’s decision to create, Leibniz stresses God’s glory and the notion that the world “mirrors” that glory; here, however, charity has vanished altogether (Leibniz 1989, 962). At least Malebranche’s deployment of Christ as redeemer—of both men and Malebranchism—does not attempt, *per impossibile*, to combine “charity” and “glory.”

One can still ask, of course, why an *être parfait* would see, as a sufficient manifestation of eternal “order,” an historical drama in which fallen and corrupt beings are redeemed through the sacrifice of Christ *qua* “perfect victim”; but this would be to question Christianity more closely than Malebranche was ever prepared to do. As early as 1687, Fénelon complained that, whether one considers Malebranche’s version of the Incarnation theologically or scripturally, it is radically problematical. From a theologian perspective, Fénelon argues that “if one examines exactly what glory is truly added by the Incarnation” to the “infinite and essential glory” of God, one finds that it “only adds an accidental and limited glory”; what Christ suffered, though “infinite in price,” is “not all something infinitely perfect, which can be really distinguished from the perfection of the divine person.” And scripturally, for Fénelon, Malebranche is no better off: Malebranche argues that “it would be unworthy of God to love the world, if this work were not inseparable from his

son,” Fénelon suggests, but “Jesus Christ teaches us,” on the contrary, that “God so loved the world, that it gave it his only son” (Fénelon 1835, chap. 36).

Malebranchism, indeed, seems to suffer from a great difficulty: Malebranche wants to operate only with an *être parfait*, and imagine what a perfect being *would* justly do—leaving out all scriptural “anthropology.” And yet the idea of an *être parfait* acting uniformly through general laws leads to deism, not to Christianity: The concept of a perfect being does not yield a “son” of God who, *qua* “perfect victim,” redeems and justifies a ruined and sin-disordered world. “Anthropological” Scripture does indeed yield Christ and his earthly works; but anthropology is a concession to “weakness” and “anthropomorphism.” Only Christ “saves” Malebranche’s system, and gives the Father a motive for creating a world unworthy of him; but Christ is not (and cannot be) spun out of the bare idea of “perfection.” Malebranche thus needs historical Christianity, even as he claims to rely solely on the concept of *l’être parfait*. It is this need which drives him to the astonishing claim—in the *Traité de morale*—that God the Father “never had a more agreeable sight than that of his only son fastened to the cross to re-establish order in the universe” (Malebranche 1960, I, 3, v, on page 41).

If, finally, eternal “order” and “relations of perfection” seem to have toppled mere “general will” from the high place it occupies in *Nature et grâce*, one can still recall that God, who “encloses” all perfection and order, is called by Malebranche *le bien général*, while mere earthly goods are styled *les biens particuliers*. So even here “generality” recovers some of its lost lustre; it is preserved even as it is canceled. For, as Malebranche has “the Word” itself say to a *dévo*t in the *Méditations chrétiennes*, “God inclines you invincibly to love *le bien en général*, but he does not incline you invincibly to love *les biens particuliers*” (Malebranche 1968a, VI, xvii, on page 65). If *généralité* does not shape the whole of what is right in Malebranche, at least *particularisme* is constantly and uniformly condemned—as it had been in *Nature et grâce*.

From the standpoint of Thomist natural-law orthodoxy, Malebranche has offered a strange argument: The natural eternity of “order” is departed from by the Father because He foresees that victim-Christ will repair disorder through blood-sacrifice. The natural eternity of quasi-mathematical moral order can be provisionally set aside provided Christ redeems *en particulier*. Thus Malebranche sets up a tension between the timelessness of “natural law” and the temporal person of Christ incarnate—something that St. Thomas would have avoided in the *Summa Theologica*.

### 7.7. Malebranche’s “Occasionalism”

Even if what Malebranche says about “order” and *rappports de perfection* deprives “general will” of some of the importance it seemed to have in *Nature et grâce*, that *volonté généralé* is still the regulator of the realms of nature and

grace, and thus remains quite significant. But what is the relation between the “general will” of God and the “occasionalism” for which Malebranche is celebrated? Originally—that is, in the Cartesian tradition—occasionalism was only a theory of perception and of will: If the essence of body is extension and the essence of mind is thought, then mind and body cannot “modify” each other, since thought is not a modification of extension and extension is not a modification of thought. Given a strict mind-body dualism, the obvious question is, How can minds “perceive,” if perception is viewed as a physical modification of the eye or the ear, as motion “in” a sense organ; and how can minds “move” bodies—through “volition”—if thought cannot modify extended substances? The obvious answer for an occasionalist must be that so-called “perception” is not *really* a modification of mind by sensed matter, and the volition is not *really* efficacious; instead, God presents to the mind the *idea* of the thing “seen” on the *occasion* of its being “seen,” just as he moves bodies (for us, as it were) on the occasion of our “willing.” This occasionalism does not, of course, require a constantly intervening *Deus ex machina* who scurries about the universe giving efficacy to occasional causes. Indeed, for Malebranche, whenever one wills to move his arm, it moves—thanks to a constant, general (thought non-natural) conjunction between mind and body, which God has established by a general will. “It is only God,” he insists in the *Conversations chrétiennes*, “who can act in the [human] soul [...] through his general will which makes the natural order” (Malebranche 1959, III, on page 83).

It was not simply in order to be a “Cartesian” that Malebranche was an occasionalist; indeed, his motivation was as much religious as philosophical, as much moral as speculative.

Malebranche’s view was that the attribution of independent causal efficacy to non-divine beings is literally *impious*; to make that clear, he employed the legal-political idea of “sovereignty.” “The idea of a sovereign power is the idea of a sovereign divinity,” Malebranche urges in *De la recherche de la vérité*, “and the idea of a subordinate power is the idea of an inferior divinity [...] Thus one admits something divine in all the bodies that surround us, when one admits [...] real beings capable of producing certain effects by the [causal] force of their nature; and one thus enters insensibly into the sentiment of the pagans.” It is true, he adds, that “faith corrects us” by reminding us of the Pauline notion that *in God* we “move” and “have our being”; nonetheless, if one reads too much Aristotle, “the mind is pagan” even if “the heart is Christian.” This is why one must prefer St. Augustine, “this great saint [who] recognized that the body cannot act upon the soul, and that nothing can be above the soul, except God” (Malebranche 1958a, VI, 2, iii, on page 310). It is no wonder that Malebranche read Descartes as an Augustinian, and the Aristotle-loving Scholastics as thinly veiled pagans. (No doubt Malebranche’s reservation of “sovereignty” for God alone leads also to his quasi-Pascalian politics in *Traité de morale*, which urges that citizens owe

princes only “external and relative submission,” following “the customs and the laws of the state”: Malebranche 1960, II, viii, on page 219. Here Bossuet’s notion of the prince as a sovereign demi-God in *Politics Drawn from the Very Words of Holy Scripture* [Bossuet 1990, Book V] is rejected. Bossuet was court preacher to Louis XIV; it is impossible to imagine Malebranche in that role.)

One can begin Malebranchian “occasionalism,” as does Malebranche himself, with knowledge and perception. The most important passage in which he treats the moral significance of the notion that “we see all things in God” is a remarkable commentary on St. Augustine in the *Trois Lettres* of 1685. Malebranche begins by allowing that St. Augustine himself did not claim to find *all* things in God: “I realized,” he grants, “that this Father spoke only of truths and of eternal laws, of the objects of the sciences, such as arithmetic, geometry, morality; and that he did not urge that one saw in God things which are corruptible and subject to change, as are all the things that surround us.” (Here a kind of *quasi* “natural law” is suggested.) Malebranche himself does not claim that one sees corruptible and changing things in God; “to speak exactly, one sees in God only the essences” of things, and those essences or ideas of things alone are “immutable, necessary and eternal.” One sees in God only “that which represents these things to the mind, [...] that which renders them intelligible” (Malebranche 1963c, 199–200). (As Malebranche put the matter in his correspondence of 1714 with Dortous de Mairan, “I see immediately [in God] only the idea, and not the *ideatum*, and I am persuaded that the idea has been for an eternity, without [any] *ideatum*”: Malebranche 1968a, 910) Corruptible things are problematical because they change, though their essence does not, but incorruptible, unchanging things one sees *simply* in God. “One can see only in an immutable nature, and in eternal wisdom, all the truths which, by their nature, are immutable and eternal.” It would not be difficult to prove, “as St. Augustine did,” that “there would no longer be any certain science, any demonstrated truths, any assured difference between the just and the unjust—in a word, truths and laws which are necessary and common to all minds—if that which all intelligences contemplate were not [...] by its nature absolutely immutable, eternal and necessary” (Malebranche 1963c, 199). All of this, of course, simply reinforces the view that God and men “see” the same speculative and practical truths—a view which is at least *congruent* with natural-law tradition.

Malebranche maintained this view of the moral importance of a “vision” in which nothing is seen, which is not a modification of mind by body, to the end of his philosophical career. In the fragmentary remains of a letter of 1713 to Fénelon, he argues that “if the mind forms its ideas by a vital act,” and if “our ideas as distinguished from our perceptions are only chimeras,” then Pyrrhonism will be established. If *all* ideas are simply mind modified by matter, then “Hobbes and Locke, authors greatly esteemed by many men, will be right.” And if they *are* right, “there will be no more true, nor false, immutably

such; neither just, nor unjust, neither science nor morality.” If “empirical” notions of perception and knowledge carry the day, “St. Augustine will pass for a fanatical Platonist” who has taught his “subtle atheism” to Malebranche himself. In Malebranche’s view, Hobbes and Locke simply extend the theory of Aristotle (and of his “impious commentator” Averroës) that “seeing objects is accomplished by means of impressed species [...] by the power of an active intellect which presents [ideas] to a passive intellect.” But this, Malebranche insists, is a “fiction of men who wanted to discuss what they did not understand” (Malebranche 1968a, 842–3). (All of this, again, is at least congruent with natural-law tradition.)

Locke, for his part, thought Malebranche’s “vision in God” just as impious as Malebranche thought Locke’s “sense perception.” In his *Examination of Père Malebranche’s Opinion of Seeing All Things in God* Locke argues that, “God has given me an understanding of my own; and I should think it presumptuous in me to suppose I apprehended anything by God’s understanding, saw with his eyes, or shared of his knowledge.” He goes on to ask, “In which of the perfections of God does a man see the essence of a horse or an ass, of a serpent or a dove, of hemlock or parsley?” Locke confesses that he himself cannot see the essence of any of these things “in any of the perfections of God.” It is perfectly true, he goes on, that “the perfections that are in God are necessary and unchangeable.” However, it is not true that “the ideas that are [...] in the understanding of God [...] can be seen by us”; it is still less true that “the perfections that are in God represent to us the essences of things that are out of God” (Locke 1813a, 211–55).

In another criticism of Malebranche, Locke adds that the Malebranchian notion that God cannot communicate to creatures the powers of real perception and real volition sets “very narrow bounds to the power of God, and, by pretending to extend it, takes it away.” He concludes his assault on occasionalism with a moral objection:

The creatures cannot produce any idea, any thought in man. How then comes he to perceive or think? God upon the occasion of some motion in the optic nerve, exhibits the colour of a marygold or a rose to his mind. How came that motion in his optic nerve? On occasion of the motion of some particles of light striking on the retina, God producing it, and so on. And so whatever a man thinks, God produces the thought: let it be infidelity, murmuring or blasphemy. (Locke 1813b, 255)

For Locke, then, *tout en Dieu* is a moral enormity; for Malebranche it is a moral necessity. For Malebranche, as for Kant a century later, mere sense perception of a natural world can never explain the possibility of the idea of moral necessity, since that idea does not arise in perception. Kant argues in his *Critique of Pure Reason* that “‘ought’ expresses a kind of necessity [...] which is found nowhere in the whole of nature” (Kant 1963, A547/B575), and Malebranche would have wholly agreed with that.

## 7.8. Conclusion

Given the radical theocentrism of Malebranche's philosophy, God must be "sovereign," and all finite, created beings must be dependent "occasional causes" who receive limited "love of benevolence"; but it is essential that divine sovereignty not be "Hobbesian" sovereignty, in which natural dominion flows from "irresistible power" alone. If a "ruined" universe, which has deviated from "order" and perfection is to be justifiable, in a proto-*Theodécie*, then God must have a general "will," but not be high-handedly willful: Like Leibniz in the *Discourse on Metaphysics* (Leibniz 1999, 1336), Malebranche wants to say *stat pro ratione voluntas* is "properly the motto of a tyrant." This non-willful voluntarism is at its clearest in Malebranche's very last work, the *Prémotion physique*, in which "moral relations" are governed by "natural/eternal" laws:

moral relations are not simple *truths*, but [...] also have the force of *laws*; for one must esteem all things in proportion as they are estimable and lovable; in proportion as they participate in the divine perfections. And since the nature of God is immutable and necessary, and since God can neither see nor will that two times two be equal to five, how can it fail to be perceived that God can neither see nor will that the idea of man which he has participate less in his perfections than that of the beast? that, as a consequence, he can neither see nor will that it be just to prefer, or rather will to prefer, one's horse to one's coachman, simply because one can or wants to? Power or will adds nothing to the eternal law, to the relations of perfection which subsist between the eternal and immutable ideas. (Malebranche 1970a, 99)

At the end of his life, Malebranche's Augustine-conveyed Platonism is almost as pure as Leibniz'; both have taken the *Euthyphro* to heart. For Malebranche, in the end, will is necessary, but not sufficient: *Volonté* is naturally *générale* in God, and that generality should remain an object of constant human striving—at least when "order" is fully realized neither in the actual world nor in human moral effort. Why there should be a merely "general" world of "ruins" and *débris* which deviates so widely *from* (natural and eternal) "order" and "perfection" remains a central Malebranchian problem: to the Leibnizian question, "Why is there something rather than nothing?" (Leibniz 1989, 357). Malebranche returns an answer which is not as persuasive as it is pious. But what is clear is that, late in life, in a Leibniz-like way, Malebranche began to give "natural/eternal" law greater weight than mere *loi générale* and *volonté générale*. His radical "Cartesianism" gave way to something more *nearly* orthodox—even if the result is closer to Leibniz than to Thomas Aquinas.



## Chapter 8

# MONTESQUIEU AND VICO

### 8.1. Montesquieu's Philosophy of Law

Montesquieu's *De l'esprit des lois* (1748)<sup>1</sup> is an astonishingly original work, and Émile Durkheim was wholly justified in viewing Montesquieu as the father of "the sociology of law."<sup>2</sup> But in many ways the least original part of Montesquieu's treatise is its *vocabulary*—the notion that laws are produced by *des causes générales* (both *physiques* and *morales*), and that "natural" laws are *rappports de perfection* or *rappports de convenance* which are as "eternal" and "necessary" as the axioms of geometry (Montesquieu 1963a, Book 1; 1963b, 106). In fact Montesquieu inherited this language of *causes générales* and of *rappports* from Nicolas Malebranche (1638–1715)—the most famous member of the Oratorian Order, which gave Montesquieu his education at the Collège de Juilly (Shackleton 1961, 98–9; Hillenaar 1967, 286–7; Desautels 1956, 26–31). (Later Montesquieu was to have several books by Malebranche, above all the *Réflexions sur la prémotion physique*, of 1715 [Shackleton 1961, 9; Robinet 1958, 24–5], in his personal library at the Château de la Brède, near Bordeaux; and Montesquieu praised Malebranche as one of the "four great poets" of Western thought; see Shackleton 1961, 5–8.) Insofar as Montesquieu is a "natural lawyer"—occasionally and fitfully—this side of his jurisprudence is demonstrably traceable to the greatest single Oratorian, Nicolas Malebranche.

It was not only Montesquieu's official Oratorian education at the Collège de Juilly that brought him into the Malebranchian orbit (Shackleton 1961, 12–3). As a young provincial from Bordeaux, Montesquieu was introduced into Parisian literary society by Malebranche's associate Père Demolets (*ibid.*, 28–9), the librarian of the *Oratoire* who had also published important manuscripts of Pascal (including the *pensée*, omitted from the Port-Royal edition, that *le coeur a ses raisons que la raison ne connaît point*; Robinet 1958, 24–5).

<sup>1</sup> See Shackleton 1961, 5–8, and Barrière 1946, 12–20, especially 16: "[Malebranche's] great work is *The Search for Truth*; is it not a perpetual search after historical truth which animates Montesquieu [...]?" (The French original: "[Malebranche's] grand ouvrage est la *Recherche de la vérité*; n'est-ce point une perpétuelle recherche de la vérité historique qui anime Montesquieu [...]?") See also Robinet 1958, 24–7 ("Précurseurs de Montesquieu"), and Roddier 1952, 347ff.

<sup>2</sup> See Durkheim 1953, *passim*; Althusser 1959, chap. 1 ("Une révolution dans la méthode"); Oakshott 1975, 246–51; Berlin 1982a, 130ff; and Shklar 1984, 197, 217ff., 235ff. (For a fuller appreciation of Shklar's remarkable reading of Montesquieu, see my review: Riley 1985, 610–1.)

He befriended Cardinal Polignac, who had intervened on Malebranche's behalf (with Fénelon) to rescue the Oratorian from a Jesuitical onslaught in the *Mémoires de Trévoux*, and whose *Anti-Lucrèce* is full of Malebranchian language (Hillenaar 1967, 286–7). He formed an alliance in the Bordeaux Academy with Dortous de Mairan, Malebranche's ablest philosophical sparring partner during the last decade of his life (Shackleton 1961, 87–90). He was always close to Fontenelle, who delivered Malebranche's memorial *éloge* in the Académie des Sciences (Malebranche 1968b, 99ff.). Montesquieu's Malebranchian education, then, by no means ended with his departure from the Collège de Juilly in 1705; he was surrounded by *malebranchistes* throughout his life.

Of course, Montesquieu should not be seen *merely* as the heir of Malebranche, for this approach necessarily overlooks more familiar facets of his thought. It ignores Durkheim's Montesquieu as father of all modern sociology; it ignores Althusser's Montesquieu as pre-Marxian discoverer of inevitable social laws; it ignores Oakeshott's Montesquieu as advocate of moderation and the rule of "recognized" law; it ignores Berlin's Montesquieu as generous tolerator of diversity; it ignores Shklar's Montesquieu as builder of a misanthropic "liberalism of fear," contrasting with Locke's "liberalism of rights."<sup>3</sup> But these views are justly familiar, and there is much to be said for drawing out an unfamiliar side of Montesquieu that is as real as it is little known. One may think, with Voltaire, that the Malebranchian opening book of *Spirit of the Laws* is a "metaphysical labyrinth" (see Beyer 1972, 145–66), but the fact remains that Montesquieu freely constructed that labyrinth, and one can find his way out of it only by first granting its existence.

In finding a *rapport* between Malebranche and Montesquieu, no work matters more than the *Réflexions sur la prémotion physique*, a copy of which was in Montesquieu's personal library. It is in the *Réflexions* that one finds what appears to be the embryonic and still-theological form of Montesquieu's doctrine, adumbrated in *Sur les causes qui peuvent affecter les esprits et les caractères* and in Book 19 of *De l'esprit des lois*, that there are social *causes générales*—both physical (climate) and moral (education)—that produce the *caractères particuliers* of individuals. To be sure, Malebranche speaks of nature and grace, while Montesquieu speaks of the physical and the moral, but is not the second pair a secularized version of the first? Malebranche himself, without "waiting" for Montesquieu, converts *nature et grâce* into *la physique* and *la morale* in the *Méditations chrétiennes*, in which he urges that something right and just on a truly grand scale—Noah's Flood, for instance—arose out of a divine *proportioning* of the moral to the physical. In the seventh *méditation*, a *dévo*t praises God's wisdom in having "so combined the physical

<sup>3</sup> Durkheim 1953, *passim*; Althusser 1959, chap. 1 ("Une révolution dans la méthode"); Oakeshott 1975, 246–51; Berlin 1982a, 130ff.; Shklar 1984, 197, 217ff., 235ff.

with the moral that the universal deluge and other considerable events were the necessary consequences of natural laws.” How much more justice and foresight there is, the *dévo*t goes on, “in having established [general] laws which [...] should have ravaged the earth just at the time that corruption was general” than in making the waters rise through “*des volontés particulières et miraculeuses*” (Shackleton 1961, 167–9). The point here, beyond Malebranche’s usual and familiar diminution of the miraculous, is the notion that God as *cause efficace* combines the physical and the moral in general laws that produce “just” particular events. Diminish or “bracket” God, and one has the substance of Montesquieu.

In the *Réflexions sur la prémotion physique* Malebranche urges that

the continual variety of thoughts and of movements which modify the soul, in consequence of the general laws of nature and grace, contribute to the variety of our acts of consent. [...] All of this produces different modifications in us: not, again, through the efficacy of our wills, but [...] through the general laws of nature and grace—laws which he [God] has established [...] to fix a constant order between natural causes and their effects. (Cited in Alquié 1977, 138–9)

Of course, when Malebranche thinks of these general laws, he is also thinking of “the efficacy of the *volontés pratiques* of the creator, who does everything in all things” (Malebranche 1970a, 48–9), whereas Montesquieu is thinking of the efficacy of a concatenation of physical and moral causes, not of God in the first instance. Yet, for both Malebranche and Montesquieu there is a *general* causality, operating both physically and morally, which produces *les choses particulières*, even though both affirm a measure of freedom (“consent”) and both deny having fallen into a Spinozistic determinism.<sup>4</sup>

Montesquieu’s notion of *causes générales* producing an *esprit* or *caractère général* (which in turn gives rise to the *esprits particuliers* of individuals) receives its definitive summing-up in Chapter 4 of the rightly famous Book 19 of *De l’esprit des lois* (characterized by Shackleton as “perhaps the most significant chapter of the whole work”; Shackleton 1961, 316–7).

Several things govern men: climate, religion, laws, maxims of government, examples of past things, *moeurs*, manners—from which arises a resulting *esprit général*.

In proportion as, in each nation, one of these causes acts with more force, the others yield to it. Nature and climate almost alone dominate savages; manners govern the Chinese; laws tyrannize Japan; *moeurs* used to set the tone in Sparta; maxims of government and ancient *mores* did so in Rome. (Montesquieu, 1963a, 641)

Thus, as Shackleton correctly insists, it is only a caricature of Montesquieu to view him as a climatological determinist, since he offers a variety of determin-

<sup>4</sup> See Malebranche’s self-defense against Dortous de Mairan’s assertion that Malebranchism is finally reducible to Spinozism, in Malebranche 1968a, 852ff.; for Montesquieu’s self-defense against the same charges, see Shackleton 1961, 261–4.

ing *causes générales*. This is especially plain in a *pensée* dating from the 1730s: “I beg,” Montesquieu pleads, “that I not be accused of attributing to moral causes the things which depend on climate alone.” (He need not have worried; he was actually accused of giving too little weight to moral causes.) It is true, he goes on, that “if moral causes do not interrupt physical ones,” the latter will “operate to their full extent.” Even if physical causes “have the power to operate by themselves (as when people inhabit inaccessible mountains),” moral causality need not be wholly destroyed, for often a “physical cause needs a moral cause in order to operate” (Montesquieu 1949–1951, 996).

Shackleton is surely right in believing that Montesquieu believed “firmly in the concomitance of moral and physical causes” (Montesquieu 1963c, 492–3). A strict physical determinism would have been obviously incompatible with his assertion, in Book 1 of *De l'esprit des lois*, that the institutions of each nation are only the *cas particulier* of a perfectly general *raison humaine* (*la raison* being, of course, a moral cause; Shackleton 1961, 317.) Thus Montesquieu can honestly say, in Book 19, that none of his efforts to show the relation between institutions (including laws) and their physical and moral causes is designed to “diminish any of the infinite distance that there is between vices and virtues,” and that it is only by granting that “all political vices are not moral vices” that one can urge that no particular nation make laws that shock its own peculiar *esprit général*.<sup>5</sup>

Montesquieu's emphasis on the relation between social institutions and their causes serves to remind one that the Malebranchian idea of *rappports*, like the notions of *généralité* and occasionalism, turned up in Montesquieu in a transformed state. The Malebranchian idea that moral laws are “relations of perfection”—relations as eternal as the *rappports de grandeur* of mathematics—comes out most clearly in two especially important works of Montesquieu: the eighty-third *Lettre Persane* and the opening book of *De l'esprit des lois*.

In *Lettre Persane* no. 83, Usbek says that God is necessarily just—that, were he not, he would be “the most imperfect of all beings” because omnipotently unjust—then moves on quickly to define justice itself. Justice is, Usbek asserts, a “*rapport de convenance*” (the very phrase of *Recherche de la vérité*), a relation of suitability that is “always the same, whatever being considers it, be it God, be it an angel, or, finally, be it a man” (Montesquieu 1963b, no. 83, 106). The notion that God and men “see” and “follow” the same *rappports*, whether of perfection or of size, is, of course, central in Malebranche. As a recent study has suggested, Montesquieu's mentioning of angels is a good in-

<sup>5</sup> Montesquieu, 1963a, 532: “Law, in general, is human reason [...]; and the political and civil laws of each nation should only be the particular instances in which this human reason is applied.” (The French original: “La loi, en général, est la raison humaine [...]; et les lois politiques et civiles de chaque nation ne doivent être que les cas particuliers où s'applique cette raison humaine.”)

dication of Malebranchian influence, since Montesquieu personally had no use for an angelic layer of intelligent beings lying between God and man and could only have mentioned them out of the wish to reproduce Malebranche's argument that *all* minds see the same *rappports* (see Beyer 1972, 145–66).

Even when men see this *rapport de convenance*, Usbek continues, they frequently prefer their own particular interest to it; justice has difficulty making herself heard “in the tumult of passions.” (Plainly, a Malebranchian “silence of the passions” is needed for justice's weak voice to be heard.) Where passions remain tumultuous, men will prefer their own satisfaction to that of others. Still, there is no *pointless* malice: “No one is evil gratuitously [...] there must be a determining reason, and that reason is always one of [self-]interest” (Montesquieu 1963b, no. 83, 106). This is not far from Malebranche's belief that men pursue false or inadequate *biens particuliers* because of a misguided but “invincible” wish for happiness; wholly “disinterested” evil is not more conceivable than wholly disinterested or quietistic love (see Malebranche 1970b, *passim*). The same is true for Montesquieu.

Since God has no tumultuous passions to silence, Usbek continues, it is not possible that he ever do anything unjust. As soon as he sees justice—in himself, obviously—“it follows necessarily that he follow it.” This anti-Hobbesian truth is true because, since God “needs nothing” and is totally self-sufficient, he would be “the most evil of all beings” if he acted wrongly, for “he would be without interest” (Montesquieu 1963b, no. 83, 106). The first half of this assertion (God's self-sufficiency) is in perfect accord with Malebranche; the second half goes beyond what Malebranche would have ventured, for Malebranche would never have treated a disinterested but evil God, even hypothetically, as “the most evil of all beings.”

Next, Usbek passes on to claims that Malebranche would have disputed: “If there were no God, we should still have to love justice: That is, strive to resemble that being of whom we have so fine an idea, and who, if he existed, would necessarily be just.” Even if, we were free of “the yoke of religion,” he adds, we would not be free of that of equity (*ibid.*). Malebranche would certainly claim here that an initially correct position has been overstated to the point of falsity: One need not say that, simply because God does not create *rappports de convenance* (or *de perfection*), they are wholly independent of him and subsist even without him. Malebranche's view is that the eternal verities are coeternal and consubstantial with God—that, to borrow Leibniz's language, God is the “ground” of those truths, though not their cause. Here Malebranche would surely have agreed with Leibniz's insistence that

even if we concede that the essence of things cannot be conceived without God [...] it does not follow that God is the cause of the essence of things; [...] for a circle cannot be conceived without a center, a line without a point, but the center is not the cause of the circle nor the point the cause of the line” (Leibniz 1908, 21–2; cf. Malebranche 1958a, 98ff.)

This makes God necessary for, though not the cause of, the truth of the eternal verities; it is just what Malebranche himself has in mind in calling *rappports* co-eternal and consubstantial with God. Just because Descartes was wrong in viewing truth, including moral truth, as *created, ex nihilo* (see Alquié 1974, 226ff.), one need not eliminate all relation between *rappports* and God.

Usbek returns to Malebranchian orthodoxy, however, in the very next paragraph: "Justice is eternal and depends not at all on human conventions." This is a précis of the neo-Augustinian, anti-Hobbesian argument of the *Réflexions sur la prémotion physique*. Nevertheless, Usbek adds (possibly for the accommodation of skeptics) that even if justice *were* merely human and conventional, this could be a "terrible truth which one would have to hide from himself" (Montesquieu 1963b, no. 83, 106).

Usbek finally passes on to the cheering (and largely Malebranchian) thought that, even though we are "surrounded by men who are stronger than us" and who might harm us with "impunity," there is relief to be found in the thought that an inner principle of justice in all men "fights in our favor." Without that inner principle, he continues, borrowing a favorite Malebranchian image, "we would walk among men as if before lions." In the penultimate paragraph of *Lettre persane* no. 83, Malebranchian ideas and images dominate completely. All of his thoughts about those *rappports de convenance* that keep men from being lions, Usbek says, "animate" him against those who "represent God as a being who undertakes a tyrannical exercise of his power" and who "make him act in a way in which we would not wish to act ourselves" (*ibid.*, 107). This is the very language of *Prémotion physique*, a reflection of Malebranche's polemic against Boursier's quasi-Hobbesian divine sovereignty. "Reflection," however, is the strongest allowable word; as Mason points out in her fine study of Montesquieu's theory of justice, the "soaring metaphysical vision" of *Lettre persane* no. 83 is not developed or followed up but exists in splendid isolation. *Lettre persane* no. 82 deals quite irreverently with a sharp contrast between the eternally silent Carthusians, and society wits who have the art of "knowing how to talk without saying anything"; while *Lettre* no. 84 treats with consummate nastiness a scene at the Hôtel des Invalides in which tottering old soldiers cling to religious consolations. ("What could be more admirable than to see these enfeebled warriors observing discipline in their place of retirement, as strictly as if they were forced to do so by the presence of an enemy, seeking a last satisfaction in this imitation of war, and dividing their hearts and minds between the duties of religion and those of military skill" (Mason 1975, 143–4).<sup>6</sup> It is true, perhaps,

<sup>6</sup> See especially Mason 1975, 157: "In Letter 83 [...] there is little in the way of coherent metaphysical theory linking the moral and the theological elements of the argument together, and placing the definition of justice [as *rapport*] with its geometric structural undertones in the context of a unified cosmological theory. [...] We must acknowledge Montesquieu's debt to Malebranche, but nevertheless, the precise ontological significance of his definition of justice remains unclear."

that the Malebranchian *Lettre persane* no. 83 stands out in higher relief for being surrounded by satirical accounts of religious and military folly; but Mason (*ibid.*) is right in saying that the letter is more a remembrance than an argument.

The idea of law as a “relation” comes far closer to being *argued* for in the opening sections of *De l'esprit des lois*. As in *Lettre persane* no. 83, a number of Malebranchian ideas resurface here. For example, Book 1 itself is called “Of Laws *en général*,” and its first section is entitled “Of Laws, in their *Rapport* with the Various Beings.” That section opens with a celebrated but much maligned claim:

Laws, in the largest sense, are the necessary relations [*les rapports nécessaires*] which arise from the nature of things: And in this sense all beings have their laws; the Divinity has his laws, the material world has its laws, the intelligences superior to men have their laws, the beasts have their laws, man has his laws. (Montesquieu 1963a, 530)<sup>7</sup>

The notion that the Creation, all creatures, and even the Creator are governed by law and that all these legal connections are *rappports* is perfectly Malebranchian, as was seen in Montesquieu’s own time by David Hume. Indeed, in his *Enquiry Concerning the Principles of Morals*, Hume insists on this relation between Malebranche and Montesquieu, if only to deplore it. Even after calling Montesquieu an “author of genius as well as learning,” whose *De l'esprit des lois* “abounds in ingenious and brilliant thoughts,” Hume complains that

this illustrious writer [...] supposes all right to be founded on certain *rappports* or relations; which is a system that, in my opinion, never will be reconciled with true philosophy. Father Malebranche, as far as I can learn, was the first that started this abstract theory of morals [...] and as it excludes all sentiment and pretends to found everything on reason, it has not wanted followers in this philosophic age. (Hume 1948, 195–6)

Even the contemptuous last clause is not as hostile as Voltaire’s characterization of Book 1 of *De l'esprit des lois* as a “metaphysical labyrinth”<sup>8</sup>; but if the contempt is lifted out it seems that Hume is essentially right—the weight of Malebranchism in Book 1 is very great.

<sup>7</sup> For a view of Montesquieu’s legal theory that stresses not Malebranchian traditionalism but radical innovation, see Althusser 1959, 22ff. Perhaps the finest short appreciation of Montesquieu’s devotion to law is to be found in Oakeshott 1975, 246–51, esp. 249: “Law [for Montesquieu] [...] is a system of conditions [...] to be subscribed to and used by persons in making their own choices of what to do or to say in contingent situations, and the associates are joined solely in recognition of the authority of these conditions.” Since this corresponds exactly to Oakeshott’s own theory of the “civil condition” (*ibid.*, 146–7), it is no wonder that he cherishes Montesquieu.

<sup>8</sup> Voltaire 1785, 354 (my translation): “Let’s not enter into the subtleties of this metaphysics: Let us protect ourselves from entering this labyrinth.” (“Ne nous jouons point dans les subtilités de cette métaphysique; gardons nous d’entrer dans cé labyrinth.”)

Nothing less than Hume's authority, then, points to a Malebranchian provenance of Montesquieu's legal theory. Montesquieu himself begins to develop the notion of law as relation after dismissing the "absurd" idea that "a blind fatality" has produced the world. Insisting upon an "original reason" accounting for the existence of intelligent beings, he goes on to say that laws are the relations that exist between this *raison primitive* and "the different beings," and that laws are also "the relations of these diverse beings between themselves" (Montesquieu 1963a, 530).

If this is a bit vague, though plainly Malebranchian, Montesquieu moves quickly in the direction of a more concrete illumination of these various *rappports*. He sets out, as would Malebranche, with God. God, he begins, "has a relation to the universe, as creator and as conservator; the laws according to which he has created it are those according to which he conserves it" (ibid.). This is reminiscent of Malebranche's assertion, in one of his defenses of *Nature et grâce*, that "it may absolutely be that God formed successively heaven, earth, and the rest, following the same natural laws which he still observes today" (Malebranche 1966, 780). Montesquieu goes on to say that God operates according to his laws "because he made them," adding that he made them because "they have a relation to his wisdom and his power" (Montesquieu 1963a, 530). Malebranche would agree that the general laws of nature are divinely made and therefore arbitrary, but he would also specify that they are dictated by wisdom.

Book 1 of *De l'esprit des lois* moves on to a further "Cartesian" thought, namely, that the world is formed by "the movement of matter." Furthermore, since the world "subsists always," it must be the case that "its movements have invariable laws." Even if there were another world, it would still have to operate through constant rules, or else be destroyed. This is a perfectly Malebranchian physics, but without Malebranche's doubts about the actual existence of bodies. The creation, Montesquieu adds, supposes "rules as invariable as the fatality of the atheists." In enlarging on this idea, further notions from "Cartesian" physics are drawn in; the laws of nature, he insists, are "a constantly established relation." Between moved bodies, it is "according to the relations of mass and of speed that all the movements are received, increased, diminished, lost; all diversity is uniformity, each change is constancy" (ibid.).

Leaving a uniform and constant physics behind, Montesquieu goes on to consider moral relations. According to Book 1, human beings ("les êtres particuliers intelligents") may have some laws that they have made, but they also have some that they have not made. Since essence precedes existence, intelligent beings were possible even before there were any; thus, "they had possible relations, and as a consequence possible laws." Before there were any positive laws, there were "relations of possible justice [*des rapports de justice possibles*]." To say, with Hobbes, that there is nothing just or unjust except



what the positive laws “ordain or forbid” is to say that “before say that “before a circle is drawn, all the radii were not equal” (ibid.). This assimilation of moral-legal relations to relations of size in mathematics and geometry is entirely Malebranchian (as well as Platonic, Augustinian, and Leibnizian): It is Malebranche who asserts, in his *Entretiens sur la métaphysique*, that “relations of perfection cannot be clearly known unless they are expressed in terms of relations of size” (Malebranche 1964, 190–1). The hostility to Hobbesian “legal positivism” is equally Malebranchian. In any case, Montesquieu insists, one must grant the existence of “relations of equity which are anterior to the positive law,” *rappports* that demand that “if human societies existed, it would be right to conform to their laws” (Montesquieu 1963a, 530).

In his splendid biography of Montesquieu, Robert Shackleton, quoting Hume on the provenance of Montesquieu’s legal theory and giving full (perhaps excessive) weight to Malebranche’s influence, claims that Malebranche “makes no express definition of a law as a relationship” (Shackleton 1961, 246). This is true of Malebranche’s *Traité de morale*, which alone Shackleton quotes; but it is not true of *Réflexions sur la prémotion physique*, which Montesquieu knew well enough to paraphrase in *Mes pensées* (Montesquieu 1949–1951, 1548). In the *Réflexions sur la prémotion physique* Malebranche asserts something very close to Montesquieu’s famous claim that laws are “necessary relations,” that those *rappports* resemble geometrical and mathematical truths, and that Hobbesian power adds nothing to eternally just relationships. Moral relations or *rappports de perfection*, he insists,

are not simple *truths*, but [...] also have the force of *laws*; for one must esteem all things in proportion as they are estimable and lovable; in proportion as they participate in the divine perfections. And since the nature of God is immutable and necessary, and since God can neither see nor will that two times two be equal to five, how can it fail to be perceived that God can neither see nor will that the idea of man which he has participate less in his perfections than that of the beast? that, as a consequence, he can neither see nor will that it be just to prefer, or rather will to prefer, one’s horse to one’s coachman, simply because one can or wants to? Power or will adds nothing to the eternal law, to the relations of perfection which subsist between the eternal and immutable ideas. (Malebranche 1970a, 99)

There is very little in the opening book of *De l’esprit des lois*, including the polemic against Hobbesian sovereignty, that is not a slightly secularized reworking of this passage.

Passing over Montesquieu’s treatment of animals—stopping, however, to notice his uncertainty whether “beasts are governed by general laws of movement, or by particular motion”—one arrives at the rest of his account of humans and their *rappports*. Man as a physical being, he asserts, is, like all bodies, governed by invariable laws. As an intelligent being, however, man “violates ceaselessly the laws that God has established and changes those that he himself establishes.” This is because human “intelligence” is not wholly intelligent; it is “finite” and “weak,” and subject to “a thousand passions.” (All of

this is thoroughly Malebranchian.) Since such a finite intelligent being might “forget his Creator,” God has supplied the laws of religion; since he might “forget himself,” philosophy has provided the laws of morality. Since men, though “made to live in society,” might nonetheless “forget others,” legislators have brought him back to his duty through political and civil laws. Man as limited intelligence is hemmed in by these various *rappports* (Montesquieu 1963a, 530–1).

Following an interesting excursus on the state of nature, in which Hobbes is shown to have attributed to “natural” men before the establishment of societies that which “can happen only after that establishment” (a point much enlarged by Rousseau), Montesquieu returns to law as a relation. First, however, he discusses particularism in a way that recalls Pascal and Malebranche and anticipates Rousseau: After societies are established, he asserts, each *société particulière* “begins to feel its power,” which produces “a state of war between nation and nation.” Similarly, within each *société particulière* individuals (*les particuliers*) begin to feel their power, which leads to an internal state of war. These two states of war, internal and external, are largely blocked by law (*la force générale*). It is Malebranchism at its purest that *une société particulière* and the strivings of *les particuliers* lead to power and war, while a moderating government and law are precisely *la force générale*. Montesquieu again uses the general-particular distinction as a bridge from law as *force générale* back to the idea of relations: “Law *en général*,” he insists, is “human reason” insofar as it governs all the peoples of the earth; and the civil and political laws of each nation “should be only the particular cases” to which that law *en général* is applied. Since the case of each nation is particular, it is only by chance that the laws of one nation “can suit another”; thus, the laws of each nation, while maintaining some *rappport* with *la raison humaine*, must be relative to a number of things. Offering a remarkable one-paragraph précis of *De l'esprit des lois*, Montesquieu insists that the laws

must relate to the nature and to the principle of the government which is established [...]. They must be relative to the climate [*la physique*] of the country [...] to the quality of its soil, to its situation, to its size; to the way of life of peoples, [whether] laborers, hunters or farmers; they must relate to the degree of liberty that the constitution can permit; to the religion of the inhabitants, to their inclinations, to their riches, to their number, to their commerce, to their *moeurs*, to their manners [...]. (Ibid., 531–2)

The rest of *De l'esprit des lois* can reasonably be viewed as the systematic examination of all of these “relations,” the fleshing out of this précis. Montesquieu himself immediately declares that “this is what I shall undertake to do in this work. I shall examine all these *rappports*: They form, taken together, that which is called *the spirit of the laws*” (ibid.). He does not stop with law as a Malebranchian relation of perfection; that Malebranchian notion informs mainly the opening book of *De l'esprit des lois*. (In Malebranche, after

all, *rapports de perfection* turn out to constitute a “great chain of being” in which those beings nearest to God are worthiest of divine [and human] love; therefore, *rapports* have the force of “law” in the sense that we *ought* to love beings in proportion to their degree of perfection.)

For Montesquieu it is mainly other *rapports* that matter; he is concerned with law as it relates to various physical and moral *causes générales*, such as climate and education. Thus it is no accident that most of the chapter titles in *De l'esprit des lois* contain the term *rapport*. To take three or four at random, one finds that Book 9 is called “Of Laws, in the *Rapport* Which They Have with Defensive Force,” Book 11 (the most celebrated of all) is “Of the Laws Which Constitute Political Liberty, in Its *Rapport* with the Constitution,” and Book 13 is “Of the *Rapports* Which the Raising of Tributes and the Size of Public Revenues Have with Liberty.” What Montesquieu means, of course, is that law is relative to—perhaps even the product of—many physical and moral causes. This is clear in Book 5, entitled “That the Laws Which the Legislator Gives Must Be Relative to the Principle of Government,” and in Book 4, called “That the Laws of Education Must Be Relative to the Principles of Government” (*ibid.*, 540, 544, 577, 585, 608). Montesquieu, then, is indeed a “relativist” in the special sense just indicated. Thus the allegedly rambling and formless structure of *De l'esprit des lois*<sup>9</sup> is in fact held together, as Montesquieu himself insisted, by the notion of law as *rapport*, as something “relative” to various general *causes physiques* (climate, geography) and *causes morales* (religion, *moeurs*). To be sure, nine-tenths of *De l'esprit des lois* is taken up with these *causes générales* and not with the concept of *rapport*. Nonetheless, the opening book of *De l'esprit des lois* is not, pace Voltaire, a “metaphysical labyrinth” having no essential *rapport* with the rest of the work; it is related by *the notion of “relation” itself*.

## 8.2. The Legal Philosophy of Giambattista Vico

It seems reasonable to treat the jurisprudence of Giambattista Vico<sup>10</sup> (1668–1744) in close proximity to that of his near-contemporary Montesquieu (1689–1755), for two reasons: (1) Both Vico and Montesquieu were products of a specifically Latin and Catholic version of the Enlightenment (as against the North-German, quasi-Lutheran jurisprudence of Leibniz, Pufendorf and Thomasius); and (2) Both Vico and Montesquieu skilfully mixed rationalism and historicism in their accounts of the genesis and nature of law (since both

<sup>9</sup> Neumann 1949, xxix: “It is generally agreed that the arrangement of *The Spirit of the Laws* is difficult to perceive, if a systematic arrangement can be said to exist in it at all.” (Most of this introduction is excellent, however.)

<sup>10</sup> For the best brief appreciation of Vico in English, see Berlin 1982b, 78ff. For the best (incomparably so) interpretation of Vico as a philosopher of law, see Fassò 1966–1970, vol. 2 (“L’età moderna”), “Vico” chapter.

viewed law as the historically conditioned outgrowth or expression of time-bound cultures, not just of *ratio*). (Hegel, of course, would later make this kind of view more famous, viewing both law and art-works as the most revealing expressions of the *ethos* of an age—especially in the great *Phenomenology of Mind*; Hegel 1967, “The Ethical World.”)

Above all it should be remembered that Vico began his career with writings on jurisprudence and Roman law, that he always hoped for (but never got) a chair in jurisprudence in Naples (and therefore had to settle for an appointment in language and philosophy; Berlin 1982b, *passim*), and that the “first version” of Vico’s wonderful *The New Science*—a version destroyed by Vico himself—apparently opened with a first chapter praising the efforts of (especially) Hugo Grotius to account for the origins of civilization and law (Fauci, 1969, 63–8). And to begin with Grotius is to begin with the founder of modern jurisprudence. Indeed Vico made extensive notes (now lamentably lost) on Grotius *De Jure Belli ac Pacis* (the 1719 edition; *ibid.*), and in his celebrated *Autobiography* ranked Grotius with Plato, Tacitus and Bacon as one of his “Four Authors” (Vico 1944, 155). (Partly for these reasons, Fauci was quite right to publish a well-known article called, “Vico and Grotius: Jurisconsults of Mankind”; Fauci 1969, 63ff.) So there is little doubt that the origin and basis of Vico’s thought is at bottom *jurisprudential*; how else can one account for the fact that he wrote a vast work called *Diritto universale* (Vico 1936)?

It was precisely in the *Diritto universale* that Vico tried brilliantly to expand the notion of “philology” so that it meant not merely the “study of language” but something closer to a broad label for all empirical evidence (not least in understanding law):

Philology is the study of speech and it treats of words and their history, then shows their origin and progress, and so determines the ages of languages, thus revealing their properties, changes and conventions. But since the ideas of things are represented by words, philology must first treat the history of things [*cose*], whence it appears that philologists study human governments, customs, laws, institutions, intellectual disciplines, and the mechanical arts. (Vico 1936, 308)

That list—“governments, customs, laws”—overlaps almost exactly with Montesquieu’s account of what deserves study in *De l’esprit des lois*, Book XIX, chap. 4: “Several things govern men: [...] laws, maxims of government, examples of past things, *moeurs*, manners—from which arises a resulting *esprit général*” (Montesquieu 1963a, XIX, chap. 4).

That Vico and Montesquieu share a concern with unearthing the historical determinants of language, law and (more broadly) human culture is evident in a celebrated paragraph from *The New Science* itself:

Philosophy undertakes to examine philology (that is, the doctrine of everything that depends on human will [*auctoritas*], for example, all histories of the languages, customs, laws and deeds

of peoples in war and peace), of which, because of the deplorable obscurity of causes and almost infinite variety of effects, philosophy has had almost a horror of treating; and reduces it to the form of a science by discovering in it that design of an ideal eternal history traversed in time by the histories of all nations; so that on account of this, its second principal aspect, our *Scienza* may be considered a philosophy of *auctoritas*. (Vico 1948, 6, pars 7)

This whole paragraph—with the possible exception of “ideal eternal history”—could be invisibly woven into Montesquieu’s *De l’esprit des lois*; the great French and the great Neapolitan juriconsult are equally concerned with “causes,” with the “infinite variety” of legal-cultural “effects,” with finding “the form of a science,” with Roman-law *auctoritas*.<sup>11</sup> To be sure Vico, as a more orthodox Catholic than the skeptical Montesquieu, made a larger place for divine Providence than is seen in *De l’esprit des lois*; but even Montesquieu begins his work with the quasi-Malebranchian claim that God governs the cosmos through naturally just laws which are as eternal as geometry (Montesquieu 1963a, chap. 1). (Hence one sees why both Vico and Montesquieu admired Grotius’ insistence that the necessity of natural law is as eternal, universal and changeless as “2+2=4”; Grotius 1964, Prolegomena, ix.) And of course Vico remains more “philological” than Montesquieu, often viewing the language of law as an offshoot of language more generally: In the *Scienza Nuova* he famously treats “three ages” of languages—the age of Gods, the age of Heroes, and the age of Men—and urges that each of these historical linguistic phases has its own *legal* language (or lack of it, as when “heroes” are, so to speak, a “law unto themselves”; see Kelley 1976, 19–20). So Vico and Montesquieu do not entirely overlap—but they do so to a very important degree; without their “historicism,” neither Herder nor Hegel (as “cultural historians”) would be conceivable.

The lawless “laws” of Hercules or of Zeus (kidnapping and raping Europa and Ganymede) are not rationally comprehensible—as Plato had already complained in both *Euthyphro* and the *Republic* (*Euthyphro* 9e–10e, above all); and for Vico himself it is only human law (in the “age of Men”) which is understandable. But that is because human law is a human creation (divine Creation and divine Providence notwithstanding); “we” understand it because “we” made it. Insisting on a so-called *Verum-Factum* principle in *Scienza Nuova*, Vico famously claims that

in the thick darkness enveloping the earliest antiquity, so remote from ourselves, there shines the eternal and never failing light of a truth beyond all question: that the world of civil society [and law] has certainly been made by men, and that its principles are therefore to be found within the modifications of our own human mind. (Vico 1948, pars. 331)

<sup>11</sup> If Vico read Montesquieu’s *Considerations on the Greatness and Decline of the Romans* (1734), which he could have done, he would have approved of it.

“Eternal” and “never failing” light of “truth” is of course Platonic language (*via* Plotinus and Ficino; see Cassirer 1936, *passim*), but what really matters here is the most important claim about the comprehension of human institutions that Vico ever makes—namely the claim that we understand law (and government and *mores*) because (be-cause, for the reason that) we caused them. Only makers fully comprehend what they have made. Thus for Vico all social phenomena (including law and language) are at once products of human will—that he calls *auctoritas*—and the outgrowth of sustained patterns of human thought which run as constants throughout human history: Human moral, legal and political imposition upon the world (“making”) has a sustained logic to it, just as language (“philology”) has a sustained logical structure behind what might at first seem to be an arbitrary application of linguistic conventions (Vico 1948, pars 144). To uncover the scientific status (what Vico calls *costantia*) of empirical social fact (above all in law and jurisprudence) by relating it to “the modifications of our own human mind”—that, for Vico, is the *scienza* which is truly *nuova*. What matters is law as a sustained outgrowth of a constant *psychology*—a point which would be embraced in different ways by Montesquieu and Hume.

But law as something psychologically truthful (in an “eternal” and “never failing” way) links Vico not just to his contemporary Montesquieu but to his intellectual ancestor Grotius—the very Grotius who had dominated the opening chapter of the destroyed first version of *Scienza Nuova*. And it seems appropriate to end where Vico began: with the author (maker, cause) of *De Jure Belli ac Pacis*. Given Vico’s “psychologism” (even more than his “historicism”), what one would expect Vico to admire in Grotius is the principle of “natural sociability” (*socialitas*) as the foundation of “natural law” (shored up by geometrical-mathematical “eternity”). As a recent interpreter of early-modern natural law has rightly said,

It was for his work in reconciling reason and authority that Vico admired Grotius so highly. The latter’s achievement in natural law was of this order, because he had produced a persistent structural feature of human existence—sociability—as his principle, and then demonstrated its presence in positive law over the centuries: his natural law must be *verum et certum* because clearly *factum*. This represented the combination of “philosophy” with “philology” that Vico was seeking in his own writing, and was marred only by Grotius’ refusal to admit a role in historical causation for divine providence, and his insistence that human reason was fully formed at the earliest stages of human experience. From the evidence that survives in the *The New Science* as published, it thus appears that what impressed Vico in Grotius’ natural law theory was its combination of inductive and deductive thinking: A “universal system” was presented derived from rationally valid principles (in this case the principle of sociability) supported by empirical historical evidence drawn from many nations of long-standing historical pedigree. Although it grew to encompass a variety of intellectual aims, initially *The New Science* originated as an attempt to complete the theory of Grotius by making human cultural development more obviously dependent upon divine providence and specifying the historical stages (the three ages) through which natural law had passed. (Hochstrasser 2000, 9)

And if the original inspiration of the first version of Vico's *New Science* was (more than anything else) "Grotian," one should remember that Grotius' own inspiration in making *socialitas* the heart of "natural law" was (more than anything else) "Ciceronian"; the common source of *De Jure Belli ac Pacis* and of *Scienza Nuova* is (more than anything else) *De Finibus Bonorum et Malorum*—which means that Cicero's name should be added to the "Four Authors" received by Vico (Plato, Tacitus, Bacon and Grotius). That means that the greatest of Roman jurisconsults should be given the final word:

In the whole moral sphere of which we are speaking there is nothing more glorious nor of wider range than the solidarity of mankind, that species of alliance and partnership of interests and that actual affection which exists between man and man, which, coming into existence immediately upon our birth, owing to the fact that children are loved by their parents and the family as a whole is bound together by the ties of marriage and parenthood, gradually spreads its influence beyond the home, first by blood relationships, then by connections through marriage, later by friendships, afterwards by the bonds of neighbourhood, then to fellow citizens and political allies and friends, and lastly by embracing the whole of the human race. This sentiment, assigning each his own and maintaining with generosity and equity that human solidarity and alliance of which I speak, is termed Justice; connected with it are dutiful affection, kindness, liberality, good-will, courtesy and the other graces of the same kind. And while these belong peculiarly to Justice, they are also factors shared by the remaining virtues. For human nature is so constituted at birth as to possess an innate element of civic and national feeling, termed in Greek *politikon*; consequently all the actions of every virtue will be in harmony with the human affection and solidarity I have described, and Justice in turn will diffuse its agency through the other virtues, and so will aim at the promotion of these. For only a brave and a wise man can preserve Justice. Therefore the qualities of this general union and combination of the virtues of which I am speaking belong also to the Moral Worth aforesaid; inasmuch as Moral Worth is either virtue itself or virtuous action; and life in harmony with these and in accordance with the virtues can be deemed right, moral, consistent, and in agreement with nature. (Cicero, *De Finibus Bonorum et Malorum*, I, 43–5)

Ciceronian "natural" sociability as something transmuted into an infinity of somewhat different, historically-conditioned types of law (as grasped by "philology," broadly defined)—that is what is both *antica* and *nuova* in Vico's *New Science*. And that is what led the eminent historian of ideas Isaiah Berlin to declare, correctly, that Vico was the most "brilliantly original" and radical thinker of the Italian Enlightenment (Berlin 1982b, 91).

## Chapter 9

# HUME AND SMITH

### 9.1. David Hume

David Hume's jurisprudence in the *Treatise of Human Nature* (1738–1740) is shaped by three converging features: anti-rationalism, anti-contractarianism, and (to use Hume's own term) "conventionalism." Hume's anti-rationalism makes him deeply suspicious of latter-day demi-Platonists such as Leibniz and Malebranche, who share Plato's belief in *Phaedo* and *Meno* that all "absolute ideas" (including moral and jurisprudential ones) are reason-given "eternal verities" which are geometrically demonstrable:

There has been an opinion very industriously propagated by certain philosophers, that morality is susceptible of demonstration; and though no one has ever been able to advance a single step in those demonstrations, yet it is taken for granted that this science may be brought to an equal certainty with geometry or algebra. [...] According to the principles of those who maintain an abstract rational difference betwixt moral good and evil, and a natural fitness and unfitness of things, it is not only supposed, that these relations, being eternal and immutable, are the same, when considered by every rational creature, but their *effects* are also supposed to be necessarily the same; and it is concluded they have no less, or rather greater, influence in directing the will of the Deity, than in governing the rational and virtuous of our own species. (Hume 1951b, 12–3)

Hume, indeed, thinks that all so-called rational "demonstration" (even in mathematics) offers merely a high degree of *probability* (not "necessity"), so that finally "*all* knowledge resolves itself into probability, and becomes at last of the same nature with that evidence which we employ in common life"—not surprisingly, since "reason is nothing but a wonderful and unintelligible instinct in our souls," not an intuitive insight into *eternity* and *necessity*. And therefore in moral and legal philosophy "we must glean up our experiments [...] from a cautious observation of human life, and take them as they appear in the common course of the world, by men's behaviour in company, in affairs, and in their pleasures" (Hume 1964, 31–53).

If, then, for David Hume, no practical idea (for example "justice") is simply, naturally "there" as demonstrable necessity derived from reason, if *nomos* is not deduced from *logos*, it must be the case that justice is an "artificial virtue" which arises from human "convention"—but that convention must *not* be mistaken for another kind of artifice altogether, namely a Hobbesian or Lockean "social contract" though which, by covenant, or promise, or "voluntary agreements," men escape a fatal "state of nature." Since some thinkers (most notably Rousseau) use the terms "social contract" and "convention" *interchangeably* (*Du Contract Social* [Rousseau 1959b and 1953b], I, iv–v), it will



be essential to show how (and why) Hume can think that “conventionalism” is as true and useful as “contractarianism” is false and deceptive.

## 9.2. Hume's Anti-Rationalism: *Contra* Plato

In treating the Malebranchian philosophical foundations of Montesquieu's jurisprudence in *Lettre persane* no. 83 and in Book 1 of *De l'esprit des lois*, it was pointed out that especially the great “Scottish Enlightenment” philosopher David Hume insisted on this Malebranchian provenance and genesis—though mainly to deplore it. For while (as was seen in Chapter 8) Hume argued that *De l'esprit des lois* was a masterpiece abounding in “brilliant” thoughts, the one thing that Hume most disliked in Montesquieu's book was its Malebranchism—its notion that laws are reason-ordained *rappports de perfection* enjoying eternal, quasi-Platonic validity. The demi-Platonism of *De l'esprit des lois*, Book 1, with its Hellenizing parallel between eternal geometry and eternal justice (all finally traceable to Plato, *Republic*, Books 4 and 7: “[L]et no one ignorant of geometry enter here”), was simply for David Hume a modern instance of the Platonic rationalism which had (unfortunately) dominated two millennia of Western moral-political-legal thought. In Book 3 of the *Treatise of Human Nature* (1740), Hume—clearly thinking of Plato's argument in the *Phaedo* that “reason” reveals mathematical/geometrical as well as “absolute” moral ideas (*Phaedo*, 74a–75d; cf. *Meno*, 82bff.)—insists that

those who affirm that virtue is nothing but a conformity to reason; that there are eternal fitnesses and unfitnesses of things which are the same to every rational being that considers them; that the immutable measures of right and wrong impose an obligation, not only on human creatures, but also on the Deity himself: all these [are simply mistaken] [...]

No one, I believe, will deny the justness of this inference; nor is there any other means of evading it, than by denying that principle on which it is founded. As long as it is allowed that reason has no influence on our passions and actions, it is in vain to pretend that morality is discovered only by a deduction of reason. (Hume 1951b, 7–8)

And this anti-rationalism is correct, for David Hume, simply because “reason” (*pace* Plato and even Montesquieu) has no capacity to “give” laws, or indeed any moral notions at all: Reason confines itself (Hume insists) to the evaluation of the truth of logical and empirical propositions, and therefore cannot occupy the office assigned to it by Platonizing rationalists such as (early) Augustine, Malebranche, or Leibniz—namely, the office of *lawgiver*.

Reason is the discovery of truth or falsehood. Truth or falsehood consists in an agreement or disagreement either to the *real* relations of ideas, or to *real* existence and matter fact. Whatever, therefore, is not susceptible of this agreement or disagreement, is incapable of being true or false, and can never be an object of our reason. Now, it is evident our passions, volitions, and actions are not susceptible of any such agreement or disagreement, being original facts and re-

alities, complete in themselves, and implying no reference to other passions, volitions, and actions. It is impossible, therefore, they can be pronounced either true or false, and be either contrary or conformable to reason.

This argument is of double advantage to our present purpose. For it proves *directly* that actions do not derive their merit from a conformity to reason, nor their blame from a contrariety to it; and it proves the same truth more *indirectly*, by showing us that, as reason can never immediately prevent or produce any action by contradicting or approving of it, it cannot be the source of moral good and evil, which are found to have that influence. (Ibid., 9–10)

The reason that Platonizing rationalists make such serious mistakes in practical philosophy (including jurisprudence), vainly raising “reason” above “mere” passions and sentiments, in Hume’s view, is that those rationalists believe that the utterance “Murder is wrong” is logically like “ $A = A$ ” or “The world is round”: But those logical and empirical truths are capable of confirmation (and can therefore be true or false), while by contrast “Murder is wrong” is simply the expression of moral *feeling*. To be sure, for Hume all normally constituted human beings, universally, will share this feeling of revulsion; but the universal validity of “Murder is wrong” is psychological, not logical or Platonic-geometrical.

Take any action allowed to be vicious, wilful murder, for instance. Examine it in all lights, and see if you can find that matter of fact, or real existence, which you call *vice*. In whichever way you take it, you find only certain passions, motives, volitions, and thoughts. There is no other matter of fact in the case. The vice entirely escapes you, as long as you consider the object. You never can find it, till you return your reflection into your own breast and find a sentiment of disapprobation which arises in you towards this action. Here is a matter of fact; but it is the object of feeling, not of reason. It lies in yourself, not in the object. So that when you pronounce any action or character to be vicious, you mean nothing, but that from the constitution of your nature you have a feeling or sentiment of blame from the contemplation of it. Vice and virtue, therefore, may be compared to sounds, colours, heat, and cold, which, according to modern philosophy, are not qualities in objects, but perceptions in the mind; and this discovery in morals, like that other in physics, is to be regarded as a considerable advancement of the speculative sciences. (Ibid., 16–7)

It is worth pointing out that Hume’s antipathy to any Platonizing “abstract theory of morals” which “excludes all sentiment and pretends to found everything on reason” arose from a deep knowledge of the neo-Platonic Malebranchian and Leibnizian philosophies which he learned in France while writing the *Treatise of Human Nature* (1736–1739). Hume, indeed, in his later *Enquiry Concerning the Principles of Morals* (1752), shows ample familiarity with Malebranchian jurisprudence resting on *volontés générales*, and with Leibnizian jurisprudence resting on *Theodicée* (theos-dike, “the justice of God”)—though in the end he firmly reject *both*.

In the *Enquiry*, indeed, he declares that he will “examine the *particular* laws by which justice is directed” and goes on to say that if there were “a creature, possessed of reason but unacquainted with human nature,” who tried to decide “what rules of justice or property would best promote the public interest,” such

a creature would hit upon the obvious thought of assigning “the largest possessions to the most extensive virtue” and of giving “every one the power of doing good, proportioned to his inclination.” Such a creature would have to be omniscient in order to know exactly what is merited. “In a perfect theocracy,” Hume argues, “where a being, infinitely intelligent, governs by particular volitions, this rule would certainly have place.” However, infinitely intelligent beings do not rule on earth; the uncertainty and obscurity of merit, coupled with the “self-conceit of each individual,” leads *not* to “perfect theocracy” governed by wise particular volitions but to the “the total dissolution of society.” All of this lends support to Hume’s conclusion in Book 3 of *A Treatise of Human Nature* that society must be directed not through theocracy or merit, or reason, but through a shared *sentiment* of the advantage of general, standing rules and practices: “It is only when a character [or an action] is considered in general, without reference to our particular interest, that it causes such a feeling or sentiment as denominates it morally good or evil.” Hence, as in Pascal, Malebranche, Montesquieu, and (later) Rousseau, generality is good while particularity is evil. Where Hume “gets” this principle is not clear, but it *is* clear that he substitutes general utility for particular providence in a “perfect theocracy” (Hume 1948, 195–7). Since this sort of language does not arise in the British tradition of Hobbes and Locke, and since Hume mentions Malebranche, Montesquieu, and even Bayle, there is reason to believe that French practical thought had some influence on him—not least in his jurisprudence.

### 9.3. Hume’s “Conventionalism”

Given Hume’s radical psychologizing of moral-legal thought—according to which “feeling” is paramount, and reason confines itself to evaluating logical and empirical propositions—it is not at all surprising that for the great Scottish philosopher law is a branch or outgrowth of (observable, describable) facts of human psychology: It is evident, Hume thinks, from both observation and the reading of history, that a sentiment such as “limited,” finite generosity or benevolence necessitates that “conventional” *legal* justice which is (in fact) inferior to an unlimited generosity which would bring all human beings spontaneously to share everything they have.

I have already observed that justice takes its rise from human *conventions*, and that these are intended as a remedy to some inconveniences which proceed from the concurrence of certain *qualities* of the human mind with the *situation* of external objects. The qualities of the mind are *selfishness* and limited *generosity*; and the situation of external objects is their *easy change*, joined to their *scarcity* in comparison of the wants and desires of men. But, however philosophers may have been bewildered in those speculations, poets have been guided more infallibly by a certain taste or common instinct, which in most kinds of reasoning goes further than any of that art and philosophy with which we have been yet acquainted. They easily perceived, that if every man had a tender regard for another, or if nature supplied abundantly all our wants and desires, then the jealousy of interest, which justice supposes, could no longer have place;

nor would there be any occasion for those distinctions and limits of property and possession which at present are in use among mankind. Increase to a sufficient degree the benevolence of men, or the bounty of nature, and you render justice useless, by supplying its place with much nobler virtues and more valuable blessings. The selfishness of men is animated by the few possessions we have, in proportion to our wants; and it is to restrain this selfishness that men have been obliged to separate themselves from the community, and to distinguish betwixt their own goods and those of others. (Hume 1951b, 44–5)

Law, then, for Hume—especially law governing property—is necessitated by the permanent, unchanging, unchangeable facts or data of human psychology: What is “eternal” is changeless sentiment, not Platonizing “reason.”

Here then is a proposition which, I think, may be regarded as certain, that it is only from the selfishness and confined generosity of men, along with the scanty provision nature has made for his wants, that justice derives its origin. (Ibid.)

Since, for Hume, human psychology is invariable—suspended midway between a benevolence which would make legal justice unnecessary and a malevolence which would make such justice impossible—and since radical scarcity cannot be transcended (in the way later imagined by Marx in *Critique of the Gotha Program*; Marx 1975b, 545),<sup>1</sup> laws forbidding murder, violence, theft, and fraud will be perpetually necessary. But one should not mistake that psychological necessity for logical or “geometrical” necessity, à la Plato, Malebranche, or Leibniz; and for Hume, Montesquieu’s *De l’esprit des lois* was great and brilliant despite (not because of) its initial Platonizing rationalism. Hume’s psychological “naturalism” reduces “reason” to a modest role, and makes the facts of human psychology triumphantly dominant. Law, for Hume, is a kind of commentary on a human psychology which is neither wholly admirable nor wholly deplorable—but which, in any case, is a permanent “given,” and which necessitates the artificial *convention* of legal justice as a “remedy” (Watkins 1951, 40–2).

The remedy, then, is not derived from nature, but from *artifice*; or, more properly speaking, nature provides a remedy, in the judgement and understanding, for what is irregular and incommensurable in the affections. For when men, from their early education in society, have become sensible of the infinite advantages that result from it, and have besides acquired a new affection to company and conversation, and when they have observed that the principal disturbance in society arises from those goods, which we call external, and from their looseness and easy transition from one person to another, they must seek for a *remedy*, by putting these goods, as far as possible, on the same footing with the fixed and constant advantages of the mind and body. (Hume 1951b, 45)

And this needful “remedy,” for Hume, is nothing other than the “convention” of legal justice:

<sup>1</sup> Marx’s argument is that “higher right” (*Recht*) may one day be possible when radical scarcity is finally transcended and “the springs of cooperative wealth” flow more abundantly. (For Hume this would be a well-meant *psychological* impossibility.)

This can be done after no other manner, than by a convention entered into by all members of the society to bestow stability on the possession of those external goods, and leave every one in the peaceable enjoyment of what he may acquire by his fortune and industry. By this means every one knows what he may safely possess; and the passions are restrained in their partial and contradictory motions. Nor is such a restraint contrary to these passions; for, if so, it could never be entered into nor maintained; but it is only contrary to their heedless and impetuous movement. Instead of departing from our own interest, or from that of our nearest friends, by abstaining from the possessions of others, we cannot better consult both there interests than by such a convention; because it is by that means we maintain society, which is so necessary to their well-being and subsistence, as well as to our own.

Once such a “convention” established “stability of possession” and “safety,” Hume goes on,

No one can doubt that the convention for the distinction of property, and for the stability of possession, is of all circumstances the most necessary to the establishment of human society, and that, after the agreement for the fixing and observing of this rule, there remains little or nothing to be done towards settling a perfect harmony and concord. All the other passions, besides this of interest, are either easily restrained, or are not of such pernicious consequence when indulged. (Ibid.)

Hume’s legal and jurisprudential “*conventionalism*” has been best illuminated, perhaps, by Gerald J. Postema:

Justice, Hume tells us, is an artificial virtue—artificial, not because it is arbitrary, or because it lacks roots in persisting human need, but rather because it depends for its existence of human reflection, communication, and construction. Our sense of justice has its roots in a natural convention, a convention that can arise only in a certain kind of environment. Only within this environment do the problems of justice emerge and flourish, but in this same environment inventive human beings find resources to solve them. In Hume’s story, the conventions of justice fix the basic terms of interaction and cooperation in human communities in the face of persisting conflicts of interest and principle. The career of justice begins within a group when there emerges among its members a common sense of interest, a sense of born in recognition of the happy convergence of individual interests, but which soon transcends and transform this recognition. The conventions of justice are invented by people who view their practical social problems from a perspective defined by this common sense of interest. In his discussion of the environment of justice Hume outlines the conditions that must obtain if this common sense of interest is to exist and flourish. (Postema 2006, 371–2)

And John Rawls, in his *Lectures on the History of Moral Philosophy*, makes a roughly similar point—though in a darker, more sceptical tone—when he urges that, for Hume, “this basic convention [of property and legal justice] is not contrary to general interests, or to those of our families and friends, but only contrary to their impetuous and heedless, we might say irrational, tendencies.” Hume, for John Rawls, “is suggesting that the convention he is describing is the *practically* best scheme,” not “ideally” but “accepting ourselves and our situation in nature as it is, without weeping and lament” (Rawls 2000, 60–1).

#### 9.4. Hume's Anti-Contractarianism: *Contra* Locke

Postema is right when he says that Hume's portrait of the conditions of justice shows that justice is the virtue of a people who, despite deep conflicts of both interest and principle, are capable of uncovering common interests and shaping a conventional structure for their interaction and mutual improvement through public reflection on a common fund of experience, that while justice remains "the cautious, jealous, virtue" (Hume 1948, 184), it is not the virtue of isolated and self-contained individuals, and that Humean justice is the virtue of interdependent individuals (and groups) who demand recognition of their role in the web of common life that they share with their fellows (see Postema 2006, 372). But Humean "conventionalism," so correctly stressed by Postema, must be sharply separated from the "contractarianism" which Hume took to be false and even dangerous.

The most formidable anti-contractarian legal philosopher in the middle of the eighteenth century, indeed, was precisely Hume, whose attack took the form of annihilating the "Lockeanism" which had been transformed from questionable innovation into received orthodoxy in the half-century between 1690 and 1740 (enabling Voltaire to speak of *le sage Locke*). In Book III of the *Treatise of Human Nature* (1738–1740), and in the essay *Of the Original Contract* (1748; Hume 1951a), Hume strove to sever the three intertwined strands of Locke's law: its contractarianism, its voluntarism, and its natural law. He undercut Lockean natural law by arguing that neither "reason" nor God could provide it: not reason, because it was "passive" or "inert," having no bearing on "active" moral feeling or sentiment; not God, because his real existence was undemonstrable (Hume 1951b, III, i, I). Lockean voluntarism he subverted by insisting that the will is no autonomous moral "cause," but simply a fully determined datum of empirical psychology: "It is a will or choice that determines a man to kill his parent; and they are the laws of matter and motion that determine a sapling to destroy the oak from which it sprung. Here then the same relations have different causes; but still the relations are the same" (Hume 1951b, III, i, I). Clearly, Hume could not say, with Locke, that by "voluntary agreement" we set up "governors" whose principal function will be to protect the natural rights (of life and property) which flow from a "natural law" provided by God or reason—within a context of "convenient" civil law (Locke 1959, Book. II, chap. 28)

If, for Hume, legality cannot reasonably be viewed as a contract for the protection of a natural order—a set of voluntarily "instituted" magistrates who "give effect" to natural law in an "inconvenient" world—one must hold that the principal social institutions (peace, civility, property, and especially *legality*) are held up by nothing more than a "sentiment of approbation" concerning them: just as, for Hume, a "sentiment of disapprobation" arises in the breast of normally constituted persons at the sight of a murdered body, so too

all social institutions and laws are recommended and sustained by nothing more than our general, shared sense or feeling of their necessity and utility. Hence Lockean contractarianism is not merely historically false, in Hume's view, given that governments in fact began through force and violence, and only slowly acquired a veneer of acceptability; it is also philosophically ridiculous. Since the real reason for obedience to government is that without such obedience "society could not otherwise subsist," it is useless to rest the duty of obedience to laws on consent or a "tacit promise" to obey. For we must then ask, "Why are we bound to observe our promise?" And for Hume the only possible answer is that promise-observance is simply necessary because "there can be no security where men pay no regard to their engagements." Since a shared sense of actual usefulness is the ground of obedience in general, as well as of promises, it is foolish to base one on the other, to ground obligation in "will": "We gain nothing by resolving the one into the other," because "the general interests or necessities of society are sufficient to establish both." Sentiments must take the place of contract, will, reason, and God (Hume 1951a, 196–7).

Hume adds, in a caustic aside, that Plato's *Crito* was the exception to the rejection of contractarianism by Greek and Roman antiquity, and that even that small but significant work was anomalous within the Platonic canon, since Plato usually stressed not consent but a mathematics-based harmonious psychic order (Plato, *Republic*, 443d–e) which is then "writ large" in a non-dissonant *polis* (and then largest in the harmony of the spheres). And even *Crito*, Hume continued, has an unexpected conclusion:

The only passage I meet with in antiquity, where the obligation of obedience to government is ascribed to a promise, is in Plato's *Crito*; where Socrates refuses to escape from prison, because he had tacitly promised to obey the laws. Thus he builds a Tory consequence of passive obedience on a Whig foundation of the original contract. (Hume 1951a, 201)

"New discoveries are not to be expected in these matters," Hume tartly concludes. "If scarce any man, till very lately, ever imagined that government is founded on compact, it is certain that it cannot, in general, have any such foundation" (ibid.).

More than a generation after Hume's *Treatise*, Jeremy Bentham, in *A Fragment on Government* (1776), had occasion to lament that the Scottish philosopher's anti-contractarian jurisprudential efforts had not been sufficient to arrest the appearance of Sir William Blackstone's *Commentaries*: "As to the original contract, by turns embraced and ridiculed by our author [Blackstone] [...] I was in hopes [...] that this chimera had been effectually demolished by Mr. Hume." For Hume had been simply right: "the indestructible prerogatives of mankind have no need to be supported upon the sandy foundation of a fiction." For Bentham, as for Hume, a sense of utility is the very thing that reveals the social contract as "dangerous nonsense": "It is the principle of

utility, accurately apprehended and steadily applied, that affords the only clue to guide a man in morals, politics, and (above all) *law*" (Bentham 1988, chap. I, par. 36, and chap. IV, par. 20, on pages 51–2 and 96).

It is no accident, indeed, that Bentham included contractarianism among dangerous "anarchical fallacies," insisting that

the origination of government from a contract is a pure fiction, or, in other words, a falsehood. It never has been known to be true in any instance; the allegation of it does mischief, by involving the subject in error and confusion, and is neither necessary or useful to any good purpose. (Bentham 1838–1843a, 501)

Since, for Bentham in the *Introduction to Principles of Morals and Legislation* (1789), mankind is "fastened to the throne of pain and pleasure," not to Lockean "will" and "natural law" (Bentham 1838–1843b, chap. 1), it is essential to avoid the kind of error which is displayed in the thought of the Abbé Sieyès during the French Revolution: the abbé's contractarian notion that "every society cannot but be the free work of a convention entered into between all the associated [members]" must be firmly repulsed. "From a man's being known to write such stuff," Bentham urges, "it follows [...] that he is living either in Bedlam, or in the French convention" (Bentham 1838–1843a, 527). Bentham was as progressive (as legal reformer) as Hume was conservative; nonetheless they shared the convention that "sentiments of utility" alone could underpin and justify "conventional" social institutions. Hume used utility to recommend continuity and stability, Bentham to urge reform and change; what linked them was the conviction that Lockeanism was a tissue of moral, political, and jurisprudential fables.

As the eminent Hume scholar Frederick Watkins has rightly observed,

because of the selfishness and confined generosity of man [...] political authority is necessary to ensure uniform and dependable enforcement of the rules of justice. The state gradually emerges to satisfy this need. Through violence or persuasion, individuals succeed from time to time in gaining a certain ascendancy over their fellows. By trial and error they discover effective techniques and institutions of government. Their personal interest in the maintenance of stable social conditions gives them a particular motive for insisting on the impartial enforcement of law. Through experience of the benefits of an effective *legal* order, subjects learn to accept political authority, and acquire the habit of obedience. Habit is the primary source of allegiance. Drastic political and social changes, by impairing the force of habit, decrease the capacity of governments to enforce the beneficial dictates of the calm, and to suppress disruptive manifestations of the violent passions. Effective political institutions are the product of long historical experience. Except in rare cases of hopeless political corruption, an established political order is more beneficial to society than any revolutionary alternative, no matter how reformatory its intent. For men of calm judgement, therefore, the problem of politics is to avoid fanatical preferences for any abstract theory of government, and to make the most of existing institutions [such as the legal order]. (Watkins 1951, xx–xxi)

Nor should it be thought that Hume's version of "skeptical conservatism" is a bygone artefact in the history of jurisprudence; for the greatest English scepti-



cal conservative of modern times, Michael Oakeshott, explicitly appeals to Hume as the antidote to all “perfectionist” and “Pelagianizing” schemes of government and law:

In my opinion, there is no better starting place for a renewed attempt to understand and to modernize the principles of sceptical tradition in our politics than a study of Pascal and Hume. [...] The sceptic observes in what is called the “rule of law” a manner of governing remarkably economical in its use of power and consequently one that wins his approval. If the activity of governing were the continuous or sporadic interruption of the habits and arrangements of society, even with arbitrary corrective measures (to say nothing of measures designed to impose a single pattern upon activity), extraordinary power would be required, each of its acts being an *ad hoc* intervention; and in addition, in spite of this extraordinary power in the hands of government, the society would be without any known and protective structure exerting a continuous containing pressure upon the forces of dissolution. But government by rule of law (that is, by means of the enforcement by prescribed methods of settled rules binding alike on governors and governed), while losing nothing in strength, is itself an emblem of that diffusion of power which it exist to promote. It is the method of governing most economical in the use of power: It involves a partnership between past and present and between governors and governed which leaves no room for arbitrariness; it encourages a tradition of moderation and of resistance to the growth of dangerous assemblies of power which is far more effective than any promiscuous onslaught, however crushing; it controls effectively, but without breaking the grand affirmative flow of activity; and it gives a practical definition of the kind of limited but necessary service that may be expected from government, restraining us from vain and dangerous expectation, and it from overreaching ambition. (Oakeshott 1996, 88–9)

Hume survives as powerfully in Oakeshott as Kant survives in Rawls and Habermas—as will be seen in later chapters.

## 9.5. Adam Smith

If David Hume was the supreme figure of the Scottish Enlightenment, the other important philosopher within that movement was Adam Smith (1719–1790), who is best-known for *The Wealth of Nations* (1776), but whose *Theory of Moral Sentiments* (1759) offers extensive thoughts on jurisprudence and moral philosophy.

Adam Smith, who advocated a kind of “Christianized Stoicism” (blending St. John with Marcus Aurelius), was at one with Hume in thinking that benevolence and beneficence are the most admirable of the virtues.

And hence it is, that to feel much for others and little for ourselves, that to restrain our selfish, and to indulge our benevolent affections, constitutes the perfection of human nature; [...] As to love our neighbour as we love ourselves is the great law of Christianity, so it is the great precept of nature to love ourselves only as we love our neighbour, or what comes to the same thing, as our neighbour is capable of loving us. (Smith 1976, 6)<sup>2</sup>

<sup>2</sup> For Smith’s devotion to Marcus Aurelius and to Epictetus, see Raphael’s “Introduction”; *ibid.*, 1ff.

But—also in the manner of Hume—Smith drew the strongest possible distinction between the virtues of benevolence and beneficence, and mere legal justice:

Beneficence is always free, it cannot be extorted by force, the mere want of it exposes to no punishment; because the mere want of beneficence tends to do no real positive evil. It may disappoint of the good which might reasonably have been expected, and upon that account it may justly excite dislike and disapprobation: it cannot, however, provoke any resentment which mankind will go along with. The man who does not recompense his benefactor, when he has it in his power, and when his benefactor needs his assistance, is, no doubt, guilty of the blackest ingratitude. The heart of every impartial spectator rejects all fellow-feeling with the selfishness of his motives, and he is the proper object or the highest disapprobation [...]

There is, however, another virtue, of which the observance is not left to the freedom of our own wills, which may be extorted by force, and of which the violation exposes to resentment, and consequently to punishment. This virtue is justice: the violation of justice is injury: it does real and positive hurt to some particular persons, from motives which are naturally disapproved of. It is, therefore, the proper object of resentment, and of punishment, which is the natural consequence of resentment. (Ibid., II, I, “Of Justice and Beneficence,” 78–80)

For Smith, in short, the *neminem laedere* and *suam cuique tribuere* of Roman legal thought are genuinely part of law and legal justice—but the higher notion of *honeste vivere* belongs to the sphere of morality, of virtues which are admirable but not *enforceable*. (“Enforceability” is, for Smith, the crucial difference between virtue and *legal* duty, between the admirable and the legally required.)

In an important passage which can only be a reference to Hume’s *Treatise of Human Nature*, Book III (1740), Adam Smith goes on to take note of

That remarkable distinction between justice and all the other social virtues, which has of late been particularly insisted upon by an author of very great and original genius: that we feel ourselves to be under a stricter obligation to act according to justice, than agreeably to friendship, charity, or generosity; that the practice of these last mentioned virtues seems to be left in some measure to our own choice, but that, somehow or other, we feel ourselves to be in a peculiar manner tied, bound, and obliged to the observation of justice. We feel, that is to say, that force may, with the utmost propriety, and with the approbation of all mankind, be made use of to constrain us to observe the rules of the one, but not to follow the precepts of the other. (Ibid., 270–1)<sup>3</sup>

Smith then goes on to insist that

Beneficence and generosity we think due to the generous and beneficent [...] The violator of the *laws* of justice ought to be made to feel himself that evil which he has done to another; and since no regard to the sufferings of his brethren is capable of restraining him, he ought to be over-awed by the fear of his own. The man who is barely innocent, who *only* observes the laws

<sup>3</sup> Some scholars maintain that the reference is to Lord Kames—but how likely is it that Smith would describe Kames as “an author of very great and original genius,” while neglecting Hume? See Smith 1976, 80, n. 1.

of justice with regard to others, and merely abstains from hurting his neighbours, can merit only that his neighbours in their turn should respect his innocence, and that the same laws should be religiously observed with regard to him. (Ibid., 78–9)

Even though Smith draws a Hume-like distinction between justice (as something “negative” and enforceable) and benevolence/beneficence (as something higher and better but not subject to “force”), he nonetheless—more than any other British moralist of the Enlightenment—has a lively sense of the attractions of a Platonic (or “Christian Platonic”) philosophy of justice as a loving ascent to higher things such as *caritas* and *benevolentia* (perhaps as recently defended by Leibniz);<sup>4</sup> and while Smith finally rejects Platonism in favor of (merely) legal justice as enforced negativity, his sympathy for Greek thought (Plato, Aristotle, Zeno) surpasses that of anyone in Britain in the 18th century.

The word, it is to be observed, which expresses justice in the Greek language, has several different meanings; and as the correspondent word in all other languages, so far as I know, has the same, there must be some natural affinity among those various significations. In one sense we are said to do justice to our neighbour when we abstain from doing him any positive harm, and do not directly hurt him, either in his person, or in his estate, or in his reputation. This is that justice which I have treated of above, the observance of which may be *extorted by force*, and the violation of which exposes to punishment. In another sense we are said not to do justice to our neighbour unless we conceive for him all that love, respect, and esteem, which his character, his situation, and his connexion with ourselves, render suitable and proper for us to feel, and unless we act accordingly. It is in this sense that we are said to do injustice to a man of merit who is connected with us, though we abstain from hurting him in every respect, if we do not exert ourselves to serve him and to place him in that situation in which the impartial spectator would be pleased to see him. (Ibid., VII, ii, 268–9)<sup>5</sup>

And Smith goes on to insist that

The first sense of the word coincides with what Aristotle and the Schoolmen call commutative justice, and with what Grotius calls the *justitia expletrix*, which consists in abstaining from what is another's, and in doing voluntarily whatever we can with property be forced to do. The second sense of the word coincides with what some have called distributive justice, and with the *justitia attributrix* of Grotius, which consists in proper beneficence, in the becoming use of what is our own, and in the applying to those purposes either of charity or generosity, to which it is most suitable, in our situation, that it should be applied. In this sense justice comprehends all the social virtues. (Ibid., VII, ii, 269)

<sup>4</sup> For *caritas* and *amicitia* as admirable virtues, Smith's source is more likely to have been Cicero—partly *De Officiis* (which Smith frequently cites), but even more *De Natura Deorum*, Lib. I, with its outcry against the Epicureans: “Is there no *caritas naturalis* among the good?” Cicero appeals to the Stoics, against the Epicurean notion that *caritas naturalis* arises merely from weakness and need; and Leibniz cites *De Natura Deorum* with approval in combatting Hobbes' “Epicureanism”: Leibniz 1948c, 248.

<sup>5</sup> Smith's language—justice as “conceiving” our neighbor through “love”—shows that he has read closely Diotima's speech to Socrates at the end of *Symposium*, especially lines 204a through 206d.

In the end, then, Adam Smith joins Hume in viewing “justice” as legal and negative, and in viewing benevolence and beneficence as “higher” but *unenforceable*; but, in finally agreeing with Hume, Smith shows a livelier sympathy for Platonism than was ever entertained by Hume. Hume was so hostile to Plato’s mathematizing “rationalism” that he could not see the charm of “erotic” ascent to doing positive good (as in *Symposium*);<sup>6</sup> Smith could see that, and rejected it only with some regret. Of all the great figures of the “Scottish Enlightenment,” only Adam Smith is in a position to see why a “Christian Platonist” such as Leibniz would say that justice must go beyond negative forbearance from harm and violence to arrive at “wise charity” and “universal benevolence” (Leibniz 1768a, Praefatio, xi–xiii). While Smith finally accepts Humean legal justice, he never says that the Greek view was *wrong*—it is merely *not* the view which he finally embraces. Smith finally embraces Edinburgh, but his sympathy for Athens remains remarkable.<sup>7</sup>

<sup>6</sup> As argued in footnote 5 (*supra*), Smith must have read the *Symposium* with care.

<sup>7</sup> Indeed Smith’s admission that Greek philosophy viewed justice as comprehending “all the social virtues” in an admirable way makes it all the harder for him to be perfectly “Humean.”

## Chapter 10

# VOLTAIRE'S SKEPTICAL JURISPRUDENCE: *CONTRA* LEIBNIZIAN OPTIMISM IN *CANDIDE*

### 10.1. Introduction

While Malebranche's *Recherche de la généralité* ("general" law and "general" will) is the dominant strain in French jurisprudence, finally shaping the legal-political thought of Montesquieu and of Rousseau, there is a recessive (but not negligible) strain which is "skeptical" (descended from Montaigne and Charron) and which emerges in its strongest form in the legal-political-moral thought of Voltaire. Since *généralité* and French *Pyrrhonisme* (between them) dominate French practical thought in early modernity, a chapter on Voltaire is fully warranted.

Surely the most natural and convenient way to illuminate Voltaire's skeptical jurisprudence is to focus on the one work of Voltaire which is still widely read—*Candide, or Optimism*<sup>1</sup>—then to show that Voltairian skepticism is best brought out through a contrast with Leibnizian optimism: The notion that the present, actual world is the "best" (*optimum*) of all logically possible ones, that God had a "sufficient reason" for creating it, and that it is justifiable as the best choice of a "wisely charitable" and "universally benevolent" *être infiniment parfait* (Riley 1996, Introduction and Chapter 1). And after showing that Voltaire's deep suspicion of rationalist metaphysics and theology (as far back as the *Traité de métaphysique*, of 1734) made him unavoidably *antileibnitzien*—to quote his own phrase from a letter to the President of the Leibniz-founded Berlin Academy of Sciences (Voltaire 1834, 23)—it will remain to point out that, ironically, Voltaire shared with Leibniz a devotion to enlightened, tolerant and generous laws and leadership which might alleviate poverty and misery, establish scientific and educational institutions, spurn religious superstition and persecution, and prefer prosperity and felicity to war and violence (see especially Leibniz 1923–2004, vol. 4, 738ff; English translation Leibniz 1988c, 120ff.). The *practical* aims of Leibniz and Voltaire are not so far apart, even if their views about "finding" principles of universal justice which are as valid for God as for men in all possible worlds diverge radically and wholly. If their "first philosophies" were as far apart as they could very well be—since Leibniz was an anti-skeptical, demi-Platonic rationalist who thought that "English" empiricism was wrong in countless

<sup>1</sup> For a brief but excellent commentary on Voltaire as a legal thinker, see Fassò 1966–1970, vol. 2: 333–5.

ways (see Riley 1996, chap. 1), while Voltaire drew together the French Pyrrhonist skepticism of Montaigne, Charron, Pascal, and Bayle, and the Lockean/Newtonian empiricism which he found during his English years (Cassirer 1962, 334)—their shared insistence on enlightenment, toleration and social-legal improvement linked them profoundly. Both of them could share the celebrated motto, *Écraser l'infame*—even if they wouldn't agree at every point about what counts as “infamous” and is worthy of being crushed.

A final introductory remark: In the post-Candide article “*Bien, tout est bien*,” from the 1770 edition of the *Dictionnaire philosophique*, Voltaire traces the notion that “all is well” to Plato's *Timaeus* and then to Leibniz' *Theodiciée*: “Leibniz [...] took Plato's part [...]. But after having read both more than once, we avow our ignorance, according to our custom; and since the Gospel has revealed nothing to us on this point, we shall remain without remorse in the shadows” (Voltaire 1828b, 110ff.)—that is, in Plato's cave *without* any ascent toward the sun.

But Leibniz never says that all is well (or good); he says that the world is best (optimal). “Best,” however, is not good; God alone is good (simply). Bestness is (and must be) congruent with the real existence of Caligula and of Dr. Goebbels; the Leibnizian world is best despite being riddled with “physical,” “metaphysical,” and “moral” evil (see Riley 1996, chap. 3). And so Voltaire's horrendously funny inventory of earthly disasters in *Candide*—murder, rape, beating, hanging, vivisection, slavery, cannibalism, bestiality, syphilis, sodomy, incest, mutilation, drowning, the Lisbon earthquake, and the Spanish Inquisition (not to mention ordinary injustice and garden-variety cruelty)—cannot damage mere “bestness” in the way that it would be fatal to straightforward *goodness*. In Chapter 28, when Candide is reunited with the supposedly long-dead Dr. Pangloss—who has now lost his nose to tertiary syphilis—the following conversation ensues:

– Well, my dear Pangloss, Candide said to him, now that you have been hanged, dissected, beaten to a pulp, and sentenced to the galleys, do you still think that everything is for the best in this world?

– I am still of my first opinion, replied Pangloss; for after all I am a philosopher, and it would not be right for me to recant since Leibniz could not possibly be wrong. (Voltaire 1828a, 38ff.)

But Leibniz would not say that everything (taken individually) is “for the best in this world”; he would say that the world as a totality, as a whole, on balance, is best overall. Not that that distinction would matter much to Voltaire: What he despises is any effort to rationalize evil, to make it comprehensible and acceptable within a so-called “universal jurisprudence.” No doubt (for Voltaire) we must endure evil (since it is inescapable for finite, sentient beings); but we need not (and indeed cannot) find a “sufficient reason” for it. “One must at least grant,” Voltaire says, “that this puny animal [man] has the

right to cry out humbly, and to seek to understand, while crying out, why these eternal laws [of the “best” world] are not made for the wellbeing of each individual” (ibid., 46). (On this last point, almost without knowing it, Voltaire puts his finger on a grave difficulty in Leibnizian optimism—as will be seen.)

So if Leibniz never says that *tout est bien*, he does assuredly say that the world is and must be best. But Voltaire never touches the most appalling difficulty in Leibniz’ thought: Why would a wisely charitable and universally benevolent *être infiniment parfait* create in time (when he need not) any “world” at all—a world which is (at best) “best,” but not good? Would not a wise, loving, benevolent perfect Being simply contemplate his own perfection *ad infinitum*—in the manner of Aristotle’s divinities at 1178b in the *Nicomachean Ethics* (Book 10, 1178bff.)—and not “translate into existence” a (merely) best world in which the admission of evil is the *conditio sine qua non* of the creation of any finite world? Leibniz himself poses the radical question, “Why is there something rather than nothing?” in the *Principles of Nature and Grace* (Leibniz 1898b, 253ff.); and if, as Leibniz thinks, the Anselmian ontological proof demonstrates the necessity of God’s existence, it doesn’t (and can’t) show that anything finite (imperfect or “metaphysically evil”) exists *ex necessitatis*. Voltaire, in a sense, didn’t appreciate the worst problem in Leibnizian bestness: how to get from God’s perfection to the *mere* bestness of an actual, created world.

## 10.2. Voltaire and Leibniz

To understand Voltaire’s critique (or rather ridicule) of Leibnizian “optimism,” one must first understand what Leibniz meant by a *jurisprudence universelle* of “wise charity” which is as valid for God as for men (see, in this volume, chap. 6).

The central idea of Leibniz’ “universal jurisprudence,” which aims to find quasi-geometrical eternal moral verities equally valid for all rational beings, human or divine, is that justice is “the charity of the wise [*caritas sapientis*]”—that it is not mere conformity to sovereign-ordained “positive” law given *ex plenitudo potestatis* (in the manner of Hobbes), nor mere “refraining from harm” or even “rendering what is due” (the *neminem laedere* and *suum cuique tribuere* of Roman law) (Leibniz 1768a, 3, 290ff.). Now the equal stress on “charity” and on “wisdom” suggests that Leibniz’ practical thought is a kind of fusing of Platonism—in which the “wise” know the eternal truths such as “absolute” goodness (Plato, *Phaedo*, 75d) which the gods themselves also know and love (*Euthyphro*, 9e–10e) and therefore deserve to rule (*Republic*, 443 d–e)—and of Pauline Christianity, whose key moral idea is that charity or love is the first of the virtues (I Corinthians, xiii: “Though I speak with the tongues of men and of angels and have not charity, I am become as sounding

brass or a tinkling cymbal.”) There is, historically, nothing remarkable in trying to fuse Platonism and Christianity; for Augustine’s thought (particularly the early *De Libero Arbitrio*) is just such a fusion. But Leibniz was the last of the great Christian Platonists, and left the world just as Hume, Rousseau and Kant were about to transform and “secularize” it: Hume by converting morality into psychology (“sentiments” of approval and disapproval disjointed from “reason”; Hume 1951b, 6ff.), Rousseau by reverting to pre-Christian antiquity (the “Spartan mother” with a radically civic “general will”; Rousseau 1911, 3), and Kant by rethinking Aristotelian *telos* (in order to respect persons as “ends” who ought never to be treated merely as “means,” and in order to define morality as “pure practical teleology”; Kant 1922d, 278).

But if justice rightly understood is “wise charity” (or universal benevolence), three main questions arise: (1) Where does Leibniz find this novel notion of justice? (2) Can an infinite Being be said to be restricted by timeless moral ideas which he finds “imbedded” in his own understanding and does not create in time (ideas which he then follows in fashioning a fully justifiable “best” of all possible worlds from a range of logically possible ones)? And (3) Can finite beings, for example, human beings in the “human forum,” actually act with greater wise charity, if their sheer finitude and limitation—what Leibniz calls their “metaphysical evil”—keeps them from knowing and therefore willing the right and the good?

The first question is mainly historical: If one decomposes *caritas sapientis* into its parts, charity and wisdom, the provenance of both elements is clear enough—charity or love is the very heart of Christian ethics (St. Paul’s “the greatest of these is charity” or St. John’s “a new commandment I give unto you, that you love one another”; *Gospel according to St. John*, VIII); and the notion that justice requires the rule of the wise is famously Platonic. How charity and wisdom relate, how they might modify each other, is not just an historical but a philosophical problem—since love is “affective,” wisdom “cognitive”; but the really grave difficulties in Leibniz’ universal jurisprudence relate to questions (2) and (3). For it is not clear that a wisely charitable God would create a world which, though it may be “best,” is not simply good; an *être infiniment parfait* might sooner contemplate his own perfection, *ad infinitum*. And whether Judas or Pontius Pilate “could have” acted better, been more benevolent, is notoriously problematical given Leibniz’ ideas of “substance” (or monad) and of preestablished harmony. (Since, however, Leibniz is a supremely architectonic thinker who wants to relate everything to “first philosophy,” one cannot just cordon off his moral, legal, and political thought from his metaphysics and theology: that is precisely what he himself did not do.)

The essential thing, then, in a philosopher of Leibniz’ stature—and he was not just a “political theorist,” but one of the three or four greatest general thinkers of the 17th century—is to relate his central moral and political ideas



to the structural principles of his first philosophy. The celebrated *Monadology*, for example, is Leibniz' theory of "substance"—but for him a (rational) substance or monad is a person, a mind, a "citizen" of the City of God governed by "eternal moral verities" and by moral memory; in short the *Monadology* is a theory of personality on which all further Leibnizian convictions about morality and justice are based (Riley 1996, 5). (Indeed one does not have to strain or force in order to read the *Monadology* as a "theory of justice.") And the *Theodicy* is a theory of the perfect justice of a divine "person" or mind who brings about what is "best," and who "justifies himself against complaints" (ibid.). Leibniz is always a moralist thinking of what is justifiable, even when he seems to be a metaphysician or a theologian: "Theology is the highest point in knowledge of those things which concern the mind, and includes in some way good morals and good politics" (ibid., 6). (That statement about what is "highest" should give pause to those who view Leibniz mainly as a mathematician and logician.)

What is crucial, then, is to see how Leibniz' central moral-political-legal convictions flow reasonably, and possibly irresistibly, from his "pure philosophy." The radically fundamental question in Leibniz is: "Why is there something rather than nothing?" (Leibniz 1898b, 253); but to that he also returns a moral-political answer, or set of answers: God is there, *ex necessitatis*, because "perfection" (which includes moral perfection above all) entails automatic existence, and then that necessary being creates everything and everyone else in time by the moral principle of what is "best." The whole of Leibnizianism is one huge "theodicy," one vast "universal jurisprudence" (Riley 1996, Introduction)—but theodicy is an account of what ought to be, what deserves to be, what has "sufficient reason" for being. To state it another way, it hardly matters whether one calls Leibniz a "theodicist" or a "monadologist," because God as creator of the "best" world is the just "monarch" of substances, or persons, or monads. At bottom Leibniz, like all the greatest philosophers, is a moralist.

Leibniz will remain incomprehensibly strange, will perhaps even be thought guilty of "category mistakes," if one fails to see that for him theory and practice; God and men, theology and justice, are welded together by "perfection": The perfect Being, who exists *ex necessitatis*, must govern his created world as well as is possible (in the "best" way), and we (finite) beings must recognize and indeed feel that perfection (which leads to love as a "feeling of perfection"), and that love or *caritas* spreads from the perfect Being to those finite creatures whom he had "sufficient reason" to translate into existence. This incredibly ambitious universal jurisprudence, valid for any "mind" in any logically possible "world," must seem extravagant in our present moral-political-legal world—in which a Rorty argues that political principles have (and can have) no metaphysical-theological "foundations," (ibid., 17) and in which a Rawls wants to use only "thin" and widely shared

assumptions to underpin his theory of justice (ibid.). Leibniz' universal jurisprudence is, by contrast, "thick": It aims to deduce moral-political perfectionism from metaphysical-theological perfectionism. It aims to present earthly justice as an outgrowth of universal justice, as the limb of a tree is the outgrowth of the trunk.

### 10.3. Voltaire against Leibniz

Such, in outline, is Leibniz' "universal jurisprudence," in which a fully defensible "best" world is made and governed by a wisely charitable and universally benevolent *être infiniment parfait*. Obviously Leibnizian "optimism"—in which so to speak, "bestness" is good enough—was a perfect object of ridicule for the Voltaire who fused French skepticism and English empiricism: the very things which Leibniz strove to combat (but from a deep understanding of both).

As is well-known, Voltaire's first serious encounter with Leibniz came in 1740, when his lover Mme. du Chatelet was converted to Leibnizianism, and when Voltaire could not resist reacting to this domestic embarrassment—by writing *La Métaphysique de Newton, ou Parallèle des sentiments de Newton et de Leibniz*. In this early work Voltaire is skeptical indeed, but not yet morally outraged by optimism:

Even if it were possible that God had done everything that Leibniz imagines, must one believe it on the basis of simple possibility? [...] Do you not feel how much such a system is purely imaginary? Is not the admission of human ignorance superior to so vain a science? What a use of logic and geometry, when one [...] walks toward error with the very torch which is destined to enlighten us! (Voltaire 1828c, 213)

That is comparatively mild, and indeed throughout the 1740s Voltaire's skeptical anti-Leibnizianism (grounded in "human ignorance") is mocking rather than indignant: The "Leibnizians," Voltaire wrote to Maupertuis in 1741, "spread about in Germany all the horrors of Scholasticism, surcharged with sufficient reasons, with monads, with indiscernibles and with all the scientific absurdities which Leibniz brought into the world through vanity, and which the Germans study because they are Germans" (Voltaire 1834, 237). (Here, to be sure, there is a provisionally humorous intimation of what will later become grimly angry: Leibniz' Scholastic "horrors" are [in effect] Gothic, and the equally Gothic Roman Catholic Church intolerantly killed Calas and the Chevalier de la Barre. Things equal to the same [Gothic] thing are equal to each other; ergo...)

But in the celebrated 1755 poem on the Lisbon earthquake—the poem that so distressed Rousseau—mere Voltairean mocking skepticism gives way to furious indignation against those (Pope as well as the Leibnizians) who imagine that they can find a divinely sufficient reason for

Cent mille infortunés que la terre dévore,  
 Qui, sanglants, déchirés, et palpitants encore  
 Enterrés sous leurs toits, terminent sans secours  
 Dans l'horreur des tourments leurs lamentables jours!

And Voltaire goes on to say: “Vous criez: ‘Tout est bien’ d’une voix lamentable, / L’univers vous dément, et votre propre Coeur / Cent fois de votre esprit a réfuté l’erreur.” This leads him to the dark end of the Lisbon poem which he (at first) thought of using:

Mortels, il faut souffrir,  
 Se soumettre en silence, adorer, et mourir.

But this was simply too dark, and so in the definitive version of the poem Voltaire brought himself to say,

Un jour tout sera bien, voilà notre espérance;  
 Tout est bien aujourd’hui, voilà l’illusion.  
 Les sages me trompaient, et Dieu seul a raison. (Voltaire 1828d, 137ff.)<sup>2</sup>

If one read just *Candide* (1758) and the poem on the Lisbon earthquake (1755), one might think that Voltaire’s considered view is that the justice of God (governing a best world) is *refuted* by piling up the bloody corpses of crushed women and babies, and especially that Leibniz’ *jurisprudence universelle* of “charity” and “benevolence” is overturned. Strictly speaking, however, Voltaire’s early insistence on “human ignorance” (in the 1740 *Métaphysique de Newton*) is still in place in the 1750s: We cannot *know* the justice or the injustice of God or the cosmos, and should therefore have the decency to stop declaring dogmatically that “all is good” or “all is evil”—especially because dogma is nothing but rationalized “imagination.” This is clear in the very important article *Du bien et du mal, physique et moral* from Voltaire’s *Dictionnaire philosophique*:

We here treat of a question of the greatest difficulty and importance. It relates to the whole of human life. It would be of much greater consequence to find a remedy for our evils; but no *remedy* is to be discovered, and we are reduced to the sad necessity of tracing out their origin. With respect to this origin, men have disputed ever since the days of Zoroaster, and in all probability they disputed on the same subject long before him. It was to explain the mixture of good and evil that they conceived the idea of two principles—Oromazes, the author of light,

<sup>2</sup> English translation (by J. McCabe) in Voltaire 1912: “A hundred thousand whom the earth devours, / Who, torn and bloody, palpitating yet, / Entombed beneath their hospitable roofs, / In racking torment end their stricken lives.” “Mortal and pitiful, ye cry, ‘All’s well,’ / The universe belies you, and your heart / Refutes a hundred times your mind’s conceit.” “All will be well one day—so runs our hope. / All now is well, is but an idle dream. / The wise deceive me: God alone is right.”

and Arimanes, the author of darkness; the box of Pandora; the two vessels of Jupiter; the apple eaten by Eve; and a variety of other systems. The first of dialecticians, although not the first of philosophers, the illustrious Bayle, has clearly shown how difficult it is for Christians who admit one only God, perfectly good and just, to reply to the objections of the Manichæans who acknowledge two Gods—one good, and the other evil. (Voltaire 1828b, 119)

Having lumped apple-eating Eve with Pandora and the Manicheans—all useless in accounting for evil—Voltaire now adds sarcastically that “the Christian doctors (independently of revelation, which makes everything credible) explain the origin of good and evil no better than the partner-gods of Zoroaster.” And the main “Christian doctor” in his philosophical sights is almost certainly Leibniz.

When they say God is a tender father, God is a just king; when they add the idea of infinity to that of love, that kindness, that justice which they observe in the best of their own species, they soon fall into the most palpable and dreadful contradictions. How could this sovereign, who possessed in infinite fulness the principle or quality of human justice, how could this father, entertaining an infinite affection for his children; how could this being, infinitely powerful, have formed creatures in His own likeness, to have them immediately afterwards tempted by a malignant demon, to make them yield to that temptation to inflict death on those whom He had created immortal, and to overwhelm their posterity with calamities and crimes! We do not here speak of a contradiction *still more revolting* to our feeble reason. How could God, who ransomed the human race by the death of His only Son; or rather, how could God, who took upon Himself the nature of man, and died on the cross to save men from perdition, consign over to eternal tortures nearly the whole of that human race for whom He died? Certainly, when we consider this system *merely as philosophers*—without the aid of faith—we must consider it as absolutely monstrous and abominable. It makes of God either pure and unmixed malice, and that malice infinite, which created thinking beings, on purpose to devote them to eternal misery, or absolute impotence and imbecility, in not being able to foresee or to prevent the torments of his offspring. (Ibid., 121–2)

And Voltaire goes on to say, in a way that ridicules the Leibnizian notion of God as a “just” monarch of a “best” universe, that

A father who kills his children is a monster; a king who conducts his subjects into a snare, in order to obtain a pretext for delivering them up to punishment and torture, is an execrable tyrant. If you conceive God to possess the same kindness which you require in a father, the same justice that you require in a king, no possible resource exists by which, if we may use the expression, God can be excused; and by allowing Him to possess infinite wisdom and infinite goodness you, in fact, render Him infinitely odious; you excite a wish that He had no existence; you furnish arms to the atheist, who will ever be justified in triumphantly remarking to you: Better by far is it to deny a God altogether, than impute to Him such conduct as you would punish, to the extremity of the law, in men.

We begin then with observing, that it is unbecoming in us to ascribe to God human attributes. It is not for us to make God after our own likeness. Human justice, human kindness, and human wisdom can never be applied or made suitable to Him. We may extend these attributes in our imagination as far as we are able, to infinity; they will never be other than human qualities with boundaries perpetually or indefinitely removed; it would be equally rational to attribute to Him infinite solidity, infinite motion, infinite roundness, or infinite divisibility. These attributes can never be His. (Ibid.)

This had been Voltaire's jurisprudence, since the *Traité de métaphysique* (1734):

We have no other ideas of justice than those which we have formed for ourselves from considering all action which is useful to society, and in conformity to laws established by us for the common good; now, this idea being only an idea of relations between men, it can have no analogy whatever to God. It is as absurd to say [...] that God is just or unjust, as to say that God is blue or square. (Voltaire 1828e, 121–2)

Philosophy informs us that this universe must have been arranged by a Being incomprehensible, eternal, and existing by His own nature; but, once again, we must observe that philosophy gives us no information on the subject of the attributes of that nature. We know what He is not, and not what He is.

With respect to God, there is neither good nor evil, physically or morally. (Ibid.)

And finally Voltaire says (in the *Dictionnaire philosophique*), in a way that makes it clear that we know human injustices perfectly, even if we know nothing about divine or cosmic justice and injustice, that

Man, you say, offends God by killing his neighbor; if this be the case, the directors of nations must indeed be tremendous criminals; for, while even invoking God to their assistance, they urge on to slaughter immense multitudes of their fellow-beings, for contemptible interests which it would show infinitely more policy, as well as humanity, to abandon. But how—to reason merely as philosophers—how do they offend God? Just as much as tigers and crocodiles offend him. It is, surely, not God whom they harass and torment, but their neighbor. It is only against man that man can be guilty. A highway robber can commit no robbery on God. What can it signify to the eternal Deity, whether a few pieces of yellow metal are in the hands of Jerome, or of Bonaventure? We have necessary desires, necessary passions, and necessary laws for the restraint of both; and while on this our ant-hill, during the little day of our existence, we are engaged in eager and destructive contest about a straw, the universe moves on in its majestic course, directed by eternal and unalterable laws, which comprehend in their operation the atom that we call the earth. (Voltaire 1828b, 124)

This is aimed at Leibniz as much as at anyone else: Leibniz hoped that from charity and benevolence a man might avoid “killing his neighbor”—and that is because, for Leibniz, the “essence” of Christianity is Pauline charity. For Voltaire the “essence” of Christianity was almost two millennia of intolerant cruelty and institutional oppression; Voltaire thought of what the Church had often done, while Leibniz thought that the Church ought to live up to its own highest principle, *caritas*. For Voltaire, “human ignorance” of divine justice should skeptically keep us from judicially murdering “heterodox” people; for Leibniz, *wise* charity should achieve the same effect. And this means that there is no necessary connection between skepticism and toleration: One can be as morally certain as Leibniz, and nonetheless urge toleration grounded in *caritas sapientis*; one can be as skeptical as Hobbes (Hobbes 1949, XVIII: “To know truth is to remember that it was made by ourselves”) and nonetheless try to impose artificial legal certainty through sovereign “authority.” Similar practical results can be arrived at from also radically different paths: If one is

a skeptic who thinks that “the passion to be reckoned upon is fear,” (Hobbes 1957, chap. 15, 99) one may less-than-tolerantly impose an official religion as an antidote to civil war—while a belief in “wise charity” may lead one to tolerantly accept any religion which (in turn) makes love and benevolence ethically central. Radically different (and utterly incompatible) theoretical bases may lead to nearly converging practical conclusions: Both Kant and Bentham, after all, wrote treatises called *Eternal Peace* (Friedrich 1948, 3ff.). So if Voltairean “ignorance” and Leibnizian *caritas sapientis* both led to enlightenment, that should not be an occasion for astonishment.

#### 10.4. Justice and Ignorance

What then must Voltaire’s conclusion be? That we know nothing about the justice or injustice of the universe or of God—since, to know what is best, one would have to know what might be absolutely good or perfect, and that is hidden from us. And therefore the calamities of *Candide* prove nothing universally. (For Voltaire we don’t even know, with Kant in the second *Critique*, that God *would* be just—crowning virtue with deserved happiness, realizing the *summum bonum*—if he turns out to exist; Kant 1962, 146ff.) Thus *Candide* cannot “refute” Leibniz (though it can effectively ridicule him)—since no one can demonstrate the justice or injustice of the cosmos. The all-too-real injustices, cruelties and horrors of the human world prove nothing *beyond* themselves—except, perhaps, that if we stay quietly at home, “work without reasoning,” and cultivate our gardens, we will be less likely to be hanged, drowned, beaten, cannibalized, raped, or mutilated. The “garden” at the end of *Candide*—a very limited post-Eden—is another anti-Leibnizian joke: For at the end of the *Theodicee* Leibniz says that we can (as a logical possibility) imagine a slightly different Sextus Tarquinius (the last king of Rome) who does not rape Lucretia (and bring about the Roman Republic)—a Sextus Tarquinius with different “predicates” who buys a house with a *garden* in a “city between two seas” (Constantinople, where *Candide* also winds up), and who lives happily ever after (Leibniz 1710, pars 416). But that (logically possible) Sextus is not the one whom God translates into existence as the *conditio sine qua non* of the “best” world. (*Candide*, of course, is full of anti-Leibnizian jokes: *Mademoiselle Cunégonde* is given her name, almost certainly, because Leibniz *als Historiker* prided himself on having discovered that Cunégonde was an 11th-century founder of the [Guelph] House of d’Este in Northern Italy, and that the house of d’Este was the forerunner of the House of Brunswick-Lüneburg—the ruling house of Hannover, which Leibniz served for forty years. If Cunégonde was, in effect, a proto-Hannoverian, what better joke at Leibniz’ expense than to make her the heroine of *Candide* but to ruin her and make her horribly ugly? Voltaire the scholar would have known all of this information about

Leibniz/Cunégonde from the 1724 Paris publication of the *Oeuvres posthumes* of Mabillon—the antiquarian with whom Leibniz had a historical *Briefwechsel* in the 1690s; Barber 1954, 76.)

### 10.5. Conclusion

We know, of course, that Voltaire did not stay quietly in his “garden” at Ferney, in imitation of *Candide* at the end of that *conte*: Voltaire’s skeptical conviction that “universal” justice (or injustice) is unknowable never led him to give up the fight against particular earthly injustices, against tyranny, war, and superstition—against known, visible, sensible evils which are not “imaginary.” When he might have “worked without reasoning” he instead defended Calas and the Chevalier de la Barre against judicial murder by intolerant ecclesiastical courts (Cassirer 1962, 337). (Or rather, *hélas*, he worked for their posthumous rehabilitation.) But here, in the realm of justice, he and Leibniz were not so far apart: Leibniz’ favorite modern Christian writer, after all, was the Jesuit Father Friedrich Spee—who had managed to abolish witchcraft trials in Mainz by a judicious use of “charity” (Riley 1996, chap. 4). If Voltaire would have preferred to rest his justice on “ignorance” and “weakness” sooner than on *caritas*, that is simply because he could not break up and separate the parts of Paul’s I Corinthians as successfully as Leibniz—who underscored “the greatest of these is charity” (I Corinthians, xiii) while minimizing the “body” of the Church (I Corinthians, xii). Leibniz’ selective Christianity let him raise Christian morality (*caritas*) above Christian historical institutions in a way that Voltaire could not follow. After all, when Diderot wrote to Voltaire in the 1760s to praise him for his “heroic” legal defense of widows and orphans, above all in the Calas case, he styled Voltaire *mon cher antichrist* (Diderot 1878, 23: 98)—and that is not merely ironic. For Diderot, as for Voltaire, letting what is “best” in Christianity (*caritas*) triumph over what is worst (centuries of intolerant oppression) simply won’t do—a Leibnizian talent for finding and stressing “the best” did not find its way into French Pyrrhonism. Leibniz’ determination to save everything “best” in the Western tradition, to have a truly synthetic (not merely syncretistic) philosophy (Loemker 1962, *passim*), finds no echo in French skepticism. For Voltaire the history of Christianity simply contained too much that was “infamous,” worthy of being crushed. Leibniz was more selective, and perhaps more generous, in his view of the past, in his judicious use of “charity.”

## Chapter 11

# THE LEGAL PHILOSOPHY OF JEAN-JACQUES ROUSSEAU

### 11.1. Introduction

Inheriting from the celebrated late-Cartesian philosopher Malebranche the notion that a just God rules the universe through “general laws” and “general wills” which are worthy of his majestic simplicity, not through an *ad hoc* patchwork of arbitrary “particular wills,” Rousseau “secularizes” the originally-theological ideas of divine *volonté générale* and of unworthy *volonté particulière*: His ideal citizen, the “Spartan mother” at the beginning of *Émile* (Rousseau 1911), subordinates her self-loving “particular will” to “the general will one has as a citizen” by asking not whether her soldier-sons have survived but whether the *bien général* of the *polis* still lives; and when she learns that Sparta is victorious though her sons have perished, she gives thanks to the gods (“*voilà une citoyenne!*”). Like Malebranche—though now for civic reasons—Rousseau always keeps “general will” and “general law” strictly together: It is not for nothing that his famous phrase “the general will is always right,” appears in the chapter of *Du contrat social* which is called “On Law” (Rousseau 1915c, Book II, chap. 6). For it is Rousseau’s view that originally egocentric “natural” beings can safely abandon all their rights to the *volonté générale* of the “sovereign” people—after “denaturing” transformation by a Great Legislator or law-giver—only if that general will expresses itself through general laws which cannot harm anyone *en particulier*. For Rousseau, as for Aristotle in the *Ethics*, law is by definition a general rule; and it is that *généralité* which makes safe the “total alienation” of rights (while in Hobbes there is a reserved natural right of self-conservation). To be sure, Rousseau feared that a state might be seized by a group with a (highly particular and self-loving) “corporate” will; but ideally a *citoyen de Genève* (as Rousseau styled himself) would think of the general good of the city, which can only be expressed by *des lois générales*. For Rousseau law is as central as it is for Hobbes: Without lawful *généralité*, *volonté* will be “willful,” arbitrary, *particulière*, self-loving, egocentric (Riley 1986, *passim*).

### 11.2. Rousseau as “Ancient and Modern”

Jean-Jacques Rousseau was a severe critic of modern social life—of its lack of a common morality and virtue, of its lack of patriotism and civic religion, of its indulgence in “base” philosophy and morally un instructive arts (see particularly Rousseau 1950a, 172–4; 1915f, 430, 437–8; 1950b, 247–52, 266–9; 1949; Cranston and Peters 1972, chap. 6). At the same time, he was a great admirer



of the more highly unified political system of antiquity, in which, as he thought, law, morality, civic religion, patriotism, and a simple way of life had made men "one," wholly socialized, and truly political (see Rousseau 1915f, 427–37; 1950a, 153–8; 1915d, 253–54, 1915l, 314–8; Shklar 1969, 1–32). And he thought that modern political life divided man against himself, leaving him, with all his merely private and antisocial interests, half in and half out of political society, enjoying neither the amoral independence of nature nor the moral elevation afforded by true socialization (Rousseau 1915h, 325–6).

Why Rousseau thought the unified ancient political systems preferable to modern ones is not hard to understand; he conceived the difference between natural man and political man in very sharp terms. While for the most contract theorists political life is merely non-natural (and this position was held largely to do away with arguments for natural political authority), for Rousseau it was positively unnatural, even anti-natural, a complete transformation of the natural man. The political man must be deprived of his natural powers and given others "which are foreign to him and which he cannot use without the help of others." Politics reaches perfection when natural powers are completely dead and extinguished and man is given "a partial and corporate existence" (Rousseau 1915c, 42; see Hulliung 1995, chaps. 3 and 4). The defect of modern politics, in Rousseau's view, is that it is insufficiently political; it compromises between the utter artificiality and communality of political-legal life and the naturalness and independence of prepolitical life and in so doing causes the greatest misfortunes of modern man: self-division, conflict between private will and the common good, a sense of being neither in one condition nor another. "What makes human misery," Rousseau says in *Le bonheur public*, "is the contradiction which exists between our situation and our desires, between our duties and our inclinations, between nature and social institutions, between man and citizen." To make man one, to make him as happy as can be, "give him entirely to the state, or leave him entirely to himself [...] but if you divide his heart, you will rip him apart; and do not imagine that the state can be happy, when all its members suffer" (Rousseau 1915h, 326). Above all, in Rousseau's view, the imperfect socialization of modern man allows private persons and corporate interests to control other private persons, leading to extreme inequality and personal dependence. Only generality of laws based on an idea of common good can abolish all private dependence, which was for him perhaps the supreme social evil. What he wanted was that socialized men might be "perfectly independent of all the rest, and extremely dependent on the city," for only the power of the state and the generality of its laws "constitutes the liberty of its members" (Rousseau 1915c, 58).

Ancient polities such as Sparta, Rousseau thought, with their simplicity, their morality or politics of the common good, their civic religion, moral use of fine and military arts, and lack of extreme individualism and private interest had been political societies in the proper sense: In them man was "part of

a larger whole” from which he “in a sense receives his life and being” (ibid.). Modern “prejudices,” “base philosophy,” and “passions of petty self-interest,” by contrast, ensure that “we moderns can no longer find in ourselves anything of that spiritual vigor which was inspired in the ancients by everything they did” (Rousseau 1915f, 166–7). This spiritual vigor may be taken to mean the avoidance, through identity with a “greater whole,” of “that dangerous disposition which gives rise to all our vices”: self-love. Political education in an extremely unified state will “lead us out of ourselves” before the human ego “has acquired that contemptible activity which absorbs all virtue and constitutes the life and being of little minds” (Rousseau 1950c, 308).<sup>1</sup> It follows that the best social institutions “are those best able to denature man, to take away his absolute existence and to give him a relative one, and to carry the *moi* into the common unity” (Rousseau 1915e, 145; see Charvet 1974, chaps. 1 and 2). These social institutions in ideal ancient polities were always for Rousseau the creation of a great legislator, a Numa or a Moses. They did not develop and perfect themselves in political experience but were handed down by the “lawgiver” (Rousseau 1915f, 163–5; see Déra-thé 1970, *passim*).

If Rousseau thought the highly unified ancient polity and its political morality of common good superior to modern fragmented politics and its political morality of self-interest, at the same time he shared with modern individualist thought the conviction that all political life is conventional and can be made obligatory only through individual consent. Despite the fact that he sometimes treats moral notions as if they simply arise in a developmental process during the course of socialization,<sup>2</sup> Rousseau often falls back on a kind of moral à priorism, particularly when speaking of contract and obligation, in which the wills of free men are taken to be the causes of duties and of legitimate authority. Thus in an argument against obligations based on slavery in the *Contrat social*, Rousseau urges that “to deprive your will of all freedom is to deprive your actions of all morality” (Rousseau 1915c, 9),<sup>3</sup> that the rea-

<sup>1</sup> Cf. Rousseau’s letter to Lieutenant Colonel Charles Pictet (September 23, 1762): “The state and morals have perished among us: nothing can cause them to be reborn. I believe that some good citizens remain with us, but their generation is dying out and that which follows will not provide any more” (Rousseau 1965–1989, 13: 100).

<sup>2</sup> Rousseau 1971, 340–8, esp. 348: “[M]y feeling, then, is that the human mind, without progress, without instruction, without cultivation, and such as it is when it leaves the hands of nature, is not in a condition to elevate itself to sublime ideas by itself [...] but that these ideas are presented to us in proportion as our mind is cultivated.”

<sup>3</sup> This crucial sentence seems to have been overlooked by Stephen Ellenburg, who argues that “as a term Rousseau’s *general will* can obscure his non-individualist meaning, for the word *will* suggests the natural ego of a deliberative individual” (Ellenburg 1976, 103n). Despite the unfortunate term *ego*, it is clear that Rousseau insists precisely on deliberative individuals: In the *Contrat social* he argues that “each individual may, as a man, have a particular will contrary to or unlike the general will he has as a citizen” (Rousseau 1915c, Book I, chap. 7). Plainly, an individual can have either kind of will. In any case, Ellenburg’s “nonindividualist” Rousseau runs counter to too much that Rousseau demonstrably said.

son that no notion of right or morality can be derived from mere force is that “to yield to force is an act of necessity, not of will” (ibid., 7). In the *Discourse on the Origins of Inequality*, in a passage that almost prefigures Kant, he insists on the importance of free agency, arguing that while “physics” (natural science) might explain the “mechanism of the senses,” it could never make intelligible “the power of willing or rather of choosing,” a power in which “nothing is to be found but acts which are purely spiritual and wholly inexplicable by the laws of mechanism” (Rousseau 1950b, 208). It is this power of willing, rather than reason, that distinguishes men from beasts. In the unpublished *Première version du contrat social* Rousseau even says, “Every free action has two causes which concur to produce it: the first [a] moral [cause], namely the will which determines the act; the other physical, namely the power which executes it” (Rousseau 1962c, 417).<sup>4</sup> Thus Rousseau not only requires the idea of will as moral causality; he actually uses such a term.

Confirmation of this view of will is given in *Émile*, where Rousseau argues, through a speech put into the mouth of the Savoyard Vicar, that “the motive power of all action is in the will of a free creature,” that “it is not the word freedom that is meaningless, but the word necessity.” The will, Rousseau goes on, is “independent of my senses”: “I consent or I resist, I yield or I win the victory, and I know very well in myself when I have done what I wanted and when I have merely given way to my passions.” Man is, he concludes, “free to act,” and he “acts of his own accord” (Rousseau 1911, 243).

To be sure, the pre-Kantian voluntarism of *Émile*, and *Inequality* as well, is not the whole story; even in the *Lettres morales* (1757), which were used as a quarry in the writing of *Émile*, the relation of will to morality is complicated and problematical. The opening of the fifth *Lettre*—“the whole morality of human life is in the intention of man” (Rousseau 1969, 1106)<sup>5</sup>—seems at first to be a voluntarist claim, almost prefiguring Kant’s notion that a “good will” is the only “unqualifiedly” good thing on earth (Kant 1949b, 11). But this *intention* refers not to the will of *Émile* but to conscience, which is a “divine instinct” and an “immortal and heavenly voice.” Rousseau, after a striking passage on moral feelings (“if one sees [...] some act of violence or injustice, a movement of anger and indignation arises at once in our heart”), goes on to speak of feelings of “remorse” that “punish” hidden crimes in secret; and this “importunate voice” he calls an involuntary feeling (“*sentiment involontaire*”) that “torments” us. That the phrase *involuntary feeling* is not a mere slip is proven by a deliberate repetition of the word *involuntary*: “Thus there is, at the bottom of all souls, an innate principle of justice and of moral truth [which is] prior to all national prejudices, to all maxims of education.

<sup>4</sup> The importance of the “First Version” or “Geneva MS” has been especially well brought out by Roger Masters (1978, 15–20).

<sup>5</sup> The importance of the *Lettres morales* is decisively established in Shklar 1969, 229–30.

This principle is the involuntary rule [*la règle involontaire*] by which, despite our own maxims, we judge our actions, and those of others, as good or bad; and it is to this principle that I give the name conscience.” Conscience, then is an involuntary moral feeling—not surprisingly, given Rousseau’s view that “our feeling is incontestably prior to our reason itself” (Rousseau 1969, 1111, 1107, 1108, 1109). And so, while the fifth *Lettre morale* opens with an apparent anticipation of *Émile*’s voluntarism, this is only an appearance. It proves that it is not simply right to find in Rousseau a predecessor of Kant. Rousseau’s “*morale sensitive*” is not easy to reconcile with rational self-determination, for if Rousseau says that “to deprive your will of all freedom is to deprive your actions of all morality,” he also says that conscience is a moral feeling that is involuntary.

The fact remains, however, that while *Émile* was published, the *Lettres morales* were held back. Perhaps Rousseau anticipated the judgment of Bertrand de Jouvenel that “nothing is more dangerous” than the sovereignty of a conscience that can lead to “the open door to subjectivism” (de Jouvenel 1947, 78). And in *Émile* Rousseau certainly insists on the moral centrality of free will. Human free will, moreover, does not derogate from Providence but magnifies it, since God has “made man of so excellent a nature, that he has endowed his actions with that morality by which they are ennobled.” Rousseau cannot agree with Hobbes that human freedom would lessen God by robbing him of his omnipotence:

Providence has made [man] free that he may choose the good and refuse the evil [...] What more could divine power itself have done on our behalf? Could it have made our nature a contradiction and have given the prize of well-doing to one who was incapable of evil? To prevent a man from wickedness, should Providence have restricted him to instinct and made him a fool? (Rousseau 1911, 243–4)

For Rousseau, then, caused or determined volition is not a necessity of proper theology; in this respect unlike Hobbes he was able to avoid having to treat will as determined and was also able to understand will as a moral causality with the power to produce moral effects. Rousseau very definitely thought that he had derived political obligation and rightful political authority from this power of willing: “[C]ivil association is the most voluntary act in the world; since every individual is born free and his own master, no one is able, on any pretext whatsoever, to subject him without his consent.” (Here, as often in Locke, consent is understood as a political way of expressing natural freedom and equality.) Indeed, the first four chapters of the *Contrat social* are devoted to refutations of erroneous theories of obligation and right: paternal authority, the “right of the strongest,” and obligation derived from slavery. “Since no man,” Rousseau concludes, “has natural authority over his fellow men, and since might in no sense makes right, convention remains as the basis of legitimate authority among men” (Rousseau 1915c, 117–8).

For Rousseau, however, contract theory may have been more a way of destroying wrong theories of obligation and authority than of creating a comprehensive theory of what is politically right. While for some theorists a notion of obligation by consent is of central importance, for Rousseau it is not a complete political-legal theory. Any political system that “confines itself to mere obedience will find difficulty in getting itself obeyed. If it is good to know how to deal with men as they are, it is much better to make them what they ought to be” (Rousseau, 1915d, 297). That was Rousseau’s criticism of all contract theory: It dealt too much with the form of obligation, with will as it is, and not enough with what men ought to be obligated to and with will as it might be.

His criticism of Hobbes is based on this point. Hobbes had, indeed, established rightful political authority on consent, rejecting paternal authority and (arguably) obligation based on either divine or natural law; he had made law and therefore morality the command of an artificial “representative person” to whom subjects were “formerly obliged” through transfer of natural rights by consent (Oakeshott 1957). But Hobbes had done nothing to cure the essential wrongness, in Rousseau’s view, of modern politics: Private interest was rampant, and indeed paramount, in Hobbes’s system (could one not decide whether or not to risk one’s life for the Hobbesian state?). The essential error of Hobbes, Rousseau thought, was to have read back into the state of nature all the human vices that half-socialization had created and thus to see culturally produced depravities as natural and Hobbesian legal absolutism, rather than the creation of a feeling of the common good, as the remedy for these depravities. “The error of Hobbes and of the philosophers,” Rousseau declares in *L’état de guerre*, “is to confound natural man with the men they have before their eyes, and to carry into one system a being who can subsist only in another” (Rousseau 1915i, 306).<sup>6</sup> Rousseau, who thought that a perfectly socialized state such as Sparta could elevate men and turn them from “stupid and limited animals” into “moral and intelligent beings” (Rousseau 1915c, 20), must have thought Hobbesian politics incomplete, a system that “confines itself to mere obedience,” one that does not attempt to make men what they ought to be but that, through mere mutual forbearance (cf. Oakeshott 1962a, 261), undertakes no improvement in political life. “Let it be asked,” says Rousseau, “why morality is corrupted in proportion as minds are enlightened.” Hobbes might well have an enlightened view of obligation, to the extent that he bases it on consent, but he says nothing about the moral corruption caused by private

<sup>6</sup> Here Rousseau anticipates by about two hundred years the Hobbes criticism of C. B. MacPherson (1962). Cf. Rousseau’s letter of January 12, 1762, to Malesherbes: “Man is naturally good and [...] it is through these [social] institutions alone that men become bad” (Rousseau 1965–1989, 10: 25).

interest and individual will. The result is that while Hobbes knew “quite well what a *bourgeois* of London or of Paris is like,” he never saw a natural man (Rousseau 1915i, 307).

Rousseau had another objection to traditional contractarianism, an objection that he nevertheless kept under control in the *Contrat social*: namely, that a social contract might simply be a fraud imposed on the poor by the rich with a view to legitimizing (“legalizing”) a ruinous inequality. In the *Discourse on Inequality* Rousseau suggests that the rich man, “destitute of valid reasons” that he can use to justify his unequal possessions and fearful of being plundered by the many, “conceived at length the profoundest plan that ever entered the mind of man: This was to employ in his favor the forces of those who attacked him [...] And to give them other institutions as favorable to himself as the law of nature was unfavorable.” He goes on to say: “‘Let us join,’ he said, ‘to guard the weak from oppression, to restrain the ambitious, and secure to every man the possession of what belongs to him: Let us institute rules of [legal] justice and peace, to which all without exception may be obliged to conform; rules that may in some measure make amends for the caprices of fortune, by subjecting equally the powerful and the weak to the observance of reciprocal obligations.’” Such an argument, Rousseau continues, would have worked quite well with “barbarous” men who were “easily seduced”; “all ran headlong to their chains, in hopes of securing their liberty.” Only the rich, who had something to lose, saw the danger involved, since they had “feelings [...] in every part of their possessions” (Rousseau 1950b, 205, 251, 252–3; see Hoffmann 1965, *passim*).

Even in the *Première version du contrat social*, which Rousseau himself suppressed, his hostility to contractarianism is in evidence. “This pretended social treaty dictated by nature is a veritable chimera,” he wrote, “since the conditions of it are always unknown or impracticable.” The social contract “only gives new [legal] power to him who already has too much,” while the weak party to the agreement “finds no asylum where he can take refuge, no support for his weakness, and finally perishes as a victim of this deceitful union from which he had expected his happiness.” This leads Rousseau to claim, in chapter 5 of the *First Version*, that it is the “*utilité commune*” rather than contract or the general will that is “the foundation of civil society” (Rousseau 1962c, 392–3, 404).<sup>7</sup>

<sup>7</sup> To be sure, at this point, Rousseau rejects the idea of general will partly because it had been Diderot’s term in his *Encyclopédie* article “Droit naturel”: Rousseau 1915b. In that piece, Diderot had argued for a *volonté générale* of the entire *genre humain*, a general will that all men can naturally find when they consult reason “in the silence of the passions” (Malebranche’s phrase from *Recherche de la vérité*; Malebranche 1958a). Rousseau’s general will is much more particular: the general will of Sparta, of Rome, of Geneva. Both Diderot’s rationalism and his universalism are rejected in the *Première version*. For a full treatment see Riley 1978, and Keohane 1978, 475–8. Cf. Wokler 1975.

It is worth noting that in the published version of the *Contrat social*, where Rousseau wants to rely on contractarian arguments, he very much mitigates the radicalism of this view. Indeed, in the definitive version he confines himself to the moderate observation that since “laws are always useful to those who have property, and harmful to those who have nothing,” the social state “is advantageous to men only in so far as they all have something and no one has any more than he needs.” In this work Rousseau emphasizes the benefits of the social contract, provided that conditions are roughly equalized for all parties to the agreement: “[S]ince each gives himself entirely, the condition is equal for all; and since the condition is equal for all, it is in the interest of no one to make it burdensome to the rest” (Rousseau 1915c, 24n., 15). But in the *Contrat social* the notion that a social contract is a rich man’s confidence trick is distinctly subordinate.

Rousseau, in any case, held both the idea that the closely unified political systems of antiquity as he idealized them were the most perfect kinds of polity and the notion that all political society is the conventional creation of individual wills through a social contract, at least when conditions could be equalized. Holding both of these ideas created problems, for while the need for consent to fundamental principles of political society, for creation of a mere political construct through will and artifice, is a doctrine characteristic of what Michael Oakeshott has called the “idiom of individuality” (Oakeshott 1962b, 249–51), the ancient conception of a highly unified and collective politics was dependent on a morality of the common good quite foreign to any insistence on individual will as the creator of society and as the basis of obligation. Rousseau sometimes recognized this distinction, particularly in the *Économie politique*. (As Hume put it, both accurately and amusingly: “The only passage I meet with in antiquity, where the obligation of obedience to government is ascribed to a promise, is in Plato’s *Crito*; where Socrates refuses to escape from prison, because he had tacitly promised to obey the laws. Thus he builds a *Tory* consequences of passive obedience on a *Whig* foundation of the original contract”; Hume 1951a, 163–5.)

Not being a systematic philosopher, as he often pointed out, Rousseau never really reconciled the tensions between his contractual theory of obligation and his “ancient” model of political-legal perfection. To make Rousseau more consistent than he cared to be, one must admit that his ancient ideal model, as the creation not of a contractual relation of individual wills but of a great legislator working with political education and a common good morality, is not obligatory on citizens, is not founded in right. It is true that Rousseau sometimes spoke as though ancient systems were constructed by mutual individual consent; but he did not usually speak in those terms. Even though, for him, all political society, ancient or modern, is artificial in the sense that it is not the original condition of man, contract theory involves an additional element of artifice: Namely, the notion that a society must be created by the will

of all its members. Rousseau spoke as though ancient systems were created not by contract, however, but by the genius of legislators like Moses and Lycurgus. Moses, for example, “had the audacity to create a body politic” out of “a swarm of wretched fugitives”; he “gave them customs and usages.” Lycurgus “undertook to give institutions” to Sparta; he “imposed on them an iron yoke” (Rousseau 1915f, 163–5). It is really only in the *Contrat social* that Rousseau makes much reference to consent or contract in ancient politics; the usual emphasis, as in the *Économie politique* and *Gouvernement de Pologne*, is on great men, political education, general law, and the absence of a highly developed individual will (Rousseau 1915d, 293–311). As Rousseau put it in an early prize essay called *Discours sur la vertu du héros*:

Men [...] do not govern themselves by abstract views; one does not make them happy except by forcing them to be, and one has to make them feel happiness in order to make them love it. There is a job for the talents of the hero; it is often through main force that he puts himself in a position to receive the blessings of the men whom he has earlier constrained to bear the yoke of the laws, in order to submit them finally to the authority of reason. (Rousseau 1962a, 118–20)

Rousseau may have made errors in analyzing the unified spirit of ancient politics by recognizing the desirable effects of a morality of the common good without recognizing that the very absence of a notion of individual will as supreme had made that morality, and thereby that unity, possible. Nevertheless, Rousseau consistently held that modern calamities caused by self-interest must be avoided and that the political systems created by ancient legislators were better than any modern ones. It did not always occur to Rousseau that both the merely self-interested will which hated, and the will necessary for consent to conventional society, were part of the same individualistic idiom of modern political thought and perhaps inseparable. Still, he always thought that mere will as such could never create a proper political society. Whatever the confusions over naturalness, will, or the presence or absence of either or both in any political idiom, the problem of political theory, above all in the *Contrat social*, is that of reconciling the requirements of consent, which obligates, and perfect socialization, which makes men “one.” Men must somehow choose the politically perfect, somehow will that complete socialization that precludes self-division. Will, though the basis of consent, cannot be left as it is in some contract theory, with no proper object. If it is true that will is the source of obligation, it is also true that merely self-interested will is the cause of everything Rousseau hated in modern civilization (Rousseau 1950c, 307–9). And perfect political forms, whatever Rousseau might have said about their being given, must now, in the *Contrat social*, be *willed*.

Setting all the contradictions and vacillations aside, there are two important elements in the two views that Rousseau held simultaneously: first, that the importance of ancient polity had to do with its unity and its common



morality and not with its relation, or lack of it, to contract theory; second, that individual consent (whatever this might do to the “legitimacy” of Sparta) is needed for obligation, which in turn is needed because the state is conventional. It is impossible to make every element of Rousseau both consistent and true to the political principle that he tried to establish: that will is not enough, that perfect polity alone is not enough, that will must be united to perfection, and that perfection must be the standard of what is willed. This synthesizing may be the source of that odd idea, the general will: a fusion of the generality (unity, communality) of antiquity with the will (consent, contract) of modernity (Shklar 1973–1974, *passim*). (Or perhaps it is more accurate to say that it is one of the sources of that idea, for the actual term *general will* comes from seventeenth-century French theology, specifically the inquiry pursued by the main Augustinians of the Grand Siècle—Arnauld, Pascal, Malebranche—as to whether God has a “general will” to save all men or only a particular will to save the elect. But Rousseau, following Montesquieu, gives the term an almost wholly secular turn: The city steps into God’s place.)<sup>8</sup> What makes Rousseau without doubt the most utopian of all great political theorists is his insistence that even a perfect political-legal system be willed by all who are subject to it. “Undoubtedly,” he says, “there is a universal justice derived from reason alone; but this justice, to be admitted among us, must be mutual [...] con-

<sup>8</sup> Though the term *general will* is especially, and rightly, identified with Rousseau—and to a lesser extent with Diderot and Montesquieu—the idea of *volonté générale* was well established in the seventeenth century, though not primarily as a political idea. In fact, the notion of general will was a theological one that referred to the kind of will that God supposedly exercised in deciding who would be granted grace sufficient for salvation and who would be consigned to hell. The question at issue was: If God wills that all men be saved—as St. Paul asserts in a letter to Timothy—does he have a general will that produces universal salvation? And if he does not, why does he will particularly that some men not be saved? Finally, would it be right to save some but not all? The first work of consequence to treat these questions through an appeal to “general will” was apparently Antoine Arnauld’s *Première apologie pour M. Jansenius* (1644), though Arnauld argued, following Augustine’s *De Correctione et Gratia*, that God’s original general will to save all men before the Fall turned into a postlapsarian particular will to save only the elect through pity. That is also roughly Pascal’s view in the magnificent *Écrits sur la grace*; but Pascal’s main achievement was to convert *volonté générale* from a purely theological question into a social one by claiming that men, and not just God, should “incline” toward what is general, that *particularisme* is the source of all evils, above all self-love. In the 1680’s Malebranche both revived and transformed the language of general and particular will, saying that it is because God’s operation is general and simple (through uniform laws) that he cannot particularly save each and every man. Here, general will keeps some men from being saved. That Rousseau was familiar with all this, and with the controversy over Malebranchism in the writings of Bayle, Fénelon, Leibniz, and Fontenelle, is clear from remarks in the *Confessions* and from the theological *Briefwechsel* between St. Preux and Julie de Wolmar in Book 6 of *La nouvelle Héloïse* in Rousseau 1959–1995, 2: 27ff. For a full account of the history of the general will see Riley 1978 and 1986, *passim*. Cf. Bréhier 1965, 84–99. Cf. also Postigliola 1980, 123–38.

ventions and laws are necessary, therefore, to unite rights with duties, and to accomplish the purposes of justice.” Though “that which is good and conformable to order is such by the nature of things, independent of human conventions,” those conventions are yet required (Rousseau 1915c, 37–8).

Rousseau’s political thought is a noble attempt to unite the best elements of contract theory, of individual consent, with his perfect, unified ancient models, which, being founded on a morality of common good, had no private wills to “reconcile” to the common interest and thus no need of consent, no need of contract. It is this perhaps unconscious and certainly unsystematic attempt to fuse two modes of political thought—to have common good *and* individual will—that gives Rousseau’s political thought the strange cast that some have thought contradictory, a vacillation between “individualism and collectivism.”<sup>9</sup> But it is not merely that. The questions for Rousseau were more specific and more subtle: How can a man obey only his own free will, the source of obligation, in society? How is it possible to insure that this individual will will want only what the common good requires? The problem is really one of retaining will while making it more than “mere” will in order to provide society with a common good and a general interest, as if it enjoyed a morality of the common good—a morality that Rousseau sometimes recognized as the real foundation of ancient unity.

Looked at from this point of view, all of the paradoxes and problems in Rousseau’s political-legal philosophy become comprehensible. One sees why will must be retained and why it must be made general; how general laws will promote the common good but why it is not law but legislative will that is final; why a great legislator can suggest perfect political forms but cannot merely impose them. Above all, this point of view helps explain the greatest paradox in all of Rousseau: The paradox created by the fact that in the original contractual situation the motives needed by individuals to relinquish particular will and self-interest and to embrace a general will and the common good cannot exist at the time the compact is made, but can only be the result of the socialization and common morality that society alone can create (Rousseau 1915c, 44; cf. Rousseau 1915a, 331). This is doubtless what Rousseau had in mind when he said that “the general will is always right, but the judgment which guides it is not always equally enlightened.” As a result the legislator must help men to “bring their wills into conformity with their reason,” and the bringing together of the legislator’s genius with the people’s inalienable right to consent will “effect a union of understanding and will within the social body.” Actually, Rousseau had his doubts about the possibility of this union, doubts that occasionally led him to ask

<sup>9</sup> Cf. Vaughan 1915, 38–61. Vaughan views Rousseau’s contractarianism as a vestigial Lockeanism, which he later abandoned to embrace a Montesquieuean “historical” method.

quite radical questions about the plausibility of social contract and consent theory:

for a new-born people to be able to appreciate sound political principles, and to follow the fundamental rules of political necessity, the effect would have to become the cause; the social consciousness to be created by the new institutions would have to preside over the establishment of those same institutions; and men, before laws existed, would have to be as the laws themselves should make them. (Rousseau 1915c, 40–1, 44)

If Rousseau did not ordinarily allow this opinion, which could have led him to be a persuasive anticontractarian, to affect his conviction that the people's moral right to consent to the fundamental laws under which they live is inalienable, even if they lack the intellectual capacities that ideally ought to accompany that moral right, he often tried to enlarge and deepen contractarianism, saying in a characteristic passage from the *Première version du contrat social* that “there is a great deal of difference between remaining faithful to the state solely because one has sworn to do it, or because one takes it to be divine and indestructible” (Rousseau 1962c, 410).

It is certain that if either an ideal of social perfection, such as Sparta, or a notion of conventional society created by will and artifice were enough for Rousseau, he would never have insisted on a combination of will and perfect socialization, on a “general will.” There would, in fact, be no paradox at all if perfection were only a formal question, if the state were founded on a morality of the common good, and obligation were not a central problem. A great “legislator” like Moses or Lycurgus could create the best forms, and obedience would be only a matter of corresponding to a system naturally and rationally right. But Rousseau said that in order to will good laws a newborn people must be able to “appreciate sound political principles,” that these cannot merely be given to them but must be willed. Why is it that “the social consciousness to be created by the new institutions would have to preside over the establishment of those same institutions” unless the people must understand and will the laws?<sup>10</sup> There would be no paradox of cause and effect—the central problem of sound politics—in Rousseau if men did not have both to will and to will a perfection that presupposes a transcendence of mere will and the attainment of all the advantages of a morality of the common good without actually having that morality, which would destroy obligation, or at least not take it into account.

<sup>10</sup> Rousseau 1915c, 44. Cf. Rousseau's letter to V.B. Tschärner (April 29, 1762), in which he says something comparable about wisdom and truth: “you want to begin by teaching men the truth in order to make them wise; but, on the contrary, it would be necessary first to make them wise in order to make them love the truth” (Rousseau 1965–1989, 10: 225).

### 11.3. General Will and General Law

It remains to show that the attempted fusion of individual will and common-good morality is comprehended in the notion of the general will.<sup>11</sup> Rousseau begins the *Contrat social* not with the concept of general will but with a fairly traditional contractarian view of the origin of society. Men being naturally, if not by nature, perfectly independent, and society being made necessary only by the introduction of property, men unite by contract to preserve themselves and their property.<sup>12</sup> In this conventional society there is an area of common interest, “for if the opposition of private interests made the establishment of societies necessary, it is the agreement of these same interests that made it possible.” It is “what these several interests have in common,” Rousseau urges, “that constitutes the social bond.” It is only on the “basis of this common interest that society must be governed” (Rousseau 1915c, 25).

Rousseau does not talk in these rationalistic, contractarian terms for very long. Soon he declares that society’s common interest is not merely what a lot of private interests have in common. A perfect society is a complete transformation of these private interests; only when “each citizen is nothing, and can do nothing, without all the rest” can society “be said to have reached the highest attainable peak of perfection.” In other words, when society is much like highly unified ancient society, perfection is reached; only “in so far as several men conjoined consider themselves as a single body” can a general will operate (*ibid.*, 42, 113).

This transformed society must be governed on the basis of common interest, which has become something more than traditional common “interest”; only general *laws*, the creation of a general will (sovereignty), can govern the common interest. Laws must be perfectly general because the general will that makes them “loses its natural rectitude when directed toward any individual and determinate object.” The sovereign (the people when active, when willing fundamental law) must make such a law: “[T]he people subject to the laws should be their author; only those who are forming an association have the right to determine the conditions of that society.” But if fundamental law is the creation of a general will, how does such a will come about? It cannot be the sum of individual wills, for “the particular will tends by its nature to partiality,” and this partiality has been the source of modern “calamities.” Law must be willed by those subject to it,

<sup>11</sup> Grimsley (1973, 103) treats the general will as “a firm determination to seek the common good,” without, however, dealing with the problems and paradoxes in Rousseau’s theory of will.

<sup>12</sup> Since, for Rousseau, the presocial man is a “stupid and limited animal,” becoming a moral and intelligent being only in society, there is a sense in which man’s highest nature is social. See Rousseau 1915j, 223.

for will is the source of obligation. Yet, mere wills can never yield generality, and law must be perfectly general, which can happen only "when the whole people legislates for the whole people." If general laws composed with a view to a common good were enough, there would be no problem; but even the most general laws must be willed. How can a self-interested multitude "by itself execute so great and difficult a project as a system of legislation?" (ibid., 25, 26, 29–30, 38–40, 32) How can a genuine general will that creates general conditions for society arise?

"Actually," says Rousseau in the *Contrat social* "each individual may, as a man, have a private will contrary to, or divergent from, the general will he has as a citizen." This could not, of course, be the case in a state with a common-good morality reinforced by legislation and education, such as the system sketched in the *Économie politique*. The passage from the *Contrat social* shows that in that work, which is the most contractarian of Rousseau's writings and the closest he comes to a systematic political theory, neither mere will nor perfection wins out. In the *Contrat social* there is the possibility that a private person, already a concept of modern individualism, may regard "the artificial person of the state as a fictitious being" and that this "may make him envisage his debt to the common cause as a gratuitous contribution." It seems clear that if Rousseau were not trying, however unsystematically, to reconcile "will" with perfect socialization, these problems could not exist: the new state could not be considered a fictitious being, for it would educate men to think otherwise; people would not think of their political role as a contribution, because they would naturally be part of a greater whole; and there would be no conflict between man and citizen, because the distinction would not exist. The paradox that a man must be "forced to be free" if his particular will does not conform to the general will indicates that Rousseau tried to gain the advantages of a common-good morality through *reconciliation* of wills, and this only because "will" is necessary to obligation (Rousseau 1915c, 18–9).

There is in this, Rousseau's most systematic political work, little postulation of a politically morality of the common good as the source of the much-desired unity. Rather, there is a constant attempt to bring particular will into "conformity" with general will through the efforts of a great legislator. What the great legislator in his wisdom knows to be good supplies the absence of a common-good morality. The difference between the great legislator of ancient politics and Rousseau's ideal legislator corresponds exactly to the difference between giving a perfect form to a nonvoluntaristic and highly unified polity (antiquity) and making people will perfect forms (modernity). In the contractual period "all stand equally in need of guidance." Individuals "must be obliged to bring their wills into conformity with their reason"; that is, they must will that which is in itself rationally best. The combination of individual consent and the legislator's guidance "will effect a union of understanding

and will within the social body.”<sup>13</sup> What is rationally best, to avoid that self-division cause by half-socialization, is the perfectly united and communal polity of antiquity. The legislator, who effects the bringing of will into conformity with reason not by force but through persuasion and religious devices, supplies the defect of a common-good morality and simply gets each individual to will something like the general laws that would have resulted from such a morality.

Michael Walzer is thus wholly correct in saying that while Rousseau denies the legislator “the right to coerce the people,” he “insists on his right to deceive the people.” But it is not so clear that Walzer is correct when he says that the legislator’s persuasive activity “raises the most serious questions about Rousseau’s fundamental argument, that political legitimacy rests on will (consent), and not on reason (rightness)” (Walzer 1981, 384–5).<sup>14</sup> The whole point of generalizing will, of course, is to make it “right”; but a general will is precisely what men do *not* have until they are transformed into citizens, partly through the “deceit” of Numa, Moses, and Lycurgus. Surely, Rousseau was making a heroic effort to draw will and reason, consent and rightness together, for will avoids “willfulness” by taking reason—or at least generality—as its object. The will and reason that Walzer holds apart, then, are the very things that Rousseau was trying to fuse. (Whether a “generalized” will is still will is another, though important, question.)

What Rousseau ultimately posits, in any case, is not so much a general will, which is hard to conceive, but a will to the generally good, which is conceivable since political perfection requires both truly general laws and consent to them. Rousseau did not, could not, abolish will; but he prescribed the form that it must take, and this form is clearly derived from the generality and unity of ancient politics as Rousseau saw it, but without a “morality of the common good,” which would not have accounted for obligation.

Moreover, not only the form of laws is derived from ancient models; the conditions under which good laws and indeed good states are possible are little more than idealizations of ancient political circumstances. A people is “fit for legislation,” according to Rousseau, if it has no old laws; if it is free from threats of invasion and can resist it is neighbors; if it is small enough that its

<sup>13</sup> *Ibid.*, 40. It is a passage like this one that leads Richard Fralin to say, that in the *Contrat social* “will cannot be represented, no one can will for the people,” but that, thanks to the need for legislator’s “understanding,” the “people’s role in formulating their will” is “much less” than some of Rousseau’s “ringing declarations” might suggest (Fralin 1978, 56). Fralin stops well short of Lester Crocker’s claim (1968, 14–5), that the phrase *general will* reveals that “what Rousseau has in mind is what we should call the conditioning of men to reflexive behavior.” If that was Rousseau’s project, then he surely did badly in insisting on general “will”: for the term *will* reminds us of Rousseau’s own claim that “civil association is the most voluntary act in the world” (Rousseau 1915c, Book IV, chap. 2).

<sup>14</sup> Walzer’s contribution to the revival of contract theory is perhaps second only to Rawls’s.

“individual members can all know one another”; if it can get along without other peoples, if it is “neither very rich nor very poor” and can be self-sufficient; and if it “combines the firmness of an old people with the docility of a new one” (Rousseau 1915c, 53–4). Most of these conditions are abstracted from Rousseau’s idealized version of ancient city-states, particularly Sparta. Not only the form of a good political system, then, but also the actual conditions that could make such a system possible are derived from Rousseau’s models of perfection.

So far, we may understand Rousseau to have said: (1) a perfect state—that is, a perfectly socialized, united, and communal state—would have perfectly general laws—that is, laws reinforcing Rousseau’s vision of a common good; (2) but in order to be obligatory laws, especially the most general laws, must be willed by everyone subject to those laws, and they must be made obligatory, for society is merely conventional; (3) therefore, will must take the form of general laws; (4) but will tends to be particular, and law, though the creation of will, must somehow be general; (5) moreover, for particular wills to appreciate the necessity of general laws, effect would have to become cause; (6) therefore, a great legislator is needed whose instruction can supply the defect of a morality of the common good, the only morality that would naturally produce general laws; (7) but this legislator is impossibly rare, and furthermore he cannot create laws, however general and good, for popular sovereignty is inalienable; (8) thus, the legislator must have recourse to religion and use it to gain the consent of individuals to the general will; (9) but now consent is something less than real consent, since it is based on an irrational device; (10) finally, the whole system is saved for individual will by the fact that “a people always has a right to change its laws, even the best,” that legislative will rather than law itself is supreme, and that the entire social system can be abolished by will, for “there is not, and cannot be, any sort of fundamental law binding on the body of the people, not even the social contract” (Rousseau 1915c, 57, 17–8).

Rousseau’s contractarianism, then, ultimately reduces itself to two main elements: the need for a great legislator to facilitate a general will and the extreme limitations put on this legislator by the fact that this general will is and must still be *will*. Both elements are the consequence of his attempting to unite all the requirements of voluntarism with all the advantages of perfect socialization. The legislator may formulate and propose general laws that will produce such socialization, and he can get them “willed” through religious devices; but the sovereign cannot be permanently bound even by perfect laws, and he can change these laws and even dissolve society. Thus, neither perfection nor will has all the claims in Rousseau; but will can finally, even if only in a destructive way, be triumphant, for if a people “is pleased to do itself harm, who has a right to prevent it from doing so?” (*ibid.*, 57).

Not that this destructive will, this willful will, was Rousseau’s aim: On the contrary, he seems to have hoped that at the end of political time men would

finally be citizens and would will only the common good by virtue of what they had learned; at the end of political time they might actually be free and not just “forced to be free.” Political society would finally, at the end of its political education, be in a position to say what *Émile* says at the end of his domestic education: “I have decided to be what you made me” (Rousseau 1911, 435). At this point there would be a “union of will and understanding” in politics, but one in which “understanding” is not the possession only of a Numa or a Lycurgus. At this point too agreement and contract would really mean something: The general will would be enlightened as well as right, and contract would go beyond the use of religious devices as well as beyond the confidence tricks of the rich. It would *become* true that, in Judith Shklar’s felicitous phrase, the general will “conveys everything” that Rousseau “most wanted to say,” that it is “a transposition of the most essential individual moral faculty to the realm of public experience” (Shklar 1969, 184). But before the faculty can be enlightened as well as right in the realm of public experience, time and education are needed. Just as, in *Émile*, children must be taught necessity, utility, and finally morality, in that inescapable order, so too in the *Contrat social* a “union of will and understanding” comes on the scene only at the end. That Rousseau had some such educational parallel in mind is almost certainly indicated in his remarks about the “firmness of an old people” and the “docility of a young one.” Whether peoples should be treated as having political infancies is a delicate question, not least for Rousseau himself. After all, his union of will and understanding requires time and shaping, but his fierce independence—plain in the “Stoic” passages in *Émile*, which insist that “there is only one man who gets his own way, he who can get it single-handed”—seems to repulse that shaping (Rousseau 1911, 141–9, 48). This is plainer still in the rather pathetic passages from the late *Réveries du promeneur solitaire*, in which Rousseau insists,

I have never been truly fit for civil society, where all is constraint, obligation, duty; and [...] my independent nature always made me incapable of those subjections which are necessary to whoever wants to live with men. So far as I act freely I am good and I only do good; but as soon as I feel the yoke, be it of necessity or of men, I become rebellious or rather restive, and then I am nothing. When I have to do what is contrary to my will, I don’t do it at all, whatever happens; I don’t even do my own will, because I am weak. I abstain from acting. (Rousseau 1959a, 1059)

Here, *will*—which Jean Starobinski has called a “*volonté de liberté immédiate*” (Starobinski 1971, 286)—is as particular as it can very well be. Nonetheless, a city with a general will (producing general laws) remains one of Rousseau’s models, and by no means the least important.

It is not meant, by analyzing Rousseau in this way, that he was always perfectly consistent in desiring that particular wills should consent to that which an ancient morality of the common good would require; in fact, he vacillated



on several points, notably in his treatment of civil religion, in which he allowed any tolerant sect to exist so long as it did not claim exclusive truth or refuse to subscribe to the basic articles of civic religious policy (Rousseau 1915c, 152–5). In this Rousseau is as close to Locke's *Letter concerning Toleration* as he is to a defense of the actual religious policies of antiquity; indeed in his *Lettre à Voltaire*—written in 1756, before his notion of civil religion was formulated—he argued that “all human government is of its nature limited to civil duties, and whatever the sophist Hobbes may have said about this, when a man serves the state well he owes no one an accounting of the way in which he serves God” (Rousseau 1915k, 163). Rousseau, in fact, insisted in the *Contrat social* that each socialized man should somehow “obey” no one but himself, and thought that he had found a solution to this problem by making the conditions of society (laws) perfectly general and equally applicable to all. Thus, the conditions being equal for all and willed by all, “it is in the interest of no one to make [social requirements] burdensome to the rest”; and since society cannot wish to hurt all its members by enacting bad general laws, society need offer its members no guarantees. But this system is essentially modified (1) by the fact that a will to general laws cannot be attained with mere wills as they are—the cause-effect problem again—but only through the shaping influence of a great legislator; (2) by Rousseau's assertion that there is no real limit to the extent of undertakings possible between the sovereign and its members; (3) by the idea that the sovereign is the sole judge of how many powers of individuals must be socialized; and (4) by the notion that an ideal society should be very socialized indeed (Rousseau 1915c, 15, 18, 33, 31). It is modified above all by Book 4, Chapter 2 of the *Contrat social*, which shows perhaps more clearly than anything else in Rousseau that consent is no longer a question of mere volition and that the general will is rather like a modified common-good morality.

The constant will of all the members of the state is the general will; that is what makes them citizens and free. When a law is proposed in the assembly of the people, what the voters are being asked is not precisely whether they do or do not approve of the proposal, but whether or not it is in conformity with the general will, which is their own. Each, when casting his vote, gives his opinion on this question; and the declaration of the general will is found by counting the ballots. Thus when an opinion contrary to my own prevails, this proves nothing more than that I was mistaken, and that what I thought to be the general will was not. (Ibid., 117–8)

The meaning of this usually confusing passage, which is paradoxical precisely because it uses voluntarist language in a way that seems to make some people's wills not “count,” can be understood if the phrase *common good* is substituted for *general will*; then it can be seen how general will is “constant” will and how citizens are being asked not whether they approve a proposal but whether it is in conformity with a common good, a good comprising their own highest good. The substitution, however, can be only tempo-

rary, since Rousseau did not use the idea of the “general will” through mere inadvertence.

With all of these modifications in mind, it is clear that while Rousseau’s theory of society and law really is, as he insisted, an attempt to preserve liberty, that liberty is conceived in a particular way: it is obedience to self-imposed law, which must, of course, be general law. Liberty, then, comes down to freeing the individual from all private dependence by making him “very dependent on the city” and its general and equally applied laws (*ibid.*, 20). But though liberty is obedience to self-imposed law, proper law cannot be created without modification of will by a great legislator; thus, the idea of liberty is, like other elements of Rousseau, a fusion of the idioms of individual will and of highly unified society. It is because of these modifications that Rousseau’s political philosophy cannot be so easily assimilated to traditional constitutionalism, or to Kant’s theory of law, as some have suggested (Kelly 1968, 117–38).<sup>15</sup> It is legislative will and not law itself that is supreme in Rousseau. Nor can Rousseau be easily assimilated to the German romantic tradition of the early nineteenth century, for he would never have replaced general will with the historical evolution of national spirits; he was certain that history in itself cannot justify anything (Rousseau 1962c, 462). This unassimilability to other traditions proves that those who view Rousseau as a unique and rather isolated figure are probably correct; he was, in his own words, one of those few “moderns who had an ancient soul” (Rousseau 1915g, 421 see Wokler 1995, *passim*).

<sup>15</sup> Ernst Cassirer provides, as always, a balanced view of the relation between *Rousseau and Kant* (Cassirer 1963, 30–43).

## Chapter 12

# THE LEGAL PHILOSOPHY OF KANT

### 12.1. Introduction

In Kant's philosophy of law (*Rechtslehre*, 1797) there is an important and authentic "formalist" strand which holds that "any action is *right* if it can co-exist with everyone's freedom in accordance with a universal law, or if on its maxim the freedom of choice of each can co-exist with everyone's freedom in accordance with a universal law" (Kant 1996, 387).

This stress on *formal* legal universality in "external legislation" even goes on to hold that "in this reciprocal relation of choice [under law], no account at all is taken of the matter of choice, that is, of the end [*Zweck*] which each has in mind," so that "all that is in question is the form in the relation of choice [...] in accordance with a universal law" (*Metaphysics of Morals*, in Kant 1996, 24). And this end-omitting legal "formalism" is in some sense parallel to the comparable moral "formalism" of Kant's *Groundwork of the Metaphysics of Morals* (1785), in which would-be-moral persons are asked whether they could will that the "maxim" of their proposed action "serve as a universal law" (though "a form, consisting in universality").

But from the same *Groundwork* one knows that the final, definitive formulation of the categorical imperative goes beyond the *form* of universal willing to arrive at the Kingdom of Ends, in which relative "ends" (relative to mere "pathology") are to be subordinated to reason-ordained "objective ends" that everyone "ought to have" (*Groundwork of the Metaphysics of Morals*, in Kant 1996, I, 1), since for the *Groundwork* "a rational nature exists as an end in itself." (May it not be, indeed, that Kant begins the *Groundwork* by praising the ancient Greeks' division of *philosophia* into logic, ethics, and physics precisely to show that "logical" necessity [e.g., universality] cannot [as it were] yield "moral necessity" or "oughtness," that immorality is thus not merely "logical" self-contradiction—as when the liar defeats himself by *universalizing* lying, thereby destroying the practice of a truth-telling, and thereby keeping his lie from usefully *passing* for the truth?)

There are good grounds for thinking that Kant (increasingly) took *reine praktische Teleologie* ("pure practical teleology," "Über den Gebrauch Teleologischer Prinzipien in der Philosophie," 1788) to be the *final* consideration (in both senses of "final") in practical reasoning. As early as the *Critique of Pure Reason* (1781), in fact, he had urged (while commenting on Leibniz) that the "systematic unity of ends in the world of intelligences [...] can be entitled an intelligible, that is a moral world (*regnum gratiae*)," which then leads to "the purposive unity of all things that constitutes this great whole, a system of ends

[...] [in which] the highest ends are those of morality" (Kant 1963, 642); and by the time of the *Tugendlehre* (1797), Kant was insisting that if in "free action" there is an infinite regress of mere "means," and an *objective* end never terminates that regress, "the doctrine of morals is destroyed" (Kant 1922d, 357) (as in Aristotle's *Metaphysics*, 994b, an infinite teleological regress makes us "lose the good"). Moreover the *Groundwork* had already insisted that, "Now I say: man and generally any *rational* being"—a being capable of conceiving the notion "end" and capable of conceiving himself (intersubjectively with others) as a final end (Kant 1952, II, 81–5)—"exists as an end in himself" (*Groundwork of the Metaphysic of Morals*, in Kant 1996, sec. 2).

Insofar as the moral-teleological elements of the *Tugendlehre* and *Groundwork* are *parallel* to the *Rechtslehre* (the doctrine of law and justice) in Kant, one might expect that the initial universalistic "formalism" of the *Rechtslehre* would also (comparably, finally) yield to *reine praktische Teleologie*—and this indeed turns out to be the case only three pages after the initial definition of "right" as the "co-existence of everyone's freedom" in accordance with "a universal law" (Flikschuh 1997, 50–73). For Kant immediately says (in "Division of the Doctrine of Right") that when one considers the Roman-law principles preserved by Ulpian and Justinian (*honeste vivere, suum cuique tribuere, neminem laedere*), then the *highest* Roman jurisprudential principle, *honeste vive*, "be an honourable human being," really "consists in asserting one's worth as a human being in relation to others, a duty expressed by the saying, 'Do not make yourself a mere means for others but be as the same time an end for them'" (Kant 1996, 392). And this passage appears when Kant is defining the "divisions" of "*Recht*" itself, even if the passage might seem to blur the line between *Recht* and *Tugend*. In other words Kant, in the opening pages of the *Rechtslehre* ("What Is Right?"), immediately moves from "formal" universality to "being an end" for others ("The Right of Humanity"). And if, as in the *Groundwork*, the forward "movement" from formal universality ("What If Everyone Did That?") to "objective ends" and the "Kingdom of Ends" is an advance from "popular" to philosophically rigorous moral reasoning (as Kant suggests); if Kantian legality itself can finally mean the pursuit of objective ends (e.g., non-murder and "eternal peace") *from* "legal" motives, then *reine praktische Teleologie* is as crucial in Kantian jurisprudence as it is in Kantian ethics. (What remains is to see whether the critical-teleological "reading" of Kant's practical thought is globally the best reading, on balance, even if "formal universalization" is fully *there* [morally and legally], and thus authentically "Kantian," but not the basis of "purposive unity" as "the *highest* unity of things"—a "purposive unity" which ultimately privileges the *telos*-shaped *Critique of Judgment* as "the coping stone of the critical philosophy"; Cassirer, *Kants Leben und Lehre*, in Kant 1918–1922, vol. 11, 378ff.)

Strictly speaking, the respect for persons as "ends in themselves" that Kantian pure practical reason demands is fully attainable, if at all, only in the

“Kingdom of Ends” of the *Groundwork of the Metaphysic of Morals*,<sup>1</sup> or in the “ethical commonwealth” of *Religion Within the Limits* (Kant 1960, 85–6), or in the *corpus mysticum* of all rational beings of the first *Critique* (Kant 1963, 637), and not in a mere republic, which rests on coercive laws, rather than on respect or virtue or good will.<sup>2</sup> So when Kant says, in the very late *Conflict of the Faculties* (1798), that if earthly sovereigns treat man as a mere “trifle” by “burdening him like a beast and using him as a mere instrument of their own ends, or by setting him up to fight in their disputes and slaughter his fellow creatures,” then this is “not just a trifle but a reversal of the ultimate purpose of creation” (Kant 1970d, 185), he must be thinking of his own doctrine in *Eternal Peace*. There he states that humanity under moral laws sets a “limiting condition” to what is politically and legally permissible (Kant 1970c, 117–8)—a limiting condition that should somehow bear on politics, even if rulers lack the good will that would lead them to respect persons (Brands 1995, *passim*; Nussbaum 1997, chap. 4; Rawls 1993b, chaps. 3 and 4).

But what is the nature of this “somehow”? How does morality as limiting condition limit and condition Kantian justice (Barry 1998, *passim*)? If a Kantian politics could be properly limited and conditioned, would persons be—if not indeed respected from moral motives—at least not used as mere means to “relative” ends? Might the notion of “objective” ends set those limiting conditions? This leads to the question whether the general concept of ends could be used as a clamp to hold Kant’s whole practical philosophy together. The rest of this chapter is an attempt to answer that question.

## 12.2. Morality, Law, and Politics

It is plainly Kant’s conviction—perhaps his central political conviction—that morality and politics must be related, since “true politics cannot take a single step without first paying homage to morals” (Kant 1970c, 125).<sup>3</sup> At the same time, however, Kant (1923, 164) draws a very strict distinction between *moral* motives (acting from respect for the moral law) and *legal* motives, and insists that their definitions must never be collapsed into each other (Beck 1965, *passim*). This is why he argues, again in *Conflict of the Faculties*, that even with growing enlightenment and republicanism, there still will not be a greater number of moral actions in the world, but only a larger number of legal ones that roughly correspond to what pure morality would achieve if it could (Kant 1970d, 187–8). (At the end of time, a purely moral Kingdom of Ends may not

<sup>1</sup> “The rational being [is] a member of a possible kingdom of ends [...] by his own nature as being an end in himself”; Kant 1949b, 52.

<sup>2</sup> “A *juridico-civil* (political) *state* is the relation of men to each other in which they all stand socially under *public juridical laws* (which are, as a class, laws of coercion)”; Kant 1960, 87.

<sup>3</sup> Translation slightly altered.

be realized on earth—though it *ought* to be—but one can reasonably hope for a legal order that is closer to morality than are present arrangements.) To put the matter a little overstarkly: Politics needs to reflect morality but cannot count on moral motives, only legal ones; morality must have a relation to Kantian politics without collapsing the meaning of *public legal justice* into that of *good will* and *respect for persons*. Put another way: Morality and public legal justice must be related in such a way that morality shapes politics—by forbidding war and insisting on eternal peace and the rights of man—without becoming the motive of politics.

Given this tension between morality and public legal justice, which must be related but which equally must remain distinct, one can tentatively and cautiously suggest that the notion of *ends* may help to serve as a bridge between them. For public law certainly upholds some moral ends (e.g., non-murder), even though that law must content itself with any legal motive. (“Jurisprudence and ethics,” Kant says in the *Rechtslehre*, “are distinguished not so much by their different duties” or ends as by different “incentives”; Kant 1965, 20–1.) Using *telos* as a bridge connecting the moral to the political-legal realm is not a very radical innovation, since Kant himself bridged far more disparate realms, those of nature and freedom, with a notion of end or purpose (subjectively valid for human “reflective” judgment) in the *Critique of Judgment*, and then threw a further bridge from nature and freedom—now linked by a *telos* thought of as a possible supersensible ground uniting nature and freedom—to art (Kant 1952). He did all of this by arguing that nature can be “estimated” (though never known) through purposes and functions that mechanical causality fails to explain; that persons, hypothetically free, both have purposes that they strive to realize and view themselves as the “final” end of creation; and that art exhibits a “purposiveness without purpose,” which makes it not directly moral but the “symbol” of morality (*ibid.*). Surely, then, if *telos* (sometimes confined to a “reflective” or “regulative” role) can link, or be thought of as linking, nature, human freedom, and art, it can link, much more modestly, two sides of human freedom: the moral and the legal realms.

Admittedly the “continuity” at this point is not perfect, since Kant says that purposiveness is only a “reflective” principle when it is used in estimating nature and art, while morality by contrast has “objective ends” that are “proposed by reason” and that everyone “ought to have.”<sup>4</sup> But a possible continuity is reestablished when Kant says, rather incautiously, that there must be “a ground of unity of the supersensible, which lies at the basis of nature, with

<sup>4</sup> “An objective end (i.e., the end which we ought to have) is that which is proposed to its as such lay reason alone”; Kant 1960, 6. The term *continuity* is borrowed from Yovel 1980, 180. It is a work that does much to give *telos* its due weight in Kant, but that diminishes that weight at the crucial point of determining the content of the categorical imperative, by insisting that “human reason must abide only by those universal rules it sets up by itself”; *ibid.*, 13.

that which the concept of freedom practically contains” (Kant 1952, 14).<sup>5</sup> In simpler language, an intelligence “other” than ours might see real purposes in nature that are as objective as the objective ends that our intelligence knows through the moral law. This could mean that *Judgment*, with its numerous teleological bridges, helps to establish the “unity of reason” that is always a central Kantian concern.

Now, if *good will* in the purely moral realm is construed to mean never universalizing a maxim of action that fails to respect persons as ends in themselves,<sup>6</sup> then morality and politics/law could be connected through Kantian teleology. If all persons had a good will, they would respect all others as ends, indeed as members of a Kingdom of Ends, for a “rational nature” such as a person is “not an end to be effected” but an “independently existing end” (*ibid.*). However, this does not actually happen, though it ought to, thanks to the “anthropological” fact that man is “radically evil” (Kant 1960, 15–39). Thus Kantian public legal justice is a kind of intersection between the facts of anthropology and the categorical imperative; if there were a Kingdom of Ends, the kingdoms of the earth would vanish. If, in sum, good will means respect for persons as ends in themselves, and if public legal justice sees to it that some moral ends (such as nonmurder) get observed, if not respected, then public legal justice in Kant might be viewed as the partial realization of what would happen if all wills were good. Beyond that, of course, Kant frequently suggests that law creates a kind of environment for good will, by bracketing out occasions of political sin (such as fear of others’ domination) that might tempt, though never determine, people to act wrongly.<sup>7</sup> One might, indeed, say that the notion of a legal facilitation of morality does not seem very Kantian;<sup>8</sup> but he does say that one has a duty to remove from the world the occasions of wrong-doing (“whatever diminishes the obstacles to an activity furthers this activity itself”; Kant 1923, 171), even though one is not

<sup>5</sup> This is preceded by one of *Judgment*’s key passages: “The concept of freedom is meant to actualize in the sensible world the end proposed by its laws; and nature must consequently also be regarded in such a way that in the conformity to law of its form it at least harmonizes with the possibility of the ends to be effected in it according to the laws of freedom” (Kant 1952, 14).

<sup>6</sup> Kant 1949b, 54: “Rational nature is distinguished from the rest of nature by this, that it sets before itself an end. This end would be the matter of every good will. But since in the idea of a will that is absolutely good without being limited by any condition [...] we must abstract from every end *to be effected* [...] it follows that in this case the end [personality or “rational nature”] must be conceived, not as an end to be effected, but as an *independently* existing end.”

<sup>7</sup> Kant 1970c, 121n: “Government [...] not only gives the whole of a veneer of morality (*causae non causae*), but by putting an end to outbreaks of lawless proclivities, it genuinely makes it much easier for the moral capacities of men to develop into an immediate respect for right.”

<sup>8</sup> Kelly 1969, 116–7: “In effect, it should be impossible for citizenship or public law-abidingness to make men moral.”

excused, *qua* malefactor, simply because occasions of sin are still there. Occasions are not causes.

Overall, then, Kantian “public legal justice” is purposively related to morality in two ways, one of them stronger than the other. In the slightly weaker sense, it simply creates legal conditions for the exercise of a good will by expanding “negative” freedom so that one can be “positively” free, or self-determining through the moral law (Schneewind 1998, *passim*). In the somewhat stronger sense it legally enforces (part of) what ought to be, even where good will is absent and only legal incentives are present. If in the weak sense Kantian public legal justice simply facilitates morality, in the strong sense it produces good conduct (though this conduct is only “qualifiedly” good because it depends on legal motives). This strong sense is illuminated by Kant himself in his unpublished commentary on Baumgarten’s jurisprudence. The moral law “suffices in itself to constrain objectively” in “making known what each [person] ought to do,” Kant urges in this commentary; but for “subjective constraint”—which means that each man may be “constrained to conform himself” to what he ought to do “when *motiva moralia* are insufficient”—one needs what Kant calls a *potestas executoria*, i.e., a civil state (Kant 1934a, 82). This *potestas executoria* will be instrumental to morality, or at least to some of the ends of morality, in the sense that it will see to it that what ought to happen does in fact happen. In a word, the strong sense of instrumental politics, or legality, sees to it that some of the ends of morality get enforced, even where *motiva moralia* are absent; the weak sense of instrumental politics, or politics as context, creates a state of affairs in which those *motiva moralia* themselves have a better chance to operate. On either view, public legal justice is “for” morality, is morality’s instrument.

### 12.3. Law as “Eternal”

The effort to locate Kant’s legal theory within his complete practical philosophy necessarily involves saying something further about the notion of instrumentality; for the relation between politics and morality in his system is mainly, if not invariably, an instrumental one, and politics serves primarily to make morality, or at least moral ends, more nearly possible. (The Kantian state realizes morally important ends; but it is morally important that only ends be realized.) Kant, then, clearly subordinates politics to morality, but at the same time bases politics on “right,” not on utility or happiness. As he said in his letter to Jung-Stilling (March 1789), “the laws [...] must be given not as arbitrary and accidental commandments for some purpose that happen to be desired”—such as the greatest happiness of the greatest number—“but only insofar as they are necessary for the achievement of universal freedom” (Kant 1967, 132). That law-protected sphere of freedom constitutes an environment for morality, a place within which morality can take place. (How, in view of



this, Charles Taylor can have urged in his imposing study of Hegel that Kantian politics “ends up borrowing from the utilitarians,” that it has as its “input” the “utilitarian vision of a society of individuals each seeking happiness in his own way” [Taylor 1975, 371–2], is not at all easy to see. One would have thought that if Kant had succeeded in anything, it was in not being mistaken for Jeremy Bentham.)

There is certainly no Benthamism in Kant’s well-known claim that the only unqualifiedly good thing on earth is a good will (Kant 1949b, 11)—a will, one may say provisionally, that strives to act on the basis of maxims that, if made universal, would not violate the dignity of men as ends in themselves.<sup>9</sup> Every element of this definition—the concept of will, the idea of universality, the problem of persons as ends in themselves—is directly relevant to Kant’s political and legal philosophy. For if a good or moral will is the only unqualifiedly good thing on earth (this does not mean that everything else is thereby worthless), then politics, among other qualified goods, must be instrumental to morality; a merely powerful and stable, even glorious, state that pursues moral evil cannot be praiseworthy. This is doubtless why Kant urges, in the already-stressed passage from *Eternal Peace*, that “true politics cannot take a single step without first paying homage to morals” (Kant 1949a, 469). He admits that if there exists “no freedom and no moral law based upon it, and if everything which happens [...] is simply a part of the mechanism of nature,” then it is appropriate to manipulate men as natural objects in order to govern them; but that if right is to be the “limiting condition of politics,” morality and politics must be conceded to be “compatible,” capable of coexistence (ibid., 459; see O’Neill 1992, *passim*).

For Kant one has a duty to enter into a “juridical state of affairs,” because moral freedom involves both the negative freedom of the will from “determination by sensible impulses” and the positive freedom of a will that determines itself through reason, through the notion of what ought to be. Negative freedom is thus instrumental to, or the condition of, positive freedom (Kant 1965, 13). Given this, if public legal justice can remove or limit some of the objects that can incline human will to be shaped by impulse—if politics and law can control, for instance, a fear of violence that might lead one to violate the categorical imperative—then politics is supportive of morality because it advances negative freedom (Wood 2000, *passim*). This point is well made by Kant himself in the first Appendix to *Eternal Peace*, which shows that he took the problem of possible dangers to the “first performer” of right actions seriously.<sup>10</sup> He argues that government or

<sup>9</sup> This formulation is a conflation of the entire *Groundwork or Fundamental Principles*.

<sup>10</sup> Cf. Hobbes 1957, 103: “For he that should [...] perform all he promises, in such time, and place, where no man else should do so, should but make himself a prey to others, and procure his own certain ruin.”

public legal justice, by putting an end to outbreaks of lawlessness, “genuinely makes it much easier for the moral capacities of men to develop into an immediate respect for right.” For everyone believes, Kant goes on, that he would always conform his conduct to what is right if only he could be certain that everyone else would do likewise; and “the government in part guarantees this for him.” By creating a coercive order of public justice, then, “a great step is taken *toward* morality (although this is still not the same as a moral step), towards a state where the concept of duty is recognized for its own sake” (Kant 1970c, 121n).

In his late *Anthropology from a Pragmatic Point of View* (1798), Kant expands this argument. The “mania for domination,” he argues, “is intrinsically unjust and its manifestation provokes everyone to oppose it. Its origin, however, is fear of being dominated by others: It tries to avert this by getting a head start and dominating them” (Kant 1974a, 140). (Surely this is a perfect instance of the asocial side of “asocial sociability” that Kant describes in his *Idea for a Universal History*; Kant 1970a, 44–5.) But domination, he goes on, “is a precarious and unjust means of using others for one’s purposes: It is *imprudent* because it arouses their opposition, and it is *unjust* because it is contrary to freedom under law to which everyone can lay claim” (Kant 1974a, 140; see Yovel 1980, *passim*). Government, which provides freedom under law, can manage this psychology; it can alleviate our desire to dominate others, out of fear that they will dominate us, by creating a system of public legal justice in which only law is coercive. Thus both the fact of domination and the fear of domination can be, at least, moderated by government. This may make it more nearly possible to exercise a good will, to respect the dignity of others as ends in themselves.

As was noticed earlier, a legal facilitation of morality might not seem very Kantian in spirit. It is surely this that George Armstrong Kelly has in mind when he says, in the “Kant” chapter of his remarkable *Idealism, Politics and History*, that “it should be impossible [in Kant] for citizenship or public law-abidingness to make men moral [...] a false juncture would be made between the realms of autonomous and heteronomous causation” (Kelly 1969, 116–7). But a possible way out is to say that public legal justice is instrumental to negative freedom (e.g., freedom from fear), so that persons can be positively free by determining themselves to act from the moral law. Mere freedom from fear, taken by itself, would not be moral; but public legal justice, by restricting fear, might diminish an obstacle to moral conduct. Morality, for Kant, is objective; but we can know, from subjective facts of human “pathology,” that something like fear may deter us from acting morally. Thus there can be a duty to block—legally—the effect of morality-deflecting fears and appetites. Were that not so, Kantian politics would not be possible at all. For Kantian politics tries to attain some moral ends without being able to count on moral incentives (Kant 1970d, 187–8).

In Kantian politics the crucial thing is thus liberty, a liberty that, by constraining others in giving me rights, will both remove impediments to morality and allow the unrestricted enjoyment of those things that morality does not forbid (Kant 1964, 154–5). The crucial thing is a harmony of my external freedom with that of others according to a universal law. Perhaps Kant’s finest statement of this view is to be found in the *Critique of Pure Reason*:

A constitution allowing the greatest possible human freedom in accordance with laws which insure that the freedom of each can co-exist with the freedom of all the others (not one designed to provide the greatest happiness [...]), is at all events a necessary idea which must be made the basis not only of the first outline of a political constitution but of all laws as well. (Kant 1963, 312)

Liberty in Kant, then, is both restrictive and permissive; liberty restricts what others can do to me by the willful exercise of their wills (things that might make it more difficult for me to be moral), and it permits the pursuit of ends that are morally indifferent (Riley 2007, *passim*).

Politics and law thus serve a high purpose in Kant’s practical philosophy: They are the guarantors of those negative conditions that make respect for the dignity of men as ends in themselves more nearly possible. They make the exercise of a good will less difficult by removing impediments that could incline (though never determine) the will to act on maxims that cannot be universalized in a way that is congruent with the rights of man, and they realize some moral ends on the basis of legal motives. So if Kantian politics is only a qualified and instrumental good, and not the supreme ornament that it is in a writer such as Aristotle,<sup>11</sup> that instrumentality is still quite important. As Kant himself says in an already quoted passage from *Practical Reason*, “whatever diminishes the obstacles to an activity furthers this activity itself” (Kant 1923, 171). Apart from moral activity itself, then, what can be more important than furthering this activity by diminishing obstacles to that unqualified good? But that, of course, is just how Kant views public legal justice.

Legality and rightful politics generally can be instrumental to morality in this rather oblique way, because law and morals commonly require many of the same things; they both prohibit murder, fraud, and so forth. Only the incentive of obedience to the demands of practical reason differs in morality and legality; as Kant says in a now-familiar sentence from the *Rechtslehre*, “jurisprudence and ethics are distinguished [...] not so much by their different duties” or ends as by “the difference in the legislation that combines one or the other incentive with the law” (Kant 1965, 20–1). And on the difference between moral and legal incentives Kant is quite clear:

<sup>11</sup> Aristotle, *Politics*, 1252a: “This most sovereign and inclusive association [...] directed to the most sovereign of all goods [...] is the polis, as it is called, or the political association.”

What is essential in the moral worth of actions is that the moral law should directly determine the will. If the determination of the will takes place in conformity indeed to the moral law, but only by means of a feeling, no matter of what kind, which has to be presupposed in order that the law may be sufficient to determine the will, and therefore not for the sake of the law, then the action will possess legality but not morality. (Kant 1923, 164)

Both legality and morality, then, are concerned with duties or moral ends, for example a duty not to kill; and therefore adherence to the law sustained<sup>12</sup> by the political order is in itself and directly a duty—a “perfect duty to others”—whatever one’s incentive may be. This must obviously be so, if morality and legality share a set of overlapping ends and differ only with respect to motives. But political-legal justice is still only instrumental to morality because politics can operate on the basis of any incentive to obedience; an adequate system of public legal justice, Kant says in *Eternal Peace*, is possible “even for a people of devils, if only they have intelligence, though this may sound harsh” (cited by Wolin 1960, 389). (To Kant, of course, it is not even conceivable that legal justice should try to moralize men; law is by definition external, and morality loses its meaning unless the internal recognition of duty alone is the incentive of obedience; Kant 1960, 404–5.)

This certainly does not mean that Kant sets too low a value on law; and in fact he is usually criticized for giving too much weight to mere legality in his political theory, even where that legality arguable conflicts with what his own morality requires. Kant did insist, after all, that “if public legal justice perishes it is no longer worthwhile for men to remain alive on this earth” (Kant 1965, 100), adding in the *Reflexionen zur Rechtsphilosophie* that “there must be law and justice in the world.” The “civil condition,” he argues in the same *Reflexionen*, “is not arbitrary, but necessary” (“*der status civilis* ist also nicht *arbitrarius* sondern *necessarius*”; Kant 1934b, 489, 560). Even if law is “necessary” rather than “arbitrary,” however, that does nothing to degrade the higher status of morality in Kant’s system; and even the notion of God is commonly derived by Kant from ordinary moral knowledge. In the *Critique of Pure Reason* he argues, in the manner of Plato’s *Euthyphro*, that “so far as practical reason has the right to serve as our guide, we shall not look upon actions as obligatory because they are the commands of God, but shall regard them as divine commands because we have an inward obligation to them” (Kant 1963, 644).<sup>13</sup> And in the *Groundwork of the Metaphysics of Morals* he adds that the idea of God is derived from “the idea of moral perfection, which reason frames a priori and connects inseparably with the notion of a free will” (Kant 1949b, 26). Given morality’s supreme place it is most accurate to say that, in Kantian politics, public legal jus-

<sup>12</sup> One uses this term because for Kant the most important laws (e.g., against murder) are “natural” laws; since they are natural, and not merely “positive” or created, it is reasonable to view them simply as *sustained* by public legal justice.

<sup>13</sup> The parallel to Plato’s *Euthyphro*, 9e–10e, is very striking.

tice sets up a context instrumental to negative freedom, in which one fulfills duties (or rather the “ends” of duty) on the basis of any incentive that will yield peaceable external conduct.

Although the realms of law and morals share a set of “objective ends,” the distinction between morality and legality is fundamental in Kant. Especially in his later historical writings, however, he does dare to hope that politics and morality will come closer together in a distant future—not in the sense that a moral incentive could ever become the motive for obedience to public legal justice, but in the sense that, as the world becomes increasingly “republican,” as states more adequately realize what Kant calls the Idea of the original contract,<sup>14</sup> politics will at least no longer command what the categorical imperative absolutely forbids. Kant “predicts” that, as the human race comes closer to enlightenment, it will progressively transform the structure of politics until the state is finally “republican”—which means that every organ of the state will treat men as free, autonomous, and legally equal persons, and that everyone will either consent to law through his representatives, or will live under laws that are worthy of consent (Kant 1965, 109–14; see Beck 1978, *passim*). As universal republicanism emerges as the product of rational historical evolution, the political-legal context provided by states will violate morality less often; in a “cosmopolitical” structure of eternal peace whose member states freely enter into a permanent equilibrium that keeps the “intrinsically healthy resistance” of states from degenerating into violence, states will no longer force their citizens to commit immoral acts (Kant 1949a, 434–6). As states become more republican, as a world-order based on an equilibrium of republican states emerges, Kant argues (most carefully in the *Critique of Judgment*; Kant 1952, 95–6), politics at the national and international level will increasingly become simply that uniform legal condition that gives men the chance to have the kind of will they should have, and that realizes some moral ends on a legal basis. The political-legal order will then be parallel, though never identical, to the moral order. All of this Kant prophesies in his late but centrally important *The Conflict of the Faculties*:

Even without the mind of a seer, I now maintain that I can predict from the aspects and signs of our times that the human race will [...] progressively improve without any more total reversals. [...] [But] the profit which will accrue to the human race as it works its way forward will not be an ever increasing quantity of morality in its attitudes. Instead, the *legality* of its attitudes will produce an increasing number of actions governed by duty, whatever the particular motive behind these actions may be [...]. Violence will gradually become less on the part of those in power, and obedience towards the laws will increase [...] and this will ultimately extend to the external relations between the various peoples, until a cosmopolitan society is created. Such developments do not mean, however, that the basic moral capacity of mankind will increase in the slightest, for this would require a kind of new creation. (Kant 1970d, 187–8)

<sup>14</sup> Kant 1970b, 79: “An original contract [...] is the test of the rightfulness of every public law.”

This moderately hopeful view of human history—which for Kant steers a non-utopian course between “moral terrorism” (the notion of constant human decline) and “chiliasm” (the notion of constant human moral improvement)—permits him to foresee that, at the end of time, politics and morality may finally be able to co-exist. At that point politics will become what it always ought to have been: the instrument to, rather than the antagonist of, morality (ibid.). For Kant, if politics can (as it should) cease to be the cause of immorality, above all in the form of war, then it can champion the cause of morality, partly by translating a part of “ought” into actual existence (in the form of legality), partly by creating peaceful conditions for a good will. In either way public legal justice, stabilized at the highest level by “eternal peace,” provides a “setting” for that will, which Kant himself calls a “jewel” that “shines by its own light, as a thing which has its whole value in itself” (Kant 1949b, 12).

Perhaps all of Kant’s thoughts on politics as the instrument of morality are best summed up in Part II of his essay *On the Common Saying: “This May be True in Theory, but It Does Not Apply in Practice.”* In that section, which is subtitled “Against Hobbes,” Kant argues that while any society has a great many subsidiary social contracts that establish “unions” of many individuals for “some common end which they all share,” there is *one* kind of union that is “of an exceptional nature,” that is an “end in itself” that all men “ought to share,” that indeed is “an absolute and primary duty in all external relationships whatsoever among human beings.” This exceptional union, he argues, is the civil state or the commonwealth, a condition of “external right” that (through “coercive public laws”) secures for each citizen “what is due to him” and freedom from “attack from any others.” But the whole notion of “external right,” Kant goes on, is derived not at all from “the aim of achieving happiness,” which is a mere empirical end, but simply from “the concept of freedom” (Kant 1970b, 73). And freedom secures and guarantees a sphere within which one can exercise a good will. Overall, then, Kantian public legal justice is instrumental to morality in two senses, one of them stronger than the other: In a slightly weaker sense, it simply creates *conditions* for the exercise of a good will; in a somewhat stronger sense, it legally enforces certain ends that ought to be (e.g., no murder), even where good will is absent and only legal motives are present. But, whether in a weaker or stronger sense, politics remains the instrument of the sole “unqualified” good (O’Neill 2000, *passim*).

This passage from *Theory and Practice*, in speaking of the state as an exceptional kind of social contract, obviously introduces the contractarian strand into Kant’s politics. As was suggested earlier, one must say something about the simple fact that Kant often uses contractarian arguments in his politics, even if one thinks that he is not a contractarian in some larger, and looser, sense. Before examining some of the passages in which Kant makes Rousseau-inspired contractarian political arguments, however, a general word is needed.



Immanuel Kant (1724–1804)

Even on the strongest “teleological” reading of Kant’s ethics, in which objective ends constitute morality and shape politics, contract can still have a place in Kant’s politics. To anticipate later arguments: For Kant, citizens of a republic arguably would not consent to adventurist wars, since they might be ruined by those wars. From the legal motive of self-love, republican citizens would dissent from war (Kant 1970c, 100). It may be, then, that a republic under the “Idea” of the contract, of everyone’s consenting, yields from purely legal motives a political state of affairs that coincides with (some) moral requirements, such as eternal peace. This would merely reflect Kant’s claim, already considered, that morality and law share duties (or ends, or purposes), but differ over motives. A contractarian republic might—since rational citizens would have to acknowledge social practices (*ibid.*)—be more likely than other forms of government to bring legality closer to morality, even if the content of that morality were found in objective ends, not made by agreement. On this view, even if Kant’s moral thought were not “deepened” Rousseau, quasi-Rousseauian ideal contractarianism could still figure in the political-legal realm (Riley 1973, 450–71).

This view provides a way of integrating Kant’s frequently stated doctrine of the original contract into a teleological view in which ends are “there” (as it were), not produced. If “original contract” is another way of saying “republic of consenting citizens,” then Kant’s contractarian utterances are fully reconcilable with his notion that morality itself requires legal enforcement of moral ends by legal means in a republic (Kant 1965, 18–21);<sup>15</sup> but if all ends are the *product* of actual historical contracts, then one is hard-pressed to account for Kant’s “rational beings” who are *already* respectable “ends in themselves,” not “ends to be realized” by agreement (Kant 1949b, 42ff). Kant’s original contract, understood as the “idea” of everyone’s consenting in a republic, can remain valid in Kant’s politics, even if the *reason* for founding and obeying states has to do with legally realizing some moral ends, not just with keeping contracts.

It is in this light that one can, and should, read Kant’s claim in *Theory and Practice* that

[a]n original contract [...] is in fact merely an Idea of reason, which nonetheless has undoubted practical reality; for it can oblige every legislator to frame his laws in such a way that they could have been produced by the united will of a whole nation, and to regard each subject, in so far as he can claim citizenship, as if he had consented within the general will. (Kant 1970b, 79)

<sup>15</sup> That the ends (though not of course the incentives) of legality must be moral is best explained by Mary J. Gregor in her fine *Laws of Freedom*: “Law [for Kant] is independent of ethics in the sense that it has no need of ethical obligation in determining its duties. But it cannot be independent of the supreme moral principle; for if its laws were not derived from the categorical imperative, then the constraint exercised in juridical legislation would not be legal obligation but mere arbitrary violence” (Gregor 1963, 31).



But one must await a full exposition of the Kantian republic to ask how far it is plausible that citizens would, through their general will, refuse to consent to some of the things (above all war) that which are forbidden by a moral law whose highest practical end—given human pathology—is peace.

#### 12.4. Law vs. “Good Will”

Kant’s practical thought begins not with the general will of the citizen, but with the good will of the individual (Kant 1949b, 11–2). And “good will” is not something that one can choose to treat or ignore in an adequate reading of Kant’s politics. For if a good will, viewed as the only unqualifiedly good thing on earth, is the core of Kantian morality; if that good will is good because it strives to act from respect for the moral law, a law that enjoins respect for persons as ends in themselves; if the moral law, in its turn, must receive the “homage” of politics; and if that homage takes the double form of (a) realizing legally some of the moral ends that a reason-governed good will “would bring forth [...] were it accompanied by sufficient physical capacities” (Kant 1962, 45) and (b) providing a context of negative legal security for the flourishing of *motiva moralia*; then good will is the first link in a Kantian moral chain that provides politics with “essential ends of humanity”<sup>16</sup> (republicanism and eternal peace). Therefore good will must, even in a political study, be given the prominence that Kant himself gives it. To be sure, if everyone had a completely efficacious good will, there would be no Kantian politics to study: The Kingdom of Ends or *corpus mysticum* of rational beings would be the only kingdom, and an “ethical commonwealth” (described in *Religion within the Limits*) could embrace the whole of humanity:

As far as we can see [...] they sovereignty of the good principle is attainable, so far as men can work toward it, only through the establishment and spread of a society in accordance with, and for the sake of, the laws of virtue, a society whose task and duty it is rationally to impress these laws in all their scope upon the entire human race [...] A union of men under merely moral laws, patterned on the above Idea, may be called an *ethical*, and so far as these laws are public, an *ethico-civil* (in contrast to a *juridico-civil*) society or an *ethical commonwealth*. (Kant 1960, 86)

What then, for Kant necessitates the juridico-civil society, which is plainly second best? Nothing but the fact that, while the ethical commonwealth is an Idea that “possesses a thoroughly well-grounded objective reality in human reason (in man’s duty to join such a state),” our knowledge of “anthropology” and human “pathology” teaches us that “subjectively, we can never hope that man’s good will lead mankind to work with unanimity towards

<sup>16</sup> Cited in Gregor 1963, 206: “He who subjects his reason to the inclinations acts contrary to the essential ends of humanity.” (Kant’s original is in the *Lectures on Ethics*; Kant 1930, 124).

this goal” (ibid.). (In *Conflict of the Faculties* Kant reinforces this by saying that for the “basic moral capacity of mankind” to “increase in the slightest,” there would have to be “a kind of new creation or supernatural influence”; Kant 1970d, 188.) But if unaided good will may not attain its goal, that end can be partly, qualifiedly, legally attained through the republicanism and eternal peace that are most nearly parallel to the Kingdom of Ends. Thus the general will of the citizen has an important relation to the good will that is the sole unqualified good. General will is not good will, but they are linked by ends, by the teleological bridge that binds the whole of Kantianism together.

### 12.5. Problems in Kant: Legal Punishment

But problems remain in Kant’s theory of public legal justice as something supportive of, but not identical to, morality. The most obvious difficulty appears in his justification of legal punishment: Kant is clear that what matters in morality is good will, or the incentive of one’s actions, while all that counts in politics and law is that one’s external behavior (however motivated) be consistent with everyone’s freedom under a universal law (Kant 1965, 34–5). In his treatment of crime and punishment in the *Rechtslehre*, however, it at least seems that his distinctions collapse. The reason one punishes a criminal, Kant urges, is that he *deserves* it; his actions must receive “what they are worth” (ibid., 102). Legal penalties must be “equivalent” to crimes because all other standards (such as reform and deterrence) are arbitrary; therefore murderers must be executed, so that their “inner viciousness” may be “expiated,” and what Kant calls “blood-guilt” will not be on the hands of a society that treats murderers too tenderly out of “sympathetic sentimentality” or an “affectation of humanity” (ibid.). The sneer at “humanity” is all the more striking, coming from Kant; but the central question is whether the idea of what people deserve because of the malevolence of their will should be taken into account by public legal justice. Might it not be better—or at least more Kantian—to say that murder, from a political-legal viewpoint, is not consistent with the external freedom of all under a universal law, and that one correctly punishes murder by “negating the negation” (crime) and thus affirming the positive value of liberty-preserving law?

Kant himself, of course, provides for exactly that view of punishment in another part of the *Rechtslehre*:

Any resistance which counteracts the hindrance of an effect helps to promote this effect and is consonant with it. Now everything that is contrary to right is a hindrance to freedom based on universal laws, while coercion is a hindrance or resistance to freedom. Consequently, if a certain use to which freedom is put is itself a hindrance to freedom in accordance with universal laws [...] any coercion which is used against it will be a hindrance to the hindrance of freedom, and will thus be [...] right. (Kant 1970e, 134)

In some ways, at least, this is a better theory of coercion and punishment for Kant to use than any argument turning on the idea of inner viciousness or what actions are *worth*, because it keeps punishment, like the law itself, external. But if a proto-Hegelian “negation of negation” is better than “expiation of inner viciousness,” it does not make Kant’s theory of punishment wholly satisfactory; to see why that is so a slightly fuller view of the reasons that led Kant to his reflections on punishment may be of use.

Kant often wants to be able to say that punishment must be deserved or merited; if it were not deserved, and deserved because of bad will, then one might punish people—even the innocent and the good-willing (*bene-volent*)—in order to maximize utility or to appease divinities (Kant 1965, 102–3). So deserving punishment matters; one cannot just think of the good (or allegedly good) end that punishment may effect. But thanks to the very rigorousness of Kant’s own distinction between ends and motives, he is debarred from considering desert seriously in his legal theory. He cannot let desert matter and still keep the law wholly “external.”

The main problem with punishment as a negation of negation is that it is *designed* not to take motives (such as deserving) into account; its strength is its weakness. It must treat all murder (for example) simply as the negation of life and punishment as negation negated; it does not seem to be able to accommodate ordinary distinctions between, say, first-degree murder and manslaughter, for those distinctions turn on questions of intentionality.<sup>17</sup> Kant not only tries to keep law external, at least when he is not thinking of “inner viciousness”; he even insists that real motives cannot be known, so that it would be impossible to take them into account even if a purely external law permitted that. (The only absolute knowledge in Kant, of course, is knowledge of the moral law—not of causality, not of God, not even of *one’s own* motives.) On this the *Critique of Pure Reason* is quite clear:

The real morality of actions, their merit or guilt, even that of our own conduct, thus remains entirely hidden from us. Our imputations can refer only to the empirical character. How much of this character is ascribable to the pure effect of freedom, how much to mere nature, that is, to faults of temperament for which there is no responsibility, or to its happy constitution (*merito fortunæ*), can never be determined, and upon it therefore *no perfectly just judgments can be passed*. (Kant 1963, 475n)

This fine passage, as humane as it is “critical,” is Kant’s best thinking on the subject of legal accountability. That being so, it is shocking that he should speak so confidently of the expiation, through execution, of a “blood-guilt,” *knowledge* of which, according to his own doctrines, is “transcendent” for any

<sup>17</sup> Sometimes, to be sure, Kant gives due weight to intentionality; cf. Kant 1965, 29–30: “The degree of imputability of actions must be estimated by the magnitude of the obstacles that have to be overcome.” But this is only true subjectively considered.

but a “searcher of hearts” (Kant 1965, 102–5). This same passage from *Pure Reason* also overturns his notion that punishments must be equivalent to crimes, or at least symbolically equivalent, as in the castration of rapists (Kant 1887, 243–4); if “no perfectly just judgments can be passed,” then the search for “equivalence” is vain. What Kant probably ought to have said about the punishment of murderers is that since murder is the negation of an objective end, it ought to be arrested: But that since motives cannot be known, murderers should be restrained by confinement unless there is reason to think that “faults of temperament for which there is no responsibility” can be overcome by an autonomy-preserving treatment (Kant 1963, 475n).

There is a passage in Kant’s very late *Anthropology* (1798) that throws further light on his difficulties with “desert” as the foundation of legal punishment, and that then relates “deserved punishment” both to his theory of revolution, and to his notion that suicide is the most striking instance of failure to treat *oneself* as an objective end (Kant 1964, 82–5). In a remarkable paragraph in which these three strands—desert, revolution and suicide—converge, Kant argues that

[I]t is not always just depraved, worthless souls who decide to rid themselves of the burden of life by suicide [...] Although suicide is always terrible, and man makes himself a monstrosity by it, still it is noteworthy that in revolutionary periods, when public injustice is established and declared lawful (as, for example, under the Committee of Public Safety in the French Republic), honor-loving men (such as Roland) have sought to anticipate by suicide their execution under the law, although in a constitutional situation they themselves would have declared this reprehensible. The reason is this: There is something ignominious in any execution under a *law*, because it is *punishment*; and when the execution is unjust, the man who falls a victim to the law cannot recognize the punishment as one he *deserves*. And he proves it in this way: That, having been doomed to death, he now prefers to choose death as a free man, and he himself inflicts it. [...] But I do not claim to justify the morality of this. (Kant 1974a, 126–7)

Everything in this remarkable paragraph, down to the exquisitely equivocal last sentence, must have cost Kant a great effort. For it reveals the deepest tensions in his practical thought. Roland could not *know* (in Kant’s sense of knowing) that he deserved no punishment, since for Kant motives are as clouded as imperatives are clear, and therefore “no perfectly just judgments can be passed” (Kant 1963, 475n); but at the same time Kant would not want to give Robespierre a license to negate whatever struck the Committee of Public Safety as a negation of the Committee’s justice. That leads straightway to a problem in Kant’s doctrine of sovereignty: He maintains that subjects of a *new* order—even one illegally established—have a duty of obedience as good citizens (Kant 1965, 89); but in the *Anthropology* he complains of “public injustice” that is “declared lawful,” and treats Roland’s suicide as a justice-loving protest against a new sovereign. By viewing Roland as motivated by love of justice, though that motive must be *assumed*, since it cannot be known, Kant grants that some suicides are not “de-

praved" and "worthless" (contrary to his general condemnation of self-destruction in the *Tugendlehre*; Kant 1964, 82–5). All of the strains in Kant's practical thought—moral, political, legal—emerge in this passage from the *Anthropology*; it is no wonder that he ends on a less than clarion note.

## 12.6. Problems in Kant: Equality and Property

Kant's theory of public legal justice as the realizer of moral ends, then, has its difficulties; and these difficulties are most visible when Kant treats, not always with sufficient consistency, the idea of legal punishment. Often, however, if one looks at everything he has to say, even on these matters, a fairly consistent view can be uncovered. This is, perhaps, even true of what is plainly the least satisfactory thing in the whole of Kant's social thought: his view of the relation between legal equality and economic inequality. In *Theory and Practice* Kant had insisted that

[the] uniform equality of human beings as subjects of a state is, however, perfectly consistent with the utmost inequality of the mass in the degree of its possessions, whether these take the form of physical or mental superiority over others, or of fortuitous external property and of particular rights (of which there may be many) with respect to others. Thus the welfare of the one depends very much on the will of the other (the poor depending on the rich), the one must obey the other (as the child its parents or the wife her husband), the one serves (the laborer) while the other pays, etc. Nevertheless, they are all equal as subjects *before the law*, which, as the pronouncement of the general will, can only be single in form, and which concerns the form of right and not the material or object in relation to which I possess rights. For no one can coerce anyone else other than through the public law. (Kant 1970b, 75)

The last sentence could at best read, "no one *should* coerce anyone else other than through the public law," for some of the social institutions that Kant describes *are* coercive; to see that, one need not even recall Anatole France's witicism that modern society allows the rich and the poor "equally" to sleep under bridges (France 1905). To be sure, Kant modifies his theory at once by insisting that "the idea of the equality of men as subjects in a commonwealth" leads to the "formula" that "every member of the commonwealth must be entitled to reach any degree of rank which a subject can earn through his talent, his industry and his good fortune. And his fellow subjects may not stand in his way by hereditary prerogatives or privileges of rank and thereby hold him and his descendants back indefinitely" (Kant 1970b, 75). Even this comparatively liberal notion of a "career open to talents," which defends equality of opportunity if not equality of outcome (Schaar 1967, 228–49), seems to forget Rousseau's argument that where there is radical economic inequality the law "only gives new power to him who already has too much" (Rousseau 1962c, 392–3). That fact is not wholly offset even by the argument of *Judgment*, Section 83, that skill, which helps to produce a culture that legally realizes some

moral ends, itself unavoidably generates inequality, simply because skills themselves are unequal (Kant 1952, 95–7).

But the gravest problem is that Kant, after insisting that civil equality is consistent with economic inequality, then modifies even *civil* equality by saying that a citizen—the person who has a right to vote on the “basic law”—must “of course” be an “adult male,” and that he must “be his own master (*sui juris*), and must have some property (which can include any skill, trade, fine art or science) to support himself” (Kant 1970b, 77–8). In cases where a person “must earn his living from others,” Kant adds, “he must earn it only by selling that which is his, and not by allowing others to make use of him; for he must in the true sense of the word *serve* no one but the commonwealth” (*ibid.*, 78). This last phrase, reminiscent of Rousseau’s insistence that citizens should be “completely independent of all the rest” but “very dependent on the city” (Rousseau 1915c, Book I, chap. 12), puts the doctrine in a better light; Kant is anxious to avoid giving a citizen’s vote to mere creatures of feudal landowners and proprietors of large estates. That is why he says that “the number of those entitled to vote on matters of legislation must be calculated purely from the number of property-owners, not from the size of their estates” (Kant 1970b, 78). Of course, he does add, in the *Rechtslehre*, that everyone should be at liberty to “work up” from a “passive” condition to “active” citizenship (Kant 1965, 80; see Gregor 1998, 757–87).

Even if, however, one represents these remarks as an effort to extend citizenship as far as possible given certain historical limitations prevailing in Kant’s day, it is still arguable that they concede too much to the mere *de facto* institutions of the eighteenth century (Flikschuh 1999, 250–71). (As Manfred Riedel has skillfully shown, Kant’s would-be liberal principle that citizens must be independent may, ironically, restrict citizenship if that independence is actually possessed by only a few, and if Kant permits the radical inequality that makes dependence hard to overcome. Thus Kant’s insistence on independence—the third attribute of a citizen—may struggle against the first attribute, namely, civil equality; Riedel 1981.)

This makes it doubly important to recall that while Kant restricts civil equality in some works—at least while the many are working up from a passive to an active status—he expands it in some others. For a balanced view one must recall this fine passage (characteristically both ringing and cautious) from *Religion within the Limits*:

I grant that I cannot reconcile myself to the following expressions made use of even by clever men: “A certain people (engaged in a struggle for civil freedom) is not yet ripe for freedom”; “The bondsmen of a landed proprietor are not yet ready for freedom”; and hence, likewise, “Mankind in general is not yet ripe for freedom of belief.” For according to such a presupposition, freedom will never arrive, since we cannot *ripen* to this freedom if we are not first of all placed therein (we must be free in order to make purposive use of our powers in freedom) [...] I raise no protest when those who hold power in their hands, being constrained by the circum-

stances of the times, postpone far, very far, into the future the sundering of these three bonds. But to proceed on the principle that those who are once subjected to these bonds are essentially unfit for freedom and that one is justified in continually removing them farther from it is to usurp the prerogatives of Divinity itself, which created men for freedom. It is certainly more convenient to rule in a state, household and church if one is able to carry out such a principle. But is it also more just? (Kant 1960, 176–7n)

This passage, to be sure, does not negate less attractive passages in other works, but it does balance them. It also serves to remind that it is Kant's *own doctrine* that only with the advent of universal republicanism, in which all are citizens, can one reasonably hope that eternal peace will be legally realized (Kant 1970c, 100–2). If Kant was not a pure enough Rousseauian to agree that social institutions are worth having only if “everyone has something and no one has too much” (Rousseau 1915c, Book I, chap. 9, n. 5), he at least looked forward to a day in which the expansion of citizenship would yield a sufficient number of persons unwilling to vote for war. But the largest number of possible citizens—and hence the best legal guarantee of peace—is *all adults*: Kant's better thoughts drive his worse ones out.

### 12.7. Conclusion

This study began with a paradox of Kant's own devising: That true politics must pay homage to morals, but without being able to count on the moral incentive (good will) that, if completely efficacious, would transcend (mere) politics altogether and produce an ethical commonwealth under laws of virtue (Kant 1960, 86–90). In order to make sense of a paradox that makes politics both cling to and shun morals, it was necessary to draw (or rather point to) Kant's distinction between *ends* and *incentives*, and to say that republicanism and eternal peace might well be moral ends that are legally attainable (or at least approachable) through the self-love of citizens of a republic, even if those citizens should be devils divested of all good will. That stress on *ends* as the link or bridge between Kantian politics and Kantian morality turned out to have the additional large advantage of tying into (and then supporting) a teleological reading of the whole of Kant, governed by the *Critique of Judgment*, in which all “ends”—“objective” and “relative,” moral, natural and aesthetic—find their place in a general theory of ends (Kant 1952, 14–5, 38–9, 116–7). A general teleological reading, which seems to work in all of Kant's realms, provides a sufficient reason to settle the tension between morality as “respect for persons as objective ends” and morality as “giving the law to oneself” in favor of the former—in favor of a Kant who finds the moral law *in* “the general concept of a rational being” as the “final end,” sooner than in quasi-Rousseauian “legislation.”

Thus the only fully intelligible reading of Kant's insistence that “true politics cannot take a single step without first paying homage to morals”—the

reading which insists that morals and politics share a realm of overlapping ends or purposes, but differ *wholly* over motives—coheres with the only fully comprehensive reading of Kant’s theoretical, practical and aesthetic philosophy taken as a totality (Kant 1963, 642–3). Kantian politics, then, can most reasonably be understood as something that legally realizes certain moral ends—generally characterizable as peacefulness and civility—in a way that is indeed inferior to a (probably unattainable) universal ethical commonwealth, but that (admittedly by relying on nonmoral motives) keep persons, the “final ends of creation,” from being used as mere “means” to arbitrary purposes (above all war).

Such a reading not only makes sense of Kant’s initially paradoxical view of politics, by appealing to a *telos* that—either “determinantly” or “reflectively”—bridges all of the Kantian realms; it also preserves, and even enhances, the stature of Kant’s political thought. For in linking republicanism and eternal peace to Kant’s moral doctrine of “objective ends” that we “ought to have,” the teleological reading shows that the (fairly common) view that Kant’s moral philosophy is perhaps the most important modern one but that his politics (in sharp contrast) is at best a *mélange* of Hobbes, Montesquieu and Rousseau (Gallie 1979, 20ff.), and at worst a mere reflection of “Prussia” (Cohen 1962, 290), will not hold up as a general view (though it may be right in points of detail). If the teleological reading is right, then Charles Taylor (to take an example) must be at least partly wrong when he insists that while “Kant starts with a radically new conception of morality, his political theory is disappointingly familiar. It does not take us very far beyond utilitarianism” (Taylor 1975, 372). It is not simply that this statement fails to notice that Kant declined to count utilitarianism as a moral theory at all; it is that it fails to take seriously Kant’s efforts to “limit” and “condition” politics through the concept of “right,” so that universal republicanism might yield a legal approximation to the “Kingdom of Ends.”

Kant is clear, after all, that citizens (not mere subjects) in a republic would *dissent* from war, out of the legal motive of self-love. Therefore republicanism (internally) and eternal peace (externally) are interlocked, absolutely inseparable. This is why Kant says that in “a constitution where the subject is not a citizen, and which is therefore not republican, it is the simplest thing in the world to go to war”—despite the fact that “reason, as the highest legislative moral power, absolutely condemns war as a test of rights” (Kant 1970c, 100). Therefore republican citizenship is instrumental to an essential moral end that good will alone may never realize, thanks to “pathology.” For this reason, W. B. Gallie’s strict division between Kant’s internal politics as a stale academic rehash of Hobbes and Rousseau, and Kant’s external politics as imaginative and revelatory, while an advance on Taylor’s general denigration of Kant’s politics, will not bear scrutiny; it is *only* republicanism that (for Kant) tends naturally to produce *ewige Frieden* (ibid.). For Kant the outside is shaped by



the inside; it is that which leads him to say that the “first definitive article” of eternal peace is that “the civil constitution of every state shall be republican” (ibid., 99).

All of this is brought out by Kant himself in the splendid last pages of the *Rechtslehre*:

Moral-practical reason within us pronounces the following irresistible veto: *There shall be no war*, either between individual human beings in the state of nature, or between separate states, which, although internally law-governed, still live in a lawless condition in their external relationships with one another. For war is not the way in which anyone should pursue his rights. Thus it is no longer a question of whether eternal peace is really possible or not, or whether we are not perhaps mistaken in our theoretical judgment if we assume that it is. On the contrary, we must simply act as if it could really come about (which is perhaps impossible), and turn our efforts towards realizing it and towards establishing that constitution which seems most suitable for this purpose (perhaps that of republicanism in all states, individually and collectively). By working towards this end, we may hope to terminate the disastrous practice of war, which up till now has been the main object to which all states, without exception, have accommodated their internal institutions. And even if the fulfillment of this pacific intention were forever to remain a pious hope, we should still not be deceiving ourselves if we made it our maxim to work unceasingly towards it, for it is our duty to do so. To assume, on the other hand, that the moral law within us might be misleading, would give rise to the execrable wish to dispense with all reason and to regard ourselves, along with our principles, as subject to the same mechanism of nature as the other animal species. It can indeed be said that this task of establishing a universal and lasting peace is not just a part of the theory of right within the limits of pure reason, but its entire ultimate purpose [*Endzweck*]. (Kant 1970e, 174)<sup>18</sup>

This simply confirms, and ties together, what has been said in various parts of this study: that it is morality itself that “vetoes” war (doubtless because war treats “ends” as mere “means,” persons as mere things); that peace as a moral end can be legally approached by “establishing that constitution” (namely, “republicanism in all states, individually and collectively”) that brings self-loving rational citizens to “veto” war; that to think that the moral law that forbids war might be “misleading” is to renounce reason (the “fact of reason”) and to fall back on the “mechanism of nature” (in the manner of Hume’s “feelings” or Rousseau’s *sentiments*); that “right,” which legally realizes some moral ends (even without good will), has “universal and lasting peace” as its “entire ultimate purpose” [*Endzweck*]. It is doubtful whether there is any other passage, anywhere in Kant, that so vividly and movingly fills out his notion of a politics that pays homage to the ends of morals. It is a passage whose visionary but sane breadth redeems the drier parts of the *Rechtslehre*. And it is a passage that confirms what should never have been doubted: That Kant is a political philosopher of the very first rank whose “evolutionary” political goals would, if realized, constitute the first wholly valuable revolution in history.

<sup>18</sup> For the German text, see Kant 1922b, 161–2.

If, finally, one contrasts Kant *als Politiker* with his principal modern competitors, it is hard to resist the judgment that he is both the most important and the most attractive of political philosophers.<sup>19</sup> For at the crucial juncture he is simply right: If politics is not given a republican and peaceful shape by objective moral ends, then public legal justice will be public and legal but not just—one will have Hobbesianism at best and the Gestapo at worst; but if politics tries to impose moral incentives for legal obedience, it will generate a despotism in which every witness-box becomes a confessional.

Kant's mastery of the details of government, to be sure, cannot touch Hobbes's or Hegel's; but then he also avoided saying, with Hobbes, that nothing is definitively right until there is a sovereign-ordained positive law (Hobbes 1957, 82–4) and, with Hegel, that war preserves the ethical health of nations from the “foulness” that eternal peace would cause (Hegel 1942, 209–10). His understanding of *Realpolitik*, while considerable, was no match for Machiavelli's; but then he never said that the attainment of historical “greatness” excuses crimes such as Romulus's murder of Remus (Machiavelli 1950a, 138–9). His comprehension of social psychology (and especially of the painfulness of inequality) cannot touch Rousseau's; but then he also refrained from saying that “the general will is always right” and that men can be “forced to be free” (Rousseau 1915c, Book I, chap. 7). His “friendship for the human race” was matched by Mill's; but then he never fell into claiming that the only proof that something is “desirable” is that people “do actually desire it” (Mill 1961c, 362–3). His hope that men would never be used as mere means to relative ends was equalled by Marx's; but then he never allowed himself the sanguine belief that a “dictatorship of the proletariat” would flower into a *Reich der Freiheit* (Marx 1896, vol. 3: 820). His careful treatment of politics as the legal realizer of moral ends is paralleled by Locke's notion that “judges” should simply execute an already known “natural law”; but then he avoided grounding that natural law in theology, in the will of God as laboring Creator (Locke 1967, 311). His sense of the fragility of social institutions is matched by Burke's; but, then he avoided Burke's contempt for the “nakedness and solitude” of “metaphysical abstraction” (Burke 1955, 284). His notion of the necessity of coercive institutions, given the facts of human psychology, is equalled by Hume's; but then he never fell into reducing practical ideas to “feelings of a particular kind” (Hume 1964, 179). His awareness that civilization and culture involve a double-edged “glittering misery” is echoed and amplified by Freud; but then he never asserted that “judgments of value” are merely efforts to “prop up [...] illusions with arguments” (Freud

<sup>19</sup> Michael Oakshott—a remarkable and generous scholar—once said to the author *en passant* that Kant is “important but not attractive” (private communication). This elegant half-jest, which probably refers mainly to Kant's style (or lack of it), half-inspired the author to write this chapter.

1968, 80). His devotion to culture is equalled, possibly exceeded, by Nietzsche's; but then he never crossed the *Grenzen der Menschheit* in search of an *Übermensch*.<sup>20</sup>

On any single point, Kant can be matched (and sometimes exceeded) by a rival, and his reflections on revolution, legal punishment and inequality are sometimes unworthy of his own better thinking; but his total conception of a republican and peaceful politics, slowly attained through "infinite approximation," seems to be the most nearly adequate non-sanguine, non-apocalyptic one, for the modern world. It is a politics and law "within the limits of reason" that mediates between utopian fantasy and unworthy quietism.

### 12.8. The Legal Thought of Johann Gottlieb Fichte

Johann Gottlieb Fichte (1762–1814) is now best-known as a forerunner of German "nationalist" thought, and as the predecessor of Hegel at Humboldt University in Berlin; appropriately, Fichte is now buried beside Hegel in the Dorotheen-Friedhof in Eastern Berlin. Fichte did indeed write several works on law and jurisprudence early in his career, when he was still (so to speak) a hyper-Kantian;<sup>21</sup> but one cannot say that philosophy of law centrally concerned him in his fully mature period. And so Guido Fassò is quite correct when he urges that, while Fichte is "among the leading thinkers," nonetheless his "account of law [...] occupies a relatively marginal place within his philosophical framework" (Fassò 1966–1970, vol. 3: 83–4).

The works by which Fichte is today best known—the *Vocation of Man* and the *Closed Commercial State*—certainly marginalize law and jurisprudence. But in Fichte's early, still-Kantian period in the early 1790s, law and the philosophy of law matter very much. In the *Beiträge* of 1793, Fichte insists (in a paragraph that could almost be invisibly woven into Kant's *Rechtslehre*) that

the question, What is the highest purpose of the legal association? Depends upon the solution of this [earlier] question: What is the purpose [*Zweck*] of each individual? The answer to this is purely moral and should be based on the moral law, which alone governs man as man and obligates him to a final purpose [*Endzweck*] [...] Once it is allowed that the final purpose of humanity, taken as individuals and in general, should not be determined from the laws of experience [*Erfahrung*], but according to its original form, the historian [of law] has no part in it [...]. (Fichte 1845–1946a, 62)

What Fichte is saying, following familiar Kantian notions of the 1790s, is that morality matters most; that morality in its turns is concerned with respecting

<sup>20</sup> Despite Nietzsche's reverence for Goethe, he may have undervalued these lines: "For with the gods / No man should ever / Seek to compare" (Goethe 1955, 64–7). ("Denn mit Göttern / Soll sich nicht messen / Irgend ein Mensch.")

<sup>21</sup> For the best over-view of Fichte's political-legal-moral thought in English, see Kelly 1969, 181ff. (a superb chapter).

persons as “objective ends” or “final purposes”; that (as Kant himself insist) morality is “destroyed” [*zerstört*] if there is an infinite regress of mere “means” and an *Endzweck* (“final end”) never appears (Kant 1922d); that the political-legal order is therefore only secondary (if essential), as the legal “realizer” of objective moral ends and as the provider of a stable framework of legal security within which morality can be safely pursued without excessive danger from immoral-illegal people. Had Fichte died before 1800, he would now (correctly) be thought of as an eloquent embroiderer of Kantian moral and jurisprudential themes—just as Kant (had he died before the *Critique of Pure Reason*) would now correctly be thought of as an embroiderer of Leibnizian-Wolffian themes (Latta 1989, lxii ff.). To be sure, Kant himself had insisted (despite his privileging of morality) that “if public legal justice perishes then it is no longer worthwhile for men to exist on this earth” (Kant, *Reflexionem zur Rechtsphilosophie*, cited in Kelly 1969, 142) given man’s “pathological” propensity to use and mis-use others as mere means to arbitrary, “relative” ends and purposes; and the young Fichte had (again) followed Kant on this jurisprudential point, saying in the *Sittenlehre* (*Doctrine of Ethics*, 1798) that “first of all [...] each person *shall* live in a community, for [...] whoever separates himself from mankind renounces his final end [*Endzweck*] and purpose and holds the extension of morality to be utterly indifferent” (Fichte 1845–1846b, 187–8). But this is just another way of saying, with Kant, that unless communal legal justice realizes some “final ends” (such as peace and civility), a would-be moral individual can never safely take “the moral law” as the motive of his free, self-determined conduct. In a word: When the young, “early” Fichte was still centrally concerned with law and the philosophy of law, he followed Kant’s idea that *reine praktische Teleologie* (“pure practical teleology”; Kant 1922e, 514) and “objective ends” *shape* law (*qua* realization of objective ends through “mere” legal motives). In his later career Fichte moved steadily, resolutely away from Kant—as did, in different ways, the other great ex-Kantianer of the late eighteenth century, Schiller and Herder (see Kelly 1969, *passim*). But in moving away from Kant and Kant’s *Rechtslehre*, Fichte also left behind any central concern for *Recht* itself, as a central concern of “practical” philosophy. For jurisprudence it is the earliest Fichte who counts—but here he was also at his least original, his least independent. When he was most jurisprudential, he was also least himself.

## Chapter 13

# THE LEGAL PHILOSOPHY OF G. W. F. HEGEL

### 13.1. Introduction

It is difficult to think of two philosophers more different than Hegel and Rousseau: Who can imagine Rousseau lecturing regularly and punctually, perhaps on the destructive effects of the arts and sciences, in a university? Still more inconceivable, who can imagine Hegel's *Confessions*? But it is instructive to compare them, for in respect to one restricted but significant problem—that of relating individuals to a social whole by means of their wills in such a way that *will* means only rational and social will, and not arbitrariness, or caprice, or “natural” will—they have a difficulty in common. Their dilemma is much the same insofar as both writers at once value and fear “the will” as the source of freedom on the one hand, and of mere willfulness on the other. (What Rousseau says about the barrenness and destructiveness of the egoistic will in the *Économie politique*<sup>1</sup> surely finds a complex echo in Hegel's *Phenomenology*.) Comparison of the two from other points of view, of course, yields only negative relationships: Hegel was the chief defender of the rationality of the large modern states that Rousseau hated, and his “universal” civil service comes close to the “government by clerks” that Rousseau detested equally.<sup>2</sup> Still it is worth nothing that, however critical of Rousseau Hegel often was, he rarely failed to point out that Rousseau had been right in basing his theory of the state on the idea of will, though he had “reduced” will to “capriciously given express consent” by settling for a mere “general” will, by not insisting on “rational” will (Hegel 1942, 156–7). In his criticism of Rousseau, Hegel almost certainly failed to appreciate that Rousseau was in fact trying to rationalize will by “generalizing” it, by helping it move away from particularity and capriciousness, and toward *volonté générale* and general *law*. In any case, Hegel's drawing a firm line between *will* and *consent*—undoing a connection established by St. Augustine and then reflected in

<sup>1</sup> Rousseau 1962a, 1: 244–5. Both Rousseau and Hegel were virtually obliged to treat the will as a moral faculty, as the source of obligations and promises, because the notion of voluntariness as an essential component of ethical action, first introduced by Christian doctrine, reached a political zenith in social contract theory as developed by Hobbes, Locke, Rousseau, and Kant. Recall the central place of the general will in Rousseau as well as Hobbes's claim in Chapter 40 of *Leviathan* (Hobbes 1957) that wills “make the essence of all covenants.” On this intricate point see Ritchie 1893, 196–226.

<sup>2</sup> See Rousseau 1953a, chap. 5, 181–2: “practically all small states [...] prosper merely by reason of the fact that they are small.” The “subordinate oppressors” necessary to administer a large state, in Rousseau's view, would be little different from Hegel's “universal class.”

Hobbes, Locke, and Rousseau—makes it impossible to agree with Plamenatz's judgment that Hegel's political philosophy is built on consent (Plamenatz 1938, 61). One of Hegel's great points is that mere consent is capricious and therefore unworthy of the "true" will—the rational will which recognizes "ethics" and law.

At any rate, the content of the will is always critical in Hegel. Throughout his political and legal writings he attacks unrelentingly the merely "abstract" or "one-sided" view of the will in its numerous forms: as mere independence or differentiation of the ego from the outside world, as Stoic indifference to everything but internal serenity, as willful "heroism of state service" on the part of medieval "haughty vassals" who act "rightly" only to please themselves, as the "frenzy of self-conceit" that tries to destroy everything that is not the much-loved self, as the Kantian rational will willing empty abstract universals that are the contradiction of nothing, as the moral "ought-to-be" (again Kantian) that allows nothing to become actual because morality must be only willed and not achieved. "Subjectivity," Hegel observed, "is insatiably greedy to concentrate and drown everything in this single spring of the pure ego" (Hegel 1967, 242–6, 526–37, 391–400, 440–53, and Hegel 1942, 90; Hegel 1967, 615–27; and Hegel 1942, 232, additions).

In spite of this attack, which is developed at such length and with so much subtlety in the *Phenomenology*, there is in the *Philosophy of Right* and the *Encyclopedia* an equally unrelenting insistence on the Hegelian state as the actualization of the "concept" of the will, on the essentiality of "ethical" life in a concrete historical state in which the will, by itself an abstract "moment," something even potentially evil because purely particular, is given a content consistent with its own concept: rational, lawful, freedom. Indeed, Hegel does not hesitate to define the concept of the good itself in terms of will: "The good is the Idea as the unity of the concept of the will with the particular will" (Hegel 1942, 87–8, 86). (Interestingly, this is almost the same as Rousseau's definition of virtue in the *Économie politique*.<sup>3</sup>) In ethical life, Hegel urges, the individual will is "canceled and preserved"—canceled in its particularity, preserved insofar as it is rational—but it is never simply negated.<sup>4</sup> Its mere subjectivity, which may have any content, is filled with the objective social ethics and legal order of a concrete society at a given point in history. As we shall see, this leaves Hegel with the difficulty of showing that history and its agent, the state, are sufficient embodiments of reason to bear the burden of fitting will with proper object. What must be emphasized here is that while Hegel devotes a great deal of his work, particularly most of the *Phenomenology*, to a dissection

<sup>3</sup> Rousseau 1962a, 248: "Virtue is only the conformity of the particular will to the general [will]."

<sup>4</sup> On the notion of "canceling and preserving" in Hegel, see particularly Kelly 1969, 311.

and repudiation of the destructive and self-destructive forms of mind and will, he never rejects the concept of willing as significant in modern Western civilization. “In the states of antiquity,” he notes in the *Philosophy of Right*, “the subjective end coincided with the state’s will. In modern times, however, we make claims for private judgment, private willing, and private conscience” (Hegel 1942, 280, additions; Pinkard 1999, *passim*).

The tone of this statement is indeed a little odd: The phrase “we make claims” is not exactly an assertion of the validity of those claims. It is also true that many of the common forms of explicit social willing are denigrated and even ridiculed by Hegel—social contract theory, above all, as well as the notion that the consent of the governed, or still less public opinion, is what makes the state legitimate. But he says again and again that men must be able to see their true will in the rationality of historically concrete institutions, in which the abstract ought-to-be comes into real existence in the form of law, and that men feel entitled to find “subjective self-satisfaction” in being parts of a rational institution, in knowing that the concept of the good is only an idea, only a “moment” in the ethical whole, unless it is actualized by the real wills of real men. “The good itself, apart from the subjective will,” he says, “is only an abstraction without that real existence which it is to acquire for the first time through efforts of that will” (*ibid.*, 253).<sup>5</sup> Against this “subjective” element Hegel balances a counterweight that keeps the will in its place, saying that “it is to take higher moral ground to find satisfaction in the [objective] action and beyond the gulf between the self-consciousness of a man and the objectivity of his deed” (Hegel 1942, 251, additions; cf. *ibid.*, 259 and 280, as well as Hegel 1967, 349). In short, the good itself is abstract, the will alone equally abstract; the former by itself produces only unconscious or “immediate” ethical life, the latter by itself only the belief that whatever one wills is good by definition. It is the union of the two that brings the subjective and the objective together.

A serious problem arises in all this: The *Phenomenology* is devoted to the “unhappy” side of subjective freedom, to a catalogue of the psychological and social disasters that this freedom has brought about (Hegel 1967, 349). Hegel never makes clear how the Hegelian state, a new self-conscious ethics, is to be possible after the gradual unfolding of a ruinous subjectivism in Western thought; after consciousness has become so “estranged” from substantial ethical life and so arbitrary that reality is found only within an individual ego and will; after confidence in the infallibility of individual mind has led to catastrophes such as the French Revolution, which Hegel viewed largely as the product of radical subjectivism, of seeing the state as merely “external” and

<sup>5</sup> Because this is so, Hegel suggests in the *Encyclopedia*, Plato was wrong in imagining that thought could rule in the person of philosophers only and not in the minds of all men. See Hegel 1894, 288–9.

“other” (Hegel 1942, 157 and 165–74).<sup>6</sup> How, in short, the ethical whole of the state in the *Philosophy of Right* is to be possible after the inventory of spiritual disasters of the *Phenomenology*, is not clear in Hegel. Since most of the forms of radical subjectivism that led to “unhappy consciousness” at best, and violence and revolution at worst, issue out of the Christian tradition that Hegel often calls a great advance in history, it is also not clear whether Christianity and its realm of will and subjectivity was really an advance or the beginning of anarchism and universal moral solipsism; whether Hegel really believed that ancient nonindividualist ethics was something that needed to be superseded or that it flourished in a “paradise of the human spirit” (Hegel 1948, 325). Of course, he may actually have believed both; this would account for a great deal that is equivocal or paradoxical in his work.

Setting some of these difficulties aside for the moment, it is necessary to point out that Hegel always tried to preserve willing as a moral concept, and that many of his most serious problems are caused by this effort. No one has understood Hegel’s special brand of voluntarism more clearly than George Kelly, who argues entirely correct that

The most striking element, perhaps, of Hegel’s political theory, which makes it quite foreign to simplistic forms of organicism, is that he takes the subjective will to be cornerstone of modern government. Of course he does not stop there: He imposes a higher “Hellenic” or *sittlich* goal of public virtue and public service upon the modern conditions. Yet the origins of this standpoint are not in “nature,” but rather in the will, which, being free, produces a system of right as “a realm of freedom made actual, the world of mind brought forth out of itself like a second nature.” [...] In historical terms, the synthesis of will and reason in actualized institutions has far less to do with the anticipation of industrial dilemmas than with the need to mediate revolutionary subjectivism with a legal recovery of the common life and the practice of public virtue. (Kelly 1978, 113–4)<sup>7</sup>

This attitude distinguishes Hegel sharply from, say, Burke, with whom he is sometimes rather facetiously compared. Both, of course, use organic metaphors of growth and decay in their political-legal writings; both speak of the rationality of the historically actual and decry the rationalism of subjectivists and revolutionaries. But Burke makes no effort to synthesize will with these elements.<sup>8</sup> Hegel almost always does and as a result is an infinitely more compli-

<sup>6</sup> According to Hegel fanatical religions claiming exclusive spiritual validity for themselves are partly responsible for making men think of the state as nothing better than a “mechanical scaffolding.”

<sup>7</sup> This passage comes from a chapter called “The Neutral State,” which is assuredly the most intelligent and helpful sympathetic reading of the *Philosophy of Right* available in English.

<sup>8</sup> When Burke says that “society is indeed a contract” (Burke 1955, Book 7, Part 2), he does so in a way that makes clear that he is no voluntarist: “Each contract of each particular state is but a clause in the great primeval contract of eternal society, linking the higher with the lower natures, connecting the visible and invisible world.” Contract, for Burke, is nothing more than a metaphor. See Burke 1955, 110.



cated political philosopher than Burke, though he is careful to balance will with the “objective”: “Ethical life is the Idea of freedom in that on the one hand it is the good become alive—the good endowed in self-consciousness with knowing and willing and actualized by self-conscious action—while on the other hand self-consciousness has in the ethical realm its absolute foundation and the end which actualizes its efforts” (Hegel 1942, 105). It is true, of course, that Hegel strove constantly to identify the “real” will with the rational will and that he defined freedom, and goodness, and virtue in terms of the reconciliation of “natural” will (impulse, caprice) with the real or rational will. “It is only as having the power of thinking that the will is free,” he urges in the *History of Philosophy*; “the unity of thought with itself is freedom, is the free will” (Hegel 1896, 3: 402). It is true that he was able to see the state as something “willed,” even without any allowance for social contract theory, consent theory, or even approval of elections or opinion, because reason (or freedom-as-reason) connects the real will and the state. More precisely, it provides a content for both: rational freedom, which is seen as “substance” in the state and as “accident” in individuals (Hegel 1942, Preface, 12). It is true in general that he treated will as thought striving to actualize itself, since it is “only as thinking intelligence that the will is genuinely a will and free” (*ibid.*, 30), since the will is a “moment” of thought, mind as it “steps into actuality” (Hegel 1894, 230–1). All of this involved a fairly severe circumscription of the numerous meaning that will can have and has had, certainly a circumscription that makes it tolerably easy to relate will to the state via the concept of rational freedom (Bobbio 1984, chap. 3).

Despite all of this, Hegel’s is still a theory of will, though will of a rather passive sort, since it ultimately reduces itself to “recognition,” to acceptance of the rational that is in actual (especially legal) institutions. Hegel could, however, argue that it is rather crude to look for willing only in explicitly consensual acts, that since “spirit” is actualized in the world through particular minds, everything is willed by somebody and derives at least its subjective value and the whole of its actual existence from being thus willed. “The educated man,” Hegel declares, “develops an inner life and wills that he himself shall be in everything he does.” Hegel could, then, urge that all social phenomena (including law) are precisely willed in a way that social contract theory, with its concentration on the explicitly consensual, never dreamed of. He could argue that mere agreement and consent can endorse and legitimize anything, however insane or evil, that his own view of volition as rational will and “recognition” was both safer and more comprehensive than the contractarian tradition (Hegel 1942, 76–9; 248, additions; 157). And none of these claims can be rejected out of hand, because they all have a certain plausibility: After all, one never signs a social contract, but one constantly performs lesser social acts of rational value that depend on being willed—such as acting *legally* (Wood 1990, *passim*).

What Hegel seems to have wanted is what he (once) says the Greeks enjoyed: a “medium between the loss of individuality on the part of man [...] and Infinite Subjectivity as pure certainty of itself—the position that the Ego is the ground of all that can lay claim to substantial existence” (Hegel 1956, 238). It is essential to point this out, because it shows that Hegel was trying to deal with a problem that was rather like Rousseau’s, and that his conceptual apparatus, though not his conclusions, links him more closely to the great contract theorists than to a total non-voluntarist like Burke. In fact, from a very abstract point of view, which is sometimes necessary to clarify obscured relations, Rousseau, Hegel, and Kant are comparable insofar as all three strove to combine the importance of the will with a rational, universal content. This is true even though the general will, the concrete universal, and the categorical imperative are very different indeed; all three philosophers could agree, in different ways, with Hegel’s dictum that “everything depends on the unity of universal and particular” (Hegel 1942, 280, additions).

Hegel as a kind of voluntarist was striving to cope in the most serious way possible with a problem that is extremely difficult for anyone who takes up a “moral” position—namely, that my private conviction, however valuable it may be from some point of view, will sometimes set itself against what actually exists, calling it immoral or even unreal; and that in the name of “morality” concrete social institutions of rational value, such as law, which “enshrine the convictions of countless individuals,” will be assaulted. “Now if I set against these [institutions] the authority of my single conviction [...] that at first seems a piece of monstrous self-conceit, but in virtue of the principle that subjective conviction is to be the measuring-rod, it is pronounced not to be self-conceit at all” (*ibid.*, 100).

Hegel is dealing with a problem that is not only of great speculative difficulty but of great practical moment as well: Granting the importance of conviction, conscience, and good will, how can it be said whether or not they are “right”? Can they even be subjected to a criterion of right without being contradicted? Whatever Hegel’s solution to this problem, he has certainly identified the crucial difficulty in “moral” philosophies and in the social consequences to which they lead.<sup>9</sup> This great question is resolved—to the extent that it is ever resolved—quite differently by various philosophers: by assigning to will an objective end defined in terms of natural law or “practical reason,” or perhaps even utility. All of these work in some sense—that is, they are coherent—so long as the standard to which will must conform is not antivoluntaristic. Hegel is perhaps the only great voluntarist who insists consistently on a concrete universal as a fit object of volition, and it is this insistence that causes him so much trouble. For standards such as natural law and

<sup>9</sup> On this point see particularly Kant 1965, Introduction, Section 3, “Of the Subdivision of a Metaphysic of Morals,” 18–21.

utility leave room for a certain creative tension between individual minds, the “mind” of the universal standard, and the “mind” of society; whereas in Hegel the identification of objectively ethical purposes with actual states and actual laws leaves him open to the charge that he is not really preserving will as a moral concept, not even by “canceling and preserving” it.

Hegel, then, resembles some of his predecessors in wanting to retain the will but to give it a content other than itself. His solution to this problem lies in seeing reason and freedom not simply in the mind and will of one person but in the “ethical” institutions that actually exist in history, especially *law*. “What lies between reason as self-conscious mind and reason as an actual world before our eyes, what separates the former from the latter and prevents it from finding satisfaction in the latter,” he wrote in the *Philosophy of Right*, “is the fetter of some abstraction” (Hegel 1942, Preface, 12). The Hegelian will must see itself realized in its highest form in these institutions; and this recognition is supposed to combine real volition with the avoidance of mere subjectivism, of conviction as an end in itself. The question then becomes: Granting that social institutions (such as law) are rational, that they embody a “prodigious transfer” of reason into the “outer world,” is this a sufficient reason for calling the state not simply rational but “mind on earth” and the “march of God in the world,” against which all forms of subjectivism are to be counted for little?<sup>10</sup> Why the “objectivity” of the legal state will suddenly become persuasive and effective in an age that Hegel himself characterizes as one of rampant subjectivism, individualism, romanticism, and revolution is none too clear.

This would be less problematical if Hegel were concerned only with the concept of the state; but Hegel wanted to demonstrate the sufficient rationality of the states that actually exist, to see “reason as the rose of the cross of the present.” Indeed, he sometimes seems to urge that while men must think only of the concept of the state, they must accept any actual state (*ibid.*, 12).<sup>11</sup> What makes Hegel’s case even more complicated is that he sometimes grants a distinction between reason itself and the partial rationality of actual ethical and legal institutions. Great difficulty is caused, he says in the *Philosophy of Right*, by the “gradual intrusion of reason, of what is inherently and actually right, into primitive institutions which have something wrong at their roots” (*ibid.*, 138).<sup>12</sup> But when are institutions sufficiently rational to serve as a

<sup>10</sup> “The genuine truth is the prodigious transfer of the inner into the outer, the building of reason into the real world, and this has been the task of the world during the whole course of its history” (Hegel 1942, 167; see also 155–7 and 279–85, additions).

<sup>11</sup> “In considering the idea of the state, we must not have our eyes on particular states” (Hegel 1942, 279). Nonetheless, he holds that any of the “mature states” of his epoch sufficiently embodies this idea.

<sup>12</sup> Hegel, however, does not fail to add that “le plus grand ennemi du Bien, c’est le Meilleur.”

“substantive end” for subjectivity—unless history is now totally fulfilled? If it is fulfilled, however, why did the French Revolution, subjectivism’s most notable triumph, wind down only at about the time that the *Phenomenology* was being written? His answer on this point is that political revolution is the consequence of juxtaposition of a “slavish” religion (Catholicism) with a relatively modern political order, and that Germany, as a Protestant power that had long recognized the sphere of “inward freedom,” would not undergo revolution because it had the good fortune to have had a Reformation (Hegel 1956, especially 452–3).

This does not seem to be one of Hegel’s more persuasive arguments. He presents his readers with an almost insurmountable problem, for the concept that he wants to represent as a positive force in history—subjective freedom being universally “actualized”—is brilliantly shown to be ruinous and anarchistic in every form except the one (the state) that the very history of that unfolding subjectivism had made deeply problematical. Only by representing his own time as one in which subjectivity and objectivity were or could be in perfect harmony could Hegel hope that the modern state would have “prodigious strength and depth because it allows the principle of subjectivity to progress to its culmination in the extreme of self-subsistent personal particularity, and yet at the same time brings it back to the substantive unity and so maintains this unity in the principle of subjectivity itself” (Hegel 1942, 161). Whether he believed that his own time—or indeed any modern time—could support such an ideal is open to some doubt. Indeed, Hegel was not content with the bare idea of the state as something that ought to be but cannot be; as he observes in the *Logic*, “Wholes like the State [or the Church] cease to exist when the unity of their notion and their reality is dissolved” (Hegel 1929, 2: 397).

Hegel is sometimes accused of unreasonably allowing the dialectical unfolding of history-as-mind to end with the Prussian state and the Prussian legal order. This charge is unfair; Hegel never announced that history had ended but merely hinted at this in the *Philosophy of Religion* (Hegel 1895, 1: 246–8).<sup>13</sup> Yet it does suggest, in however crude a way, that the actualization of freedom ought not to stop until reality is equivalent to its “concept” (hence the “radical” side of Hegel). The Greek institution of partial freedom (for those who “knew”), for example, contradicted the idea of freedom itself, since it was “compatible” with slavery for many; thus, a tension was set up between the concept and its actualization. But the concept always strives to attain its intrinsic limits. This expansion, passing from the abstract freedom of

<sup>13</sup> The latest version of Hegel as a “Prussian” in politics is to be found in Findlay 1958, 327. In this passage Findlay says that Hegel’s state, though not “vile,” is nonetheless redolent of “the enclosed atmosphere of the small stuffy waiting-rooms of Prussian officials,” and that the *Philosophy of Right* is “small-minded and provincial.” The really astonishing claim is Findlay’s assertion that Hegel “was not really gifted with deep political and social understanding.”

the few who know in Greece to the more diffusive but still abstract legal freedom for all in Roman law, finally attained a Christian stage, in which every person is recognized as an ethically perfectible subject capable of knowledge and will. And when the Reformation overcame the gulf between this Christian concept and the unfortunate reality of Catholic worldliness, that concept finally was able to flower in autonomous secular social forms (including of course law) (Hegel 1956). Part of the objection to Hegel involves the apparent cutting off of this dynamism in his claim that any mature state of his epoch had in it “the moments essential to the existence of the state” coupled with the claim that “the state is [...] the actualization of freedom.” Many could agree with Hegel that “it is an absolute end of reason that freedom should be actual” without thinking that this was yet the case or that such freedom should be found simply and only in the state and its legal order (Hegel 1942, 279, additions).

Furthermore, Hegel could not recommend that we simply accept the best we can get in the way of rational institutions, as by, analogy, his criticism of Leibniz’s optimism in the *History of Philosophy* shows: “If I have some goods brought to me in the market at some town, and say that they are certainly not perfect, but are the best that are to be got, this is quite a good reason why I should content myself with them. But comprehension is a very different thing from this” (Hegel 1896, 3: 341). Something’s being tolerable is very different from its being rational. In the end, Hegel’s attitude toward the state may not be quite coherent. He says at one point that “we should desire in the state nothing except what is an expression of rationality,” which seems to put judgments about such rationality in the minds of persons and particularly of philosophers. But he also urges that since it is easy to find defects in any actual state, and since the state “is no ideal work of art” but “stands on earth and so in the sphere of caprice, chance and error,” it is unreasonable to insist on perfection. In a remarkable analogy he adds that “the ugliest of men, or a criminal, or an invalid, or a cripple is still always a living man,” the point apparently being that even the most crippled state is still a state (Hegel 1942, 285, additions; 279). This is put in an even harsher, almost utilitarian way in the *Logic*: The notion of the state, he says, so essentially constitutes the nature of individuals that “they are forced to translate it into reality [...] or submit to it as it is, or else perish. The worst state, whose reality least corresponds to the notion, is still Idea insofar as it exists” (Hegel 1929, 398).

In the end, he is forced to say that he intends to emphasize only the “affirmative factor” in the state (Hegel 1942, 279, additions). But this selectivity is not exactly open to one who wishes to emphasize the rationality of what is *actual*. In any case, since philosophy, as the highest manifestation of “absolute” mind, stands in judgment over the “objective” mind of the state, just as objective mind stands over “subjective” mind in individuals, ultimately phi-

losophy and not history will judge the adequacy of states.<sup>14</sup> However, since Hegel sometimes represents philosophy as retrospective—as “understanding” what has been rather than “prescribing” what ought to be<sup>15</sup>—and sometimes as absolute, uncontingent knowledge free of historical limitation (Hegel 1929, Introduction; cf. chapter on “Absolute Knowledge” in Hegel 1967 and the one on “Philosophy” in Hegel 1894), it is hard to know whether philosophy will stand above the state or simply make it intelligible. Unless reality fully actualizes a concept—unless a state is not merely more rational than its predecessors but “mind on earth”—then objective mind will always have to yield to absolute mind, or so one might think. Even if “moral” objections can have no weight against “ethics” and law, philosophy will be in another, higher position; and for philosophy reason itself will be more than what is rational. But all of this depends on whether Hegel saw philosophy as absolute or as retrospective; he tries to relate the two—it is not for nothing that the *history* of philosophy is for him part of philosophy itself—but retrospective understanding seems passive, and Hegel is not passive.

Hegel’s efforts to fuse the state, law, ethics, morality, history, philosophy, and the concept of will into a system based on rational freedom is extraordinarily intricate and problematical. The only way to judge his success is to turn to the details of several of his works.

### 13.2. *Phenomenology of Mind*

Hegel’s most familiar and influential, though scarcely most important work, the *Philosophy of History*, suggests that the concepts of will, private judgment, and conscience are going to be more important—above all, more highly praised—than they in fact are in the rest of his work. Indeed, reading this work only gives the impression that Hegel saw the progressive actualization of freedom in the world as the most important of all considerations and that the main vehicle of this realization was the “subjectivity” of Christianity after it fell on the receptive “inward-looking tenderness” of the Germanic nations. In the *Philosophy of History* the Greeks, who are treated much more reverently in the *Phenomenology*, appear largely as a people who did not understand the real meaning of freedom, though they are praised in other respects. The Ro-

<sup>14</sup> Hegel 1894, 291: “The notion of the mind has its reality in the mind [...]. The subjective and the objective mind [individual and state] are to be looked on as the road on which this aspect of reality or existence rises to maturity.” In Sections 572ff. of this work Hegel shows that it is philosophy that is “absolute mind.”

<sup>15</sup> This is particularly true of the preface to Hegel 1942, 10–3: “This book [...] is to be nothing other than the endeavor to apprehend and portray the state as something inherently rational. As a work of philosophy, it must be poles apart from an attempt to construct a state as it ought to be [...]. To comprehend what is, this is the task of philosophy, because what is, is reason.”

mans are treated as a people who converted freedom into mere legal rights or rights of “legal personality.” Only the “Germanic” peoples of the Christian era are represented as peoples who, beginning with the idea of the individual as the subject of salvation in religious thought, went on to diffuse this concept of individualism into the spheres of philosophy, literature, and politics (Hegel 1956, 18, 351–60, 238–40, 279–82; cf. Hegel 1967, 501–6). The best account of this diffusion is given by Hegel in the *Philosophy of Right*, though in a tone reminiscent of the *Philosophy of History*: “The right of the subject’s particularity, his right to be satisfied, or in other words the right of subjective freedom is the pivot and center of the difference between antiquity, and modern times.” This right, Hegel declares, appears in an “infinite” form in the Christian religion, and has become the essential principle of a “new form of civilization.” Among the “primary shapes” that this right has taken are “love, romanticism, the eternal salvation of the individual,” then “moral convictions and conscience,” and finally the “other forms.” Here, Hegel becomes rather vague, speaking of “what follows as the principle of civil society and as moments in the constitution of the state”; probably he was thinking of the freedom to buy and sell, to contract, and to find “subjective satisfaction” in being part of the actualization of society and state (Hegel 1942, 84; cf. Hegel 1895, 1: 253). In any case, his characterization of modern Western civilization as shaped by the principle of subjective particularity is remarkably complete, though even at this point there is an inkling of Hegel’s later operations in that salvation, morality, and conscience are mentioned in the same breath with love and romanticism.

In Christianity, Hegel suggests, individual conviction and subjective belief were important for the first time, and religion was no longer simply worship of nature or a mere ritual. What remained was to “introduce the principle into the various relations of the actual world [...] the application of the principle to political relations.” The “molding and interpenetration of the constitution of society” by this principle of subjective freedom was “a process identical with history itself” (Hegel 1956, 18). The Greeks initiated this process but did not sufficiently advance it because they “had not the idea of man and the essential unity of the divine and the human nature according to the Christian view” (ibid., 250; cf. Hegel 1896, 3: 4). During the Christian era the Church itself, in Hegel’s view, began to corrupt its own principles: Authoritarianism infringed on conscience, and concern with mere external show despiritualized religion. “The Church took the place of conscience: It put men in leading strings like children, and told them that man could not be freed from the torments which his sins had merited, by any amendment of his own moral condition, but by outward actions, *opera operata*—actions which were not the promptings of his own good will, but performed by commands of the ministers of the Church” (Hegel 1956, 379).

Because the Church had begun to insist only on external requirements such as masses and pilgrimages, the Reformation was necessary to restore the true spirit of Christianity: not in the sense of returning to a primitive and unphilosophical community (Hegel condemned those who would reject the philosophy of the Fathers of the Church) but in the sense of eliminating the merely external and “sensuous.” Since the Reformation time “has had no other work than the formal imbuing of the world with this principle.” Furthermore, all human institutions must be given this newly-recovered form: “Law, property, social morality, government, constitutions, etc., must be conformed to general principles in order that they be in accord with the idea of the free will and be rational. Thus only can the spirit of truth manifest itself in subjective will—in the particular shapes which the activity of the will assumes.” Spirit, having “gained consciousness” of itself through the Reformation, must now take up the principle of freedom and carry it out “in building up the edifice of secular institutions” (ibid., 416, 417, 422).

To be sure, there are scattered indications that in the *Philosophy of History* Hegel was mindful of what he built the whole of the *Phenomenology* upon: the destructiveness, both of self and of society, of the various forms of modern subjectivism. When, for example, he suggests that the Sophistic principle “man is the measure of all things” is ambiguous because the term *man* “may denote spirit in its depth and truth, or in the aspect of mere caprice and private interest,” he goes on to point out that “this Sophistic principle appears again and again, through different forms, in various periods of history” and makes this more explicit by saying that “in our own times subjective opinion of what is right—mere feeling—is made the ultimate ground of decision” (ibid., 269).<sup>16</sup> And in the last few pages of the *Philosophy of History* he warns that when the right of subjectivity takes the form of pitting the private will against the rationality of the state and existing law (here he is thinking of the French Revolution), will is out of control, has become a mere “frenzy of self-conceit,” is no longer one moment of a whole that must include the objective moment of “ethics” (ibid., 440–8). Nonetheless, and despite these few passages, the general spirit of the *Philosophy of History* is one of seeing Christian moral theory as a great advance, as something that may in some forms drift toward moral anarchism but that is to be defended in principle.

The *Phenomenology* is a remarkably different as well as a far greater work. Indeed, Judith Shklar exaggerates only enough to make her point when she calls it a “massive assault upon the ‘subjectivity’ of individualism” (Shklar 1971, 74).<sup>17</sup> Most of this huge book is given over to demonstrating that con-

<sup>16</sup> Cf. Hegel 1894, 161, in which the maxim “Know thyself” is submitted to similar criticism.

<sup>17</sup> Cf. Shklar 1976. This splendid book is indispensable to any serious student of the *Phenomenology*; what follows here obviously owes a great deal to this remarkable commentary.



centration on the self leads to egoism, to subjectivism, to a denial of the real world—in any case to the deification of arbitrary willfulness and caprice—and ultimately, when subjectivism externalizes itself, to destruction and death. As early as the introduction a rather “Protestant” observation, “To follow one’s own conviction is certainly more than to hand oneself over to authority,” is demolished by the succeeding explication: “If we stick to a system of opinion and prejudice resting on the authority of others, or upon personal conviction, the one differs from the other merely in the conceit which animates the latter.” Hegel strongly condemns the merely private understanding that “always knows how to dissipate every possible thought and to find instead of all the content, merely the barren Ego” (Hegel 1967, 136, 138–9). In the *Phenomenology* he seems determined to display the dark, negative, destructive side of subjective particularity, just as in the *Philosophy of History* he displays, on the whole, the positive side.

Hegel’s attack on subjectivism and “justification by conviction” in the *Phenomenology* is made all the sharper by his extremely sympathetic treatment of a wholly nonvoluntarist and preindividualistic ethical system—that of the Greeks. True, he grants that the “germ of destruction” always lay within “that very peace and beauty belonging to the gracious harmony and peaceful equilibrium of the ethical spirit.” But there is a great deal of nostalgia and regret in Hegel’s characterization of ancient ethics. “Virtue in the olden times had its secure and determinate significance, for it found the fullness of its content and its solid basis in the substantial life of the nation”; it had for its purpose not “a virtue merely in idea and in words” but a “concrete good that existed and lay at its hand.” And since this purpose was concrete, really existed, it was not “directed against actual reality as a general perversity” (*ibid.*, 498, 409–10). The subjective end of individuals and the will of the state coincided.

Hegel, as Shklar reminds us, often found it useful to show what he thought the nature of ancient ethics had been by reminding his readers of certain Greek plays, particularly *Antigone* and *Oedipus*, which were ideally suited to a demonstration of the fact that strong individualism and insistence on personal will and conviction (Christian and Kantian notions) were foreign to Greek ethics. It was not exactly the case, however, that such an ethical system was so integrated that there were no elements whatever that could fly apart; on the contrary, Greek ethical communities contained an inherent tension between what Hegel called the “divine law” of the family and its “piety” and the objective “universality” of the city. This tension might break out into open conflict if, as in the case of *Antigone*, a woman, who for Hegel embodies family piety, defied the state in the service of the family. Both the divine command ordering the burial of her brother and the state’s legal command, issued by its agent Creon, to leave the body unburied were valid for *Antigone*, but the divine law took precedence. Be it ever so true, Hegel suggests, that “the family [...] finds in the community its universal substance and subsistence” and that “the com-

munity finds in the family the formal element of its own realization," this ideal unity can fly apart so long as minds can choose between different "moments" of ethical life. It is true that for Hegel individuals in Greek life, as exemplified in Greek tragedy, do not choose qua individuals, putting forward their own conviction or intention; the content of choice is determined by the "laws and customs of [...] class or station." Hence, Antigone chooses as a sister and as a defender of the family, not as a particular "self." In antiquity "self-consciousness within the life of a nation descends from the universal only down as far as specific particularity, but not as far as the single individuality." Still, even though fully personal choice and personal will are not involved in a decision like Antigone's, the Greek ethical consciousness "cannot disclaim the crime and its guilt," for "the deed consists in setting in motion what was unmoved, and in bringing out what in the first instance lay shut up as a mere possibility" (ibid., 478, 489, 490). Guilt is purer, Hegel suggests, if crime is knowingly committed; hence, Antigone's "ethical consciousness" is more complete than that of Oedipus because, though an agent of "divine" law and family piety, she defied the city, whereas Oedipus was ignorant of his situation (Hegel 1942, 250, additions).

Unlike modern men, however, Antigone does not dwell on the less than fully voluntary character of her choice in an effort to justify herself; in acknowledging her error she indicates that "the severance between ethical purpose and actuality has been done away," that "the agent surrenders his character and the reality of his self, and has utterly collapsed." But this "victory" of the ethical whole, which wants to preserve permanently "a world without blot or stain, a world untainted by any internal dissension," is short-lived, because, according to Hegel, the opposition of ethical powers to one another "have reached their true end only insofar as both sides undergo the same destruction" (Hegel 1967, 491, 481, 492). This destruction might take a merely external form, as when foreign forces attack the city to right the wronged divine laws of the family. But in a deeper sense the destruction is contained within the society itself, in the form of an individualism and self-consciousness that ethical choices help to bring into the light. It is this deeper malaise of subjectivity with which Hegel is really concerned, and with which he knew Plato had been concerned as well: For Hegel the *Republic* represents a monumental effort to refute the rising claims of individualism (Hegel 1942, 124).<sup>18</sup> In any case, Hegel felt that *Antigone* serves to show in a stroke all of the implications of Greek ethical thought.

However morally "undeveloped" Antigone may be, Hegel does not throw a very flattering light on her more "advanced" successors. She takes

<sup>18</sup> Plato, according to Hegel, "could only cope with the principle of self-subsistent particularity, which in his day had forced itself into Greek ethical life, by setting up in opposition to it his purely substantial state" (ibid.)

rules for the “unwritten and unerring laws of the gods”: the laws simply *are*. If, however, one insists, as do modern men, on knowing where the laws came from, Hegel says, one makes oneself and one’s conviction about the laws what is universal, thus making the laws themselves “conditional and limited.” Hegel says, “If they are to get the sanction of my insight, I have already shaken their immovable nature.” But true ethical sentiment “consists just in holding fast and unshaken by what is right [...] it is right because it is the right” (Hegel 1967, 452, 453). Antigone may have no fully developed sense of self, of private will, but she knows what is right. In *Antigone* Hegel sees not the “comic spectacle of a collision between two duties,” both representing themselves as absolutes recognized by conscience, but the unavoidable and hence tragic collision of two “laws of nature”—the law of the family and that of the city—through agents—Antigone and Creon—who do not personally choose their fates (*ibid.*, 485).<sup>19</sup> Hegel often suggested that Greek ethics was inadequate insofar as it did not sufficiently distinguish between voluntary and involuntary acts, but this did not affect his opinion of the grandeur and the simplicity of that ethos (Hegel 1942, 250, additions). Sometimes Hegel almost yearns for this wholeness, despite what he calls its inadequacies.

The Greek ethical society, for all its peaceful equilibrium, was destined to collapse because of the necessary way in which mind develops, individually and socially, once the consciousness of subjectivity gets the better of “unconscious” universality. The “harmony” of such an ethical system notwithstanding, it is bound to perish, because it is not “conscious regarding its own nature”; for while the individual in such a social order enjoys a “solid imperturbable confidence,” he is unable to conceive of himself as existing in “singleness and independence.” The ethical nation lives in a “direct unity with its own substance, and does not contain the principle of pure individualism of self-consciousness”; in it the individual has not yet attained the “unrestricted thought of his free self.” After he arrives at an awareness of his singleness and independence, “as indeed he must,” his unity with the collectivity is broken; “isolated by himself he is himself now the central essential reality.” The actual society comes to be looked on as an abstraction, while the particular ego becomes “the living truth” (Hegel 1967, 378, 379, 710).

<sup>19</sup> It should be pointed out that while Hegel used Greek art to illustrate truths about Greek ethical life, he paid back this debt by showing how that very ethos gave rise to essential features of Greek art itself. The chorus in Greek tragedy, in particular, as the embodiment of general social judgment passed on individual characters he brilliantly shows to be not only possible but necessary in a culture that is not subjective, whereas in modern tragedy, in which ruin is the consequence of highly personal characteristics rather than a conflict between such established ethical powers as family and city, a chorus would be out of place. What he says about the differences between *Antigone* and *Hamlet* in this connection is incomparably insightful. See Hegel 1920, 4: 312–36.

Much of the rest of the *Phenomenology* is taken up with illuminating the various forms that the “ego as living truth” can take. In a remarkably concentrated passage at the beginning of his account of this “slow progression and succession of spiritual shapes,” Hegel anticipates all of the private and social forms that consciousness took after the destruction of the Greek ethos (*ibid.*, 807). After abandoning the “beautiful simplicity” of the polis, after beginning to come to an “abstract knowledge of its essential nature,” spirit, or mind, found itself partly embodied in the “formal universality of right or legality” in the Roman Empire. But since this legalistic world of “crass solid actuality” was unequal to the fullness of spirit, an element of it went inward into the “element of thought,” into the “world of belief or faith,” the realm of the inner life and of truth—into Christian subjectivity. After a number of stages including the Middle Ages, the Reformation, and the Enlightenment, self-consciousness took the form of “morality,” which “apprehends itself as the essential truth,” and finally “conscience,” in which individual conviction is stated in the form of language—itself universal by definition—ultimately combining subjectivity with the universal requirements of publicity and recognition (*ibid.*, 460–1).<sup>20</sup> Along the way, in his traversal of the spiritual “gallery of pictures,” Hegel finds plenty of time to stop for a lengthy critique of Hobbesian psychology (together with its political consequences) and, later, of Kant’s system. By the end Hegel has treated almost every form of subjectivity known up until his time.

Hegel passes rather quickly by the Romans, whose concept of “legal personality” he seems particularly to have disliked and whom he condemned for making the state something purely “external” and merely a matter of power (the Stoics, he suggested, had some reason to turn inward, to the “pure universality of thought,” in such a time of “universal fear and bondage”). He speaks at some length of the kind of ethical life that existed in the Middle Ages, characterizing it as the “heroism of service,” a kind of virtue that “sacrifices individual being to the universal and thereby brings this into existence” (Hegel 1967, 245, 527). But this heroic service did not bring about the existence of a real state for two reasons. First, no state has attained its concept until it has a monarch whose will adds a “moment of subjectivity” to the intrinsic rationality of state activity, and this was not yet possible in the Middle Ages. And second the man who served heroically only seemed to do so; he did not really serve the state or general law since he was unwilling to serve any real monarch, but was only a “haughty vassal” who served merely to gain the “self-importance” that “honor” brought him (*ibid.*, 528).<sup>21</sup> Because of honor and self-importance, the medieval state never became a true state—the “essential reality”—in Hegel’s view.

<sup>20</sup> For the relation of this to Hegel’s general theory of becoming as the unity of Being and Nothing see Hegel 1929, 64.

<sup>21</sup> On this point see the incomparable passages in Shklar 1976, 155–8.

If the medieval state was one of aristocratic particularity rather than genuine universality, of privilege rather than law, the next stage in the unfolding of subjectivity is not seen in a particularly attractive light either. One of the most destructive and contradictory forms of subjectivism is “the law of the heart, and the frenzy of self-conceit,” a phenomenon that Hegel deliberately links with the philosophy of Hobbes by a careful choice of terms. When consciousness sets up the “law” of its heart as the only thing it can recognize as real, Hegel says, it is resisted by others who want to make equal claims for the law of their hearts. If there is any universality in this, he goes on, it is only a “universal resistance and struggle of all against one another,” a “state of war of each against all.” The cause of this “meaningless insubstantial sport,” in Hegel’s view, is the “restless individuality which regards opinion or mere individualism as law, the real as unreal, and the unreal as real.” It is the individual consciousness trying to be universal that is “raving and perverted,” and in such a situation the only possible kind of social order is the one Hegel describes in connection with the worst days of the Roman Empire. In Rome (and implicitly in *Leviathan*), where no true ethical society existed, the “absolute plurality of dispersed atomic personalities” was gathered into a single center that, in contrast to the “pretended absolute but inherently insubstantial reality” of these single personalities, was the “entire content,” the “universal power.” The power of such a ruler, says Hegel, is “not the spiritual union and concord in which the various persons might get to know their own self consciousness. Rather they exist as persons separately for themselves, and all continuity with others is excluded from the absolute punctual atomicity of their nature” (ibid., 399, 397, 504, 505).

Of course, this is not an altogether fair characterization of Hobbesianism: Hegel treats only Hobbesian psychology, and then only to display it as another form of subjectivism. It is perhaps only just to point out that in the *History of Philosophy* Hegel treats Hobbes more moderately and is even willing to allow the affinities between his own political thought and that of Hobbes. The English philosopher, Hegel claims, was significant insofar as he based the idea of the state on “principles which lie within us” rather than on ideals, Scripture, or positive law, and insofar as he maintained that “the natural condition [of men] is not what it should be, and must hence be cast off.” In Hobbes, Hegel says, there is “no idle talk about a state of natural goodness”; on the contrary, Hobbes realized that a state of nature is a condition “far more like that of animals—a condition in which there is an unsubdued individual will.” Interestingly, in this relatively favorable version of Hobbes, Hegel says not a word about contract theory; on this reading *Leviathan* is not authorized by consent but involves only the “subjection of the natural, particular will of the individual will to the universal will.” Hobbes was “really correct” in locating the universal will of the state in the monarch, Hegel urges, but somehow equated this monarchical will with arbitrary will, even with

“perfect despotism.” This, of course, is as unfair to Hobbes in one way as the characterization of him in the *Phenomenology* is in another; Hobbes could agree with Hegel that the sovereign’s will ought to be “expressed and determined in laws” (Hegel 1896, 3: 316, 317–8, 319). In any event, Hegel’s treatment of Hobbes in the *Phenomenology* shows why he thought so little of contract theory, which might involve nothing more than an agreement to limit the most destructive forms of violence. Its content would not be worthy of the “concept” of the will; freedom would mean mere caprice moderated by the security sufficient to make that caprice somewhat safer.

The law of the heart and the frenzy of self-conceit are already somewhat more advanced than the morality of the haughty vassal, since they at least deal with efforts to universalize will. But the most advanced and subtle form of subjectivism—and, as such, the one closest to the truth, since it strives for universality even though it winds up with the “bare abstraction” of duty as a mere intention—Hegel calls “morality,” or moral self-consciousness. It is, in his view, a contradictory and muddled position because, in its effort to isolate pure intentions and purposes from the imperfection of the natural world of impulse and inclination, it by definition denies itself the possibility of being actualized in that unfortunately imperfect world and shuts itself up in a solipsism in which only its own conviction can possibly matter. The contradiction, as Hegel explains it, is this: Morality has a content—its purpose, its aim—that “has to be thought of as something which unquestionably has to be, and must not remain a problem.” But at the same time, since the translation of purpose into reality in an imperfect world would make duty “flawed,” morality cannot carry anything out and must think of its intentions “merely as an absolute task or problem.” Actually, Hegel suggests, the moral attitude would be negated if any moral task were really completed, because morality “is only consciousness of the absolute purpose *qua* pure purpose, i.e., in opposition to all other purposes”; that is, it is only this purpose combined with a “struggle” against sensibility and impulse. As a result, Hegel says, morality always shifts the completion of anything “away into infinity” (Hegel 1967, 615–27, 635).

If moral self-consciousness does act, it is not only contradictory but hypocritical—or, as Hegel says more gently, it “dissembles.” When it tries to bring its pure purposes into reality it must act in the external world and so through the sensibility of impulses and inclinations; indeed “self-conscious sensibility, which should be done away with, is precisely the mediating element between pure consciousness and reality—in the instrument used by the former for the realization of itself” (*ibid.*, 633; cf. Robinson 1977, 44–67). Morality is not, then, quite candid either with itself or with others: it must use the means it affects to despise. If it acts, it does so through a corrupt medium; if it does not act, then it cannot claim that its intentions are serious. In either case the position is, for Hegel, absurd.

From a purely philosophical point of view this is an effective but somewhat grotesque characterization. Only a foolish “moral” position would ever hold that action is impossible because it cannot be perfect; in fact, it is only by representing intention as a desire to *be* perfect that Hegel can make his argument plausible. Many moralists, of course, would agree with Hegel that sensibility is only to be controlled, not negated, by a good will; and one of these would be Kant, who in his *Theory and Practice* provides a strong answer to Hegel’s charges. No person is expected to renounce the aim of happiness, which is dependent on “inclination” and “sensibility,” Kant says, “for like any finite rational being, he simply cannot do so.” He need only “abstract from such considerations” of sensible happiness “as soon as the imperative of duty supervenes, and must on no account make them a *condition* of his obeying the law prescribed to him by reason” (Kant 1970b, 64). Hegel, of course, had what he took to be a decisive objection to this: That reason cannot prescribe anything, that if it is to have any practical force at all, it must be as the reason that is *in* ethical institutions (such as law) not as the reason that is simply in minds. Since Hegel’s attempted refutation of Kant is absolutely decisive for his system—since he claimed to replace the abstract universal of Kant’s categorical imperative with the “concrete” universal of the state, or “morality” with “ethics”—it is well worth trying to see why Hegel thought that even Kant’s version of morality would not work.

In the *Phenomenology* Hegel urges that since there is no “absolute content” in the Kantian system—no ethical content—the only kind of content available is “formal universality,” which means merely that a moral position must not be self-contradictory. Only the “bare form of universality” is left in the Kantian system; reason is not the content of moral laws but only their criterion: “[I]nstead of laying down laws reason now only tests what is laid down” (Hegel 1967, 445).

These observations are made far plainer in the *Philosophy of Right*, where after praising Kant for giving prominence to “the pure unconditioned self-determination of the will as the root of duty,” Hegel goes on to say that to adhere to the moral position without passing on to ethics is to “reduce this gain [of the idea of will] to an empty formalism.” He continues, “if the definition of duty is taken to be the absence of contradiction, formal correspondence with itself [...] then no transition is possible to the specification of particular duties.” Kant’s idea of universalization contains “no principle beyond abstract identity and the ‘absence of contradiction.’” But “a contradiction must be a contradiction of something”; if property is shown to be valid independently of mere universality and noncontradiction, or if life is shown to be a good, “then indeed it is a contradiction to commit theft or murder” (Hegel 1942, 90). In Hegel’s view, however, Kant never shows that any particular moral content is valid; he only shows that certain kinds of action would be wrong if a certain content were presupposed. In Kant, Hegel insists, men follow duty not for the

sake of real content but only for duty's sake; as a result they never know what is in itself good but only that some action would contradict a content that is no content.

It must be granted that Kant invites such criticism, particularly in the *Groundwork of the Metaphysics of Morals*, by not relating the notion of the dignity of persons as ends-in-themselves to the principles of universality and non-contradiction until halfway through that particular work. Nonetheless, that correlation is finally made, though there are difficulties in it, and as a result there is a little ultimate justification for accusing Kant of mere formalism.<sup>22</sup> Whatever objections may be brought against Kant, it is not this easy to overturn him. (Obviously, Hegel was not simply unaware of Kant's notion of "ends": the brilliant criticism of the *Critique of Judgment* in Hegel's early *Glauben und Wissen* rules this out; Hegel 1977, 84–96.<sup>23</sup>) It remains true, of course, that practical reason in Kant is in some ways problematical—no more than a "necessary hypothesis" (see particularly Kant 1949b, 63–4)—and that Hegel is able to exhibit a concrete manifestation of reason in the form of an ethical community that will provide concrete legal duties. But it is doubtful, first, whether the state is a fit object for the "unconditioned self-determination of the will," to use Hegel's own phrase, and second, whether ethical duties will always be right, unless they are defined as necessarily right. So it is hard to see how one is better off with Hegel than with Kant, particularly in view of the fact that Kant never pits morality against the state; indeed he sees the state not as the embodiment of practical reason but as the *conditio sine qua non* of the effective exercise of practical reason in the phenomenal world and as such as something that must always be obeyed.<sup>24</sup>

If it is not impossible to counter Hegel's objection to "morality," and particularly to the Kantian version of it, he has a stronger point when he speaks of the social effects of moral self-consciousness, especially in the *Philosophy of Right*. In the moral position of pure purpose, Hegel fears, concrete social ethics is "reduced to the special theory of life held by the individual and to his private conviction." If good intention and "subjective conviction" become the standard of what is worthy in conduct, then hypocrisy and immorality will disappear, since even the man who is objectively criminal can cite his good intentions as being really important. "My good intention in my action and my conviction of its goodness make it good" (Hegel 1942, 99).

<sup>22</sup> If Hegel had wanted to consider the strongest possible version of Kant, he would have asked how the ideas of universality and noncontradiction are related to a good will as the only unqualifiedly good thing on earth, and to the notion of persons as "ends in themselves." Cf. Rawls 1971, 251–60, and Rawls 2000, 143–247 for a good defense of Kant.

<sup>23</sup> Again, Hegel is characterizing Kantian morality in terms of "so-called duties of a formalistic kind that determine nothing"; *ibid.*, 143.

<sup>24</sup> Or almost always. Kant once or twice allows the idea of necessity to have a force he says it ought never to have. See Kant 1965, 87–8n.



In the additions to the *Philosophy of Right* Hegel makes his argument more explicit by contrasting the modern moral position with the more truly ethical one of older times. “It is a striking modern innovation to inquire continually about the motives of men’s actions,” Hegel notes, saying that in other times one simply asked whether a man did his concrete legal duty. But, he goes on—in a remark that is difficult to reconcile with his observations on the superiority of modern morality, unless one recalls that it is meant to synthesize the will with what is “objective”—“the laurels of mere willing are dry leaves that never were green.” Conviction, he urges again, is different from right and truth and “the bad could only be that of which I am not convinced” (ibid., 251, additions; 252, 258). What Hegel hopes for as the reconciliation of self-conscious, Christianized morality with objectivity he makes clear enough: “The unity of the subjective with the objective and absolute good is ethical life [...]. Morality is the form of the will in general on its subjective side. Ethical life is more than the subjective form and self-determination of the will; in addition it has as its content the concept of the will, namely freedom [as law]” (ibid., 259; cf. Hegel 1895, 48–50). What is objectively right and good—rational actual freedom—by itself “lacks the moment of subjectivity,” while morality is only this subjectivity. Both find their union in the state. Hegel could not yet say this in the *Phenomenology*, but the *Philosophy of Right* puts in a clearer perspective his complaint in the earlier work that for moral self-consciousness there is no ethical reality, “no actual existence which is moral” (Hegel, 1967, 626). The moral position for Hegel, takes what is most volatile and solipsistic in the Christian ethos and aims it against the rationality and freedom of a concrete legal order.

While Hegel on occasion uses the terms *morality* (or *moral self-consciousness*), and *conscience* almost interchangeably, in the *Phenomenology* he is extremely careful to draw a line between them, for, there being no theory of the state as the reconciliation of objectivity and subjectivity in this work, he wants to make “conscience” the most universal, the most objective, the most social concept in his gallery of forms. He was, doubtless, all the more careful to be clear about this term, in view of the significance attached to it since the Reformation; in a sense Hegel was reclaiming the word from religious sectarians.

Hegel criticizes “moral self-consciousness” because it is completely self-contained; conscience, on the other hand, involves “the common element of distinct self-consciousness,” that is, recognition by others. “Doing something,” he says, “is merely the translation of its individual content into that objective element where it is universal and is recognized.” What is dutiful, what the content of conscience is, is not specified in the concept of conscience; conscience is simply what is “universal for all self-consciousness,” which is recognized or acknowledged and thus objectively is. The essence of the act of conscience, Hegel says, is in the “conviction that conscience has about it,” but this conviction is not merely private or personal since con-

science, by being universalized, by declaring itself and appealing for recognition, can will only what is universal. Hegel tries to clarify this difficult idea in a passage that is central: "When anyone says, therefore, he is acting from conscience, he is saying what is true, for his conscience is the self which knows and wills. But it is essential that he should *say* so, for this self has to be at the same time universal self." This universality cannot exist in the content of the conscientious act, since for Hegel content is derivative from the actual ethics of a given society at a given time. The universality can lie only in the form of the act of conscience. And this form is the self, which is "actual in language, which pronounces itself to be the truth, and just by so doing acknowledges all other selves, and is recognized by them" (ibid., 650, 663).

Obviously, a great deal depends on Hegel's view of language, and it is precisely his theory of language that makes his whole doctrine of conscience work. "We see language to be the form in which spirit finds existence. Language is self-consciousness existing for others [...] [it] [...] is self separating itself from itself [...] the self perceives itself at the same time that it is perceived by others: And this perceiving is just existence which has become a self." By concentrating on what is "universal in all selves," by insisting on the embodiment of personal conviction in language, which can only be understood because it uses "universal" terms, any "distinction between the universal consciousness and the individual self is precisely what has been canceled, and the superseding of it *constitutes* conscience" (ibid., 660, 662).

In the *Philosophy of Right* Hegel makes this point even plainer. The "objective system" of the principles and legal duties that constitute the content of conscience "is not present until we come to the standpoint of ethical life." He supplements what he says in the *Phenomenology* by declaring that "whether the conscience of a specific individual corresponds with [the] idea of conscience [...] is ascertainable only from the content of the good it seeks to realize." Since the good is defined in terms of the amount of rational freedom actualized in the state and its laws, the state cannot "give recognition to conscience in its private form as subjective knowing, any more than science can grant validity to subjective opinion." It may tolerate rather than recognize less-than-universal forms of conscience, if it is strong enough to afford such toleration; but it need not, and if it is too weak, it should not (Hegel 1942, 91, 168).<sup>25</sup>

These formulations involve a radical transformation of the idea of conscience: What is only private in conviction is precisely what is "bracketed out." Indeed, Hegel argues that "actual conscience is not this insistence on a knowledge and a will which are opposed to what is universal" and that anyone who acts from a conscience "of his own" is actually saying that he is

<sup>25</sup> Cf. Hegel 1894, 235: "The discussion of the true intrinsic worth of the impulses, inclinations and passions is thus essentially the theory of legal, moral and social duties."

“abusing and wronging” others (Hegel 1967, 670). Doubtless this transformation was important to Hegel’s purposes if he wanted to cancel and preserve the Christian and Kantian “realm of subjectivity”—to retain conviction but to require it to universalize itself through language, to appeal for “recognition.” On Hegel’s view of conscience whoever says “Here I stand” must find others to stand there with him: *Con-science*, after all, stresses this *with*, this need of “others.”

Ironically, the charge of “formalism” that Hegel makes against Kant could be turned against his own notion of conscience: Just as a Kantian conviction may (allegedly) have any content, so may the ethics of any historical society. If the “formalism” of Kant involves accepting the content of everyone’s conviction, the formalism of Hegelian conscience involves accepting the content of whatever customs obtain at a given time. Perhaps Ernst Cassirer does not even go too far in saying that it involves the acceptance of whatever power is most effective or successful at any given moment,<sup>26</sup> though this was surely not Hegel’s intention, to judge from what he says against the equation of might and right in his contemptuous refutation of von Haller.<sup>27</sup> Nonetheless, in the absence of a general theory of the state in the *Phenomenology*, and given both his objections to moral subjectivism and his wish to preserve conviction in some form, such a formulation as Hegel’s theory of conscience appears to be essential. It is supplanted by the more concrete content of the state in the *Philosophy of Right*.

It is, incidentally, the fact that the *Philosophy of Right* is built around the notion of rational will that makes it impossible to accept unreservedly Alexandre Kojève’s celebrated reading of Hegel’s philosophy as something shaped throughout by the notions of mastery and slavery, by the notion of a dialectical “struggle for recognition” between masters and slaves.<sup>28</sup> The reason, indeed, that this chapter has given prominence to the *Phenomenology*’s great set-pieces on Antigone and Kant at the expense of the brilliant “Master and Servant” chapter is that Antigone and Kant bear directly on Hegel’s notion of will as it finally flowers in the *Philosophy of Right*,

<sup>26</sup> Cassirer 1946, 272: “Hegel could reconcile himself to almost everything—supposing it had proved its right by power.” What is remarkable in *The Myth of the State* is the restraint with which Cassirer, though a Kantian, treats Hegel. But even Cassirer, for all his fairness, cannot abide Hegel’s claim that “men are so foolish as to forget [...] in their enthusiasm for liberty of conscience and political freedom, the truth which lies in power” (Cassirer, 1946, 267); this Cassirer regards as “the clearest and most ruthless program of fascism that has ever been propounded by any political or philosophic writer.” But cf. Cassirer 1979, 117: “Hegel’s [...] term ‘power’ [...] never means a mere physical but a spiritual force.”

<sup>27</sup> Speaking of von Haller’s notion that “the mightier rules, must rule, and will always rule,” Hegel complains that “it is not the might of justice and ethics, but only the irrational power of brute force” which von Haller has in mind (Hegel 1942, 157–60).

<sup>28</sup> For a discriminating treatment of the strengths and weaknesses of Kojève’s reading of Hegel see Kelly 1978, 29–54. Cf. Riley 1980, 233–284.

while mastery and slavery by contrast are, in Hegel's own words, something long since transcended. In Section 57 of the *Philosophy of Right* Hegel insists that

the position of the free will, with which right and the science of right begin, is already in advance of the false position at which man, as a natural entity and only the concept [of man as mind, as something inherently free] implicit, is for that reason capable of being enslaved. This false, comparatively primitive phenomenon of slavery is one which befalls mind when mind is only at the level of consciousness. The dialectic of the concept and of the purely immediate consciousness of freedom brings about at that point the fight for recognition and the relationship of master and slave. (Hegel 1942, 48)

This passage is difficult to reconcile with Kojève's famous insistence that in "having discovered" the struggle for recognition between masters and slaves, "Hegel found himself in possession of the key idea of his whole philosophy" (Kojève 1946, 352).<sup>29</sup> The notions of mastery, slavery, struggle, and recognition are certainly key ideas in one part of the *Phenomenology*; but it is doubtful whether that part shapes all the other parts, and it is simply not true that it shapes the *Philosophy of Right*.<sup>30</sup> It is not surprising that Kojève's extraordinary *Introduction to the Reading of Hegel* says next to nothing about the *Philosophy of Right*. There is little that it can say; for, as George Kelly has pointed out, the master-slave relationship simply cannot be used as "the synoptic clue to a whole philosophy" (Kelly 1969, 338). Kojève's reading is especially helpful to those who, like Jean Hyppolite, are working for a Hegel-Marx rapprochement, for the notions of slavery and struggle are clearly important in that connection.<sup>31</sup> But it throws little light on Hegel's final political and legal thoughts, which ground "right and the science of right" in "the position of the free will." It is to that "right," and to that "will," that one finally turns.

<sup>29</sup> In Kojève 1947, 11–58, Kojève is less sweeping, and confines the concepts of struggle and mastery mainly to the *Phenomenology*, with only passing references to the *Philosophy of Right* (Kojève 1947, 437).

<sup>30</sup> It is no accident that the only part of Hegel's *Philosophy of Right* that Kojève can use to advantage is the celebrated passage in the preface about philosophy as something "cut and dried": "It is only when actuality is mature that the ideal first appears over against the real and that the ideal apprehends this same real world in its substance and builds it up for itself into the shape of an intellectual realm" (Hegel 1942, 13). Since this might be thought to "prefigure" Marx's *The German Ideology*, Kojève cites it; see Kojève 1947, 437.

<sup>31</sup> Hyppolite, 1955, 133: "The struggle for life and death [...] is the root of history for Hegel, while the exploitation of man by man is only a consequence of it, this consequence serving on the other hand as Marx's point of departure." Cf. Hyppolite 1946, 1: 163–71, where the master-slave relationship is integrated much more carefully into a better-balanced reading of the *Phenomenology*.

### 13.3. *Philosophy of Right*

The *Phenomenology* ends, so far as forms of society are concerned, with conscience, with expressing oneself universally not in the Kantian sense but in the sense of getting one's conviction universally *recognized* and of not insisting on conscience as something private and, as Hegel will have it, "capricious." The chapter on conscience however, came near the end of a work in which will in all of its forms is treated quite unfavorably, particularly as compared with the ethics of the Greeks and their "statuesque virtue free from moral ambiguity" (Hegel 1948, 326). By contrast, the *Philosophy of Right* strains to incorporate a transformed theory of will as a moral concept: Modern ethical life, "the good become alive," is that good "endowed in self-consciousness with knowing and willing," is "actualized by self-conscious action." This willing and actualizing assume some concrete social, though not political, forms. Whether a man will belong to the agricultural, business, or universal class in civil society, for example, is partly a matter of birth, capacity, and accident; but the "essential and final determining factors are subjective opinion and the individual's arbitrary will, which win in this sphere their right, their merit, and their dignity." On this point Hegel criticizes Plato for allowing the question of vocations to be left to the ruling class (Hegel 1942, 105, 132, 133).

This willing is put in a proper perspective by several other remarks of Hegel's, most particularly by his suggestion that when confronted with the claims that are made for the individual will "we must remember the fundamental conception that the objective will is rationality implicit or in conception, whether it be recognized or not by individuals" (*ibid.*, 157). This assertion, reminiscent of Rousseau in its intimation that people may have a "real" will that they fail to recognize (though not of his claim that they may be "forced to be free"; Rousseau 1953b, Book 1, chap. 7, 19), helps to reinforce Hegel's view that thinking is the highest form of willing and that "subjective mind" must will the state as a concrete, rational, legal content. The perspective is broadened by his striking—at first sight even startling—assertion that to the "ethical powers which regulate the life of individuals" those individuals are "related as accidents to substance" (Hegel 1942, 105). It was surely no accident that Hegel, possessed of an incomparable knowledge of the history of philosophy, should have chosen to describe the relation of men to the state in the way that Spinoza had described the relation of men to God: as beings not truly individual in themselves but "real" only to the extent that they "participate" in the One that alone has reality.<sup>32</sup> Hegel modifies this Spinozistic concept of the relation between substance and accident by allowing that the

<sup>32</sup> See, *inter alia*, Spinoza 1927a, 165–6. At one point in the *History of Philosophy* Hegel says that "to be a follower of Spinoza is the essential commencement of all philosophy" (Hegel 1896, 3: 257).

“substantial order” of the state is attained in the self-consciousness of individuals (Hegel 1942, 105). This is not surprising in view of his belief that either mere self-consciousness or mere unwilled good are “abstractions” and that, *pace* Spinoza, “true individuality and subjectivity is not a mere retreat from the universal,” provided one sees that the universal is the highest state of being that the individual can will or recognize (Hegel 1896, 3: 261).

In any case subjective opinion, whatever right and dignity it may win in “civil society,” wins none—at least none directly—in the guiding of the state. “What the service of the state really requires is that men shall forego the selfish and capricious satisfaction of their subjective ends; by this very sacrifice they acquire the right to find their satisfaction in, but only in, the dutiful discharge of their public [legal] functions” (Hegel 1942, 191).<sup>33</sup> To a large extent “satisfaction” replaces the active forms of willing that are excluded. Indeed, Hegel makes a great deal of use of the term, since it seems to allow a kind of assent that is not an active political consent. In the state the idea of the good provides the will with a satisfying object, and this is essential since “the subjective will has value and dignity only insofar as its insight and intention accord with the good.” Hegel drives this point home with a rather harsh observation: “What the subject is, is the series of his actions. If these are a series of worthless productions, then the subjectivity of his willing is just as worthless. But if the series of his deeds is of a substantive nature, then the same is true also of the individual’s inner will.” This passage is extraordinary in that it juxtaposes with great boldness the inner will and “substantiality,” which can only mean the state, without allowing any significance whatever to that will if it is objectively “wrong.” (Sometimes, somewhat paradoxically, Hegel does affirm that even mere belief cannot be touched by politics and law since as far as “moral conviction” is concerned, a person “exists for himself alone, and force in that context is meaningless.”) This he does too in a theory of the state that claims to take account of will—at least the real will (*ibid.*, 87, 83; 246, additions).

Perhaps it is because he employs the idea of will in so attenuated a way that Hegel must use the weakest form of voluntarist language (“*find subjective satisfaction*” rather than the stronger terms *consent*, *agree*, or *authorize*) whenever he uses the idea of volition in a political sense. In the absence of will in any active sense in Hegel’s theory of the state—not only contract theory but also most opinion, and conscience conventionally defined are denigrated

<sup>33</sup> This is probably because Hegel never presents the will in an ordinary form but always tries to reduce it to reason (hence seeing acceptance of the state as willing) or to desire (hence allowing “caprice” in the economic sphere of civil society to be something meritorious). As M.B. Foster observes in his excellent study *The Political Philosophies of Plato and Hegel* (Foster 1935, 131–40), the ethical will that relates to the state is “imperfectly differentiated from reason,” while the will that “wins its right” in the sphere of free economic activity is “imperfectly differentiated from desire.”

(*ibid.*, 205)—what is left is will as “recognition” (*Anerkennung*), above all as acceptance of the rationality of the universal. The recognition of conscience in the *Phenomenology* becomes the recognition of the state and law in the *Philosophy of Right*. Since the only worthwhile will is the rational will, and since rationality cannot be found in mere Kantian moral universality, it must be looked for in the concrete rationality of the laws and customs and institutions around us: “The state exists immediately in custom, mediately in individual self-consciousness, knowledge and activity” (*ibid.*, 155). The state, Hegel says in a characteristic passage from the *Encyclopedia*, “provides for the reasonable will insofar as it is in individuals only implicitly the universal will coming to a consciousness and understanding of itself and being found” (Hegel 1894, 263). And if, as Aristotle holds, thinking is the highest form of action, then man wills by knowing, by recognizing, by accepting the state as a content (Aristotle, *Nicomachean Ethics*, 1177a–b). Man is then truly free, since true freedom “consists in the will finding its purpose in a universal content, not in subjective or selfish interests” (Hegel 1894, 231).

Hegel’s view of the state as something “recognized” by the rational will and not merely “consented” to has been sympathetically restated by Michael Oakeshott in his splendid *On Human Conduct*.

The claims that the conditions of *das Recht* [right or law] are themselves fully satisfied in the “goodwill” or benevolence of the agent, or in the “sincerity” or conscientiousness of his engagement in self-enactment, or that the “authenticity” of his conduct absolves it from the imputation of fault, are ill-formulated. So far from identifying *das Recht*, they merely deny it. They are, however, exaggerated rather than merely false. The “authenticity” of conduct cannot be a sufficient identification of the conditions which constitute *das Recht*, but it stands for a principle of the highest importance; namely, that the only conditions of conduct which do not compromise the inherent integrity of a Subject are those which reach him in his understanding of them, which he is free to subscribe to or not, and which can be subscribed to only in an intelligent act of Will. The necessary characteristic of *das Recht* is not that the Subject must himself have chosen or approved what it requires him to subscribe to, but that it comes to him as a product of reflective intelligence and exhibiting its title to recognition. (Oakeshott 1975, 260)<sup>34</sup>

When Hegel’s political-legal philosophy is taken as a whole, it becomes perfectly clear why he could not allow any of the traditional manifestations of will in politics—contract, consent, agreement, election, opinion, conscience—to have any considerable weight in his state. It is possible to apply to these manifestations a criticism that he made of mere opinion in general: “What is right these [modern] principles locate in subjective aims and opinions, in subjective feeling and particular conviction, and from them follows the ruin of the inner ethical life and a good conscience, of love of right dealing between private

<sup>34</sup> In one eloquent paragraph Oakeshott achieves what Kojève does not achieve in hundreds of pages by showing that recognition in Hegel is not a mere epiphenomenon of a “fight to the death for pure prestige” (*ibid.*).

persons, no less than the ruin of public order and the law of the land.” So strongly did Hegel resent subjectivism by the time he wrote this passage in the preface to the *Philosophy of Right* that, dropping his usual insistence on the moral inadequacy of Platonism, he even likened modern moral ideas to the “maxims which constitute superficiality in this sphere, i.e., [...] the principles of the Sophists which are so clearly outlined for our information in Plato” (Hegel 1942, Preface, 8). The tension in the *Philosophy of Right* is very great indeed; there is a struggle to incorporate into a general theory of freedom-as-reason a form of human activity—willing—that in *almost* every shape he detests.

Not surprisingly, Hegel had a good deal to say about social contract theory, which he was determined to expose as a bad form of voluntarism. Since he believed that contractual relationships enshrine no more than the “arbitrary” wills of the contractors, and not something universal, he could view social contract theory only with loathing (ibid., 57–64).<sup>35</sup> Not that Hegel was contemptuous of contracts in themselves or of the work and property that they reinforce: Work has, for him, a “universal” character that binds society together by making it strive for common ends, and contracts are part of this process. But some things are too important to be seen as contractual, and therefore merely legal—among them marriage and the state. Theorists who conceive political legitimacy in terms of contract have “transferred the character of private property into a sphere of a quite different and higher nature.” To conceive of the state as a bargain was as offensive to Hegel as it had been to Burke. He was willing to grant that contract theory contains one moment of truth insofar as it stresses the importance of “will as the principle of the state.” But, particularly in the case of Rousseau, only a “general” will, not a rational and universal will, can arise out of mere agreement, and this vitiates the whole theory. In treating will as mere contract, Hegel claims, Rousseauian theory concentrates too much on “opinion” and “capriciously given express consent,” and these are of little value to Hegel (ibid., 126–9, 59, 156, 157).

In the additions to the *Philosophy of Right*, he enlarges on his objections to contract theory. The relation of individuals to society, he urges, can be looked at in only two ways: “Either we start from the substantiality of the ethical order, or else we proceed atomistically and build on the basis of single individuals.” The second point of view leads to a mere juxtaposition of persons; it excludes mind, because mind requires the unification of the particular and the universal. In another passage Hegel emphasizes the naturalness of the state in language heavily indebted to Aristotle. We are citizens of the state by birth

<sup>35</sup> That Hegel was hostile to contractarian views of society from his earliest writings is clear in the *System der Sittlichkeit* (1802–1803): “The determine provisions [of a contract] [...] are treated as the singular aspect of the individuals or of the things about which the contract is made. And for this reason true reality cannot fall within this level” (Hegel 1979, 122–3).



and by what we require as rational beings, not by something as arbitrary as agreement: “The rational end of man is life in the state, and if there is no state there, reason at once demands that one be founded.” In his view it is false to hold that the state is something optional that may or may not be founded at the whim of contracting parties; “it is nearer the truth to say that it is absolutely necessary for every individual to be a citizen” (ibid., 261, additions; 242).

In Hegel’s view the deficiencies of the contractarian position are not merely theoretical either. In the French Revolution such “abstract” conclusions came into power in the form of fanatics who destroyed everything existent and tried to build a truly “rational” state. The result was “the maximum of frightfulness and terror” (ibid., 157). The universal freedom of thinking that a new and more rational order can simply be decreed by fiat and “good will,” he says in the *Phenomenology*, can produce only negative action: “It is merely the rage and fury of destruction.” The only achievement of the illusion of willing new and better things is death, “a death that achieves nothing, embraces nothing within its grasp” (Hegel 1967, 604–5).

It is not surprising to find Hegel hostile to the idea that the state is the consequence of an agreement, however much its actuality may depend on will in a weaker, or at least very different sense. However, he is opposed not only to the idea that the origin and/or legitimacy of the state is traceable to some consensual act but also to less comprehensive manifestations of political will such as elections and public opinion. To be sure, Hegel develops at some length the idea that estates-assemblies ought to exist, at least as a “mediating” force between “civil society,” with its multiplicity of interests, and the universality of the state. But Hegel says quite clearly that the estates only add something to the intrinsically rational determinations of the “universal class” of civil servants, who “necessarily have a deeper and more comprehensive insight into the nature of the state’s organization and requirements.” Those who insist on “summoning the estates” (here he surely has France of 1789 in mind) generally make the mistake of thinking that “the deputies of the people, or even the people themselves, must know best what is in their best interest” and that their will to promote it is “undoubtedly the most disinterested.” This kind of reasoning, however much it might appeal to a Bentham or a J. S. Mill, does not appeal to Hegel; “to know what one wills, and still more to know what the absolute will, reason, wills, is the fruit of profound apprehension and insight, precisely the things which are not popular.” Here, Hegel carries to its extremest point his earlier claim that “true” will simply *is* reason. Given this, and given the nonvalue of conviction qua conviction, it is not surprising that he suggests that the real will of a state can never be found in a popular assembly, since “profound apprehension and insight” are “not popular,” but only in the determinations formulated by that class that has “the universal as the end of its essential activity” (Hegel 1942, 195–8).

It is scarcely necessary to point out at much greater length what Hegel's opinion of public opinion is: No more than Plato could he accept the doctrine that opinion must be set above knowledge. If knowledge is the province of the universal class, and at best only "glimmers more or less dimly" in the opinion of the public, then that opinion will not suddenly have a social value that it intrinsically lacks (ibid., 205). Though the idea of the universal class does not involve the actual rule of philosophy or philosophers, it does involve the predominance of knowledge; an opinion, however, as Hegel says in the *History of Philosophy*, "is merely mine" (*die Meinung ist mein*). While Hegel does not quite claim for knowledge what he claims for philosophy ("philosophy contains no opinions [...] philosophy is objective science of truth"), knowledge is first in the state, and opinion's main justification is either the possibility of its absorbing knowledge or its absolute harmlessness.<sup>36</sup>

Hegel has little difficulty in relating his view of opinion to what he had said in the *Phenomenology* about the identity of the purely personal with the bad and the universal with the good: "The bad is that which is wholly private and personal in its content; the rational, on the other hand, is the absolutely universal, while it is on peculiarity that opining prides itself" (Hegel 1942, 204).<sup>37</sup> As he goes on to show, just as the only social will worthy of respect is that which wills the state as its rational, substantive end, so too the only respectable opinion is that which accepts the state: "Subjectivity is manifested in its most external form as the undermining of the established life of the state by opinion and ratiocination when they endeavor to assert the authority of their own fortuitous character and so bring about their own destruction. But its true actuality is attained in the opposite of this, i.e., in the subjectivity identical with the substantial will of the state" (Hegel 1942, 208).

Since he is no absolutist, Hegel does not propose to stifle opinion, except when it is directly dangerous; and danger is entirely relative to historical circumstances (ibid., 205–8). But the security of opinion is the same as the security enjoyed by very poor men against very great thieves: poverty.<sup>38</sup> Freedom of public communication, Hegel says, is controlled in part by law but mainly "by the innocuous character which it acquires as a result principally by the rationality of the constitution," and to a secondary degree by the fact that the publication of the debates of the estates leaves the public with "nothing of much importance to say" (Hegel 1942, 206).

<sup>36</sup> Cited in Kaufmann 1966, 281. Kaufmann translates from Hoffmeister's critical edition of *History of Philosophy*.

<sup>37</sup> Cf. Hegel, 1929, 43 (Preface to the 2nd edition): "The peculiar essence" of anything "consists in the concept of the thing, in the universal immanent in it; as every human individual, though infinitely unique, is so only because it belongs to the class of men." Whoever things of Hegel as a romantic should examine this passage with particular care.

<sup>38</sup> This striking turn of phrase has been adapted from Diamond 1961, 44.

As consent, election, and opinion are very much weakened in Hegel's system, and as at the same time he wants to see the modern principle of "subjectivity" embodied in the state, there is little alternative to injecting this "sphere of subjectivity" into the monarch. In the additions to the *Philosophy of Right* Hegel makes the greatest effort to contrast the modern principle of subjective volition with what he sees as the inadequacy of ancient morality. He then suddenly refines the new principle down to its tiniest compass: "This 'I will' constitutes the great difference between the ancient world and the modern, and in the great edifice of the state it must therefore have its appropriate objective existence [...] In a well-organized monarchy, the objective aspect belongs to law alone, and the monarch's part is merely to set the subjective 'I will'" (ibid., 288–9, additions).

Just as ethics requires the union of objective good with subjective actualization of this good, so too the "objective" law formulated by the universal class needs the actual consent of a real person if the "individual aspect of the state" is to attain actuality. This actual will cuts short the "perpetual oscillation" between mere possibilities and, "by saying 'I will,' makes it decision and so inaugurates all activity and actuality" (ibid., 181).<sup>39</sup> In a monarch, too, will has an objective existence; that is, it is not just anyone's will but the unification of rational law with the principle of subjectivity.

Hegel makes clear in several works how important it is that this will be a real will, not a fiction or a metaphor. In the *Encyclopedia*, for example, he says that "in the perfect state [...] subjectivity is not a so-called 'moral person,' or a decree issuing from a majority (forms in which the decreeing will has not an *actual* existence), but an actual individual—the will of a decreeing individual monarchy. The monarchical constitution is therefore the constitution of developed reason" (Hegel 1894, 269).

It may be thought a little extraordinary that the very "subjectivity" that Hegel had spent the whole *Phenomenology* in assaulting in individual minds should now be represented in the person of a monarch as the "constitution of developed reason," particularly when, as Hegel says, the monarch need be no extraordinary person at all. "It is wrong [...] to demand objective qualities in a monarch; he has only to say 'yes' and dot the 'i.'" Neither is it self-evident why will must be the will of *one* person only in order to have any actual existence. Indeed, Hegel comes close to saying that individual wills are so important that there can be only one. "Not individuality in general, but a single individual, the monarch," is what is necessary (Hegel 1942, 289, additions; 181). Marx was not at all wide of the mark when he complained in his *Critique of Hegel's Philosophy of Right* that "personality and subjectivity [...] never ex-

<sup>39</sup> Frequently, of course, Hegel is thinking of the sovereign as the will of the state in external affairs, since for him states are the "actors" in world history. But monarchy also serves to represent the principle of subjectivity.

hausts the spheres of its existence in a single one, but in many ones," though Marx was clearly wrong in treating Hegelian monarchy as interchangeable with *l'état c'est moi*, since Louis XIV did not confine himself to "dotting the 'i'" (Marx 1970, 27, 26).<sup>40</sup>

Nor does this theory of monarchical will simply represent the difference between the fragmented medieval polity undermined by the "haughty vassal" and the modern unified state. Hegelian will is not just sovereign command, as in legal positivism; it expresses the "principle of subjectivity." But it was precisely this principle of subjectivity that had to find full expression somewhere in a rational state, since for Hegel reason involves willing. In individual men the subjective will had been allowed only *as* rationality, only as acceptance and "recognition" of the rational, only as striving toward that end. But if the will can be allowed to "expand" safely somewhere, the person of the monarch is the ideal place, for he adds only the "moment of subjectivity." As a result Hegel can say, for example, that state councilors may be discharged at the "unrestricted caprice" of the monarch, without saying the withering things that he usually says about "caprice" (Hegel 1942, 187). A reader unsympathetic to Hegel might be excused for thinking that he has given to monarchs everything that is dangerous or arbitrary in individuals or, even more, that this is demanded by the very "concept" of the rational state. This ingenious transmutation of the idea of will as the principle of the modern state, in which will is raised to its highest pitch—rationality—for ordinary men but is left largely unrestricted in the one who represents the unity of the state, or rather *is* the unity of the state, is truly brilliant, truly original. Whether it meets Hegel's aim of showing that will is "canceled and preserved" in the modern state is another matter altogether. If one is willing to see the principle of subjectivity defined in one way for monarchs and in a very different way for citizens, the whole system works; if not, then it is not clear why this principle must find its fullness only in monarchy.

In the end, after everything that Hegel has to say about the good and the bad social forms of willing has been considered, it turns out that he is right in his assertion that his political-legal philosophy has "canceled and preserved" the will.<sup>41</sup> But it has canceled it in every form thought politically important since the time of Hobbes while preserving it only (1) in the subjectivity of monarchy; (2) in the fact that nothing in the world becomes actual unless will

<sup>40</sup> The same thought is put in a non-Marxian form by Charles Taylor: "This is one of those cases where the detail of Hegel's argument leaves one with a sense of the arbitrary [...] it is not clear why the realization of the modern idea requires that this be an hereditary monarch" (Taylor 1975, 440).

<sup>41</sup> The most that can be said is that Hegel is a certain kind of voluntarist; but it is a mistake to say, with Plamenatz, that his political philosophy is build on consent (Plamenatz 1938, 61). One of Hegel's great points is to make consent capricious and therefore unworthy of the "true" will—that is, the rational will, or perhaps just reason itself.

translates ideas into existence, which is true but politically not very important; or (3) in the idea that whatever is rational and “recognized” as rational is willed, which is again true in a certain sense but politically even less important. Hegel shows to brilliant effect the precise weaknesses and dangers of every form of voluntarist theory, and his effort to transform the theory of the will until it becomes congruent, and sometimes even identical, with reason itself is equally brilliant. It is more than that. To draw together incredibly diverse phenomena—thought, religion, the good, law, the virtuous—in terms of reconciliation of object and subject, of abstract and concrete, and to fit “true” volition into such an edifice surely shows a capacity for systematic explanation that has not been remotely equaled by anything since Hegel’s death. But his own claim to have canceled and preserved the will is, appropriately enough, both true and false.

What remains simply true, nonetheless, is that Hegel thought that modern “subjects” (persons) should find their “subjective satisfaction” not in capricious “subjectivism” but in being willing members of an ethical-legal “objective” order which situates and secures them and frees man for the appreciation of “Absolute” mind—philosophy, art and religion. In this sense, law for Hegel is the necessary pre-condition of any and every *ascent* to “absolute” value.

## Chapter 14

# KARL MARX'S PHILOSOPHY OF LAW

### 14.1. Introduction

The very phrase “Marx’s philosophy of law” is deeply problematical—for there are important thinkers on the political “left” who underscore Marx’s own argument that all philosophy is *ideology*, a mere “epiphenomenal” reflection or echo of a determining material “substructure” (see esp. Marx and Engels 1963, Part 1, *passim*)—so that “philosophy of law” must really be “ideology of law,” not an inquiry into timeless, placeless “justice.” (Marx’s reduction of philosophy to ideology is applauded by Althusser [1963, *passim*], attacked by Sartre [1961, vol. 3: 237ff.] but both are in sympathy with Marxism’s practical *aims*.) On the other hand, Marx insists in *Critique of the Gotha Program* (1875) that “higher right” (*Recht*) may be finally attainable once radical scarcity has been overcome and all the springs of “cooperative wealth” flow more abundantly—so that society will finally be able to “inscribe on its banners” the (up-til-now) irresponsibly utopian Lassalleian slogan, “from each according to his ability, to each according to his needs” (Marx 1975b, 545ff.). The problem, of course, is that immediately after praising a (finally attainable) “higher right,” Marx himself goes on to complain of “ideological nonsense about right and other trash” (*ibid.*) in the writings of French socialists; and so the central question is, Can there be a non-ideological (or no-longer merely ideological) “right” or justice in the fullness of Marxian time? That question is inevitably suggested by the text of *Gotha Program* itself:

Right can never be higher than the economic structure of society and its cultural development conditioned thereby.

In a higher phase of communist society, after the enslaving subordination of the individual to the division of labour, and therewith also the antithesis between mental and physical labour, has vanished; after labour has become not only a means of life but life’s prime want; after the productive forces, have also increased with the all-round development of the individual, and all the springs of co-operative wealth flow more abundantly—only then can the narrow horizon of bourgeois right be crossed in its entirety and society inscribe on its banners: from each according to his ability, to each according to his needs!

[On the other hand it is important] to show what a crime it is to attempt, on the one hand, to force on our Party again, as dogmas, ideas which in a certain period had some meaning but have now become obsolete verbal rubbish, while again perverting, on the other, the realistic outlook, which it cost so much effort to instil into the Party but which has now taken root in it, by means of ideological nonsense about right and other trash so common among the democrats and French Socialists. (*Ibid.*)

Is all *Recht*—even “higher right” at the end of time—“nonsense” and obsolete “rubbish”? Or can there be “true” justice when the “ideology” of equal

rights is transcended and everyone (in times of post-scarcity) can have basic needs (not mere wants) satisfied—so that everyone can have (in Marcuse's phrase) a "recognizably human existence"?<sup>1</sup> To sort out these problematical worries, the best course will be to treat at some length Marx's most famous defense of "philosophy as ideology" (in the remarkable *German Ideology* of 1846 and in *Preface to a Critique of Political Economy* of 1859), and then to turn to a line-by-line "unpacking" of Marx's (compressed, terse, laconic) utterances about "higher" *Recht* in *Gotha Program*.

## 14.2. Marx on "Ideology"

Since *The German Ideology* offers the most brilliantly trenchant version of the Marxian argument that *all* philosophy (including, of course philosophy of law) is merely an epiphenomenal echo of a determining material base or *Grundlegung*, it is best to begin with this work—and more precisely with its most general theoretical claim:

Men can be distinguished from animals by consciousness, by religion, or anything else you like. They themselves begin to distinguish themselves from animals as soon as they begin to produce their means of subsistence, a step which is conditioned by their physical organization. By producing their means of subsistence men are indirectly producing their actual material life.

The way in which men produce their means of subsistence depends first of all on the nature of the actual means of subsistence they find in existence and have to reproduce. This mode of production must not be considered simply as being the production of the physical existence of the individuals. Rather it is a definite form of activity of these individuals, a definite form of expressing their life, a definite mode of life on their part. As individuals express their life, so they are. What they are, therefore, coincides with their production, both with *what* they produce and with *how* they produce. The nature of individuals thus depends on the material conditions determining their production. (Marx and Engels 1963, 7)

One of Marx's most startling innovations is to use the term "production" in the widest possible sense—so that production is not confined to an assembly-line in a factory, but means whatever is created by human effort (not least "ideas").

The production of ideas, of conceptions, of consciousness, is at first directly interwoven with the material activity and the material intercourse of men, the language of real life. Conceiving, thinking, the mental intercourse of men, appear at this stage as the direct efflux of their material behaviour. The same applies to mental production as expressed in the language of politics, laws, morality, religion, metaphysics, etc. of a people. Men are the producers of their conceptions, ideas, etc. real, active men, as they are conditioned by a definite development of their productive forces and of the intercourse corresponding to these, up to its furthest forms. Consciousness can never be anything else than conscious existence, and the existence of men is their actual life-process [...]. It must not be forgotten that law has just as little an independent history as religion. (Ibid., 14 and 61)

<sup>1</sup> Marcuse 1961, 77ff. Marcuse's book is a highly unusual effort to synthesize Marx and Freud.

In this remarkable paragraph, “law” is (like everything else) the conditioned (or rather caused) product or “efflux” of “material behavior”—as is “metaphysics,” so that the Kantian-Hegelian notion of a *Metaphysik der Sitten* is ruled out. Lest the reader should have missed this crucial point, Marx repeats it (with some variations and amplifications) in his very next paragraph:

In direct contrast to German philosophy which descends from heaven to earth, here we ascend from earth to heaven. That is to say, we do not set out from what men say, imagine, conceive, nor from men as narrated, thought of, imagined, conceived, in order to arrive at men in the flesh. We set out from real, active men, and on the basis of their real life-process we demonstrate the development of the ideological reflexes and echoes of this life-process. The phantoms formed in the human brain are also, necessarily, sublimates of their material life-process, which is empirically verifiable and bound to material premisses. Morality, religion, metaphysics, all the rest of ideology and their corresponding forms of consciousness, thus no longer retain the semblance of independence. They have no history, no development; but men, developing their material production and their material intercourse, alter along with this their real existence, their thinking and the products of their thinking. Life is not determined by consciousness, but consciousness by life. (Ibid., 14)

Marx then goes on to make it clear that his “premisses” are not the more-or-less “idealist” ones of Plato, Descartes, Kant, and Hegel (separated by whole universes as those thinkers are), but properly materialist ones stressing (once again) that what separates men from animals is productive capacity, *not* “consciousness” or religion:

This method of approach is not devoid of premisses. It starts out from the real premisses and does not abandon them for a moment. Its premisses are men, not in any fantastic isolation and rigidity, but in their actual, empirically perceptible process of development under definite conditions. As soon as this active life-process is described, history ceases to be a collection of dead facts as it is with the empiricists (themselves still abstract), or an imagined activity of imagined subjects, as with the idealists. (Ibid., 15)

Since philosophical ideas are now “phantoms”—literally “ghost” rather than *Geist*—it is not surprising that philosophy of law (as a branch of philosophy) should suffer the same fate as philosophy-in-general:

When reality is depicted, philosophy as an independent branch of knowledge loses its medium of existence. At the best its place can only be taken by a summing-up of the most general results, abstractions which arise from the observation of the historical development of men. Viewed apart from real history, these abstractions have in themselves no value whatsoever. (Ibid.)

If philosophy now has “no value whatsoever,” then the prospects for a *philosophy of law* are bleak indeed—unless “philosophy of law” merely means “phantoms” which have lost (or more accurately never had) their “medium of existence.” If Marx had died in 1846, leaving *The German Ideology* as his principal legacy, then he would have bequeathed an anti-jurisprudence in which “justice” is as much an epiphenomenal ghostly “product” as any other “idea.” And even if Marx had lived another thirteen years, to “produce” (*pour ainsi dire*) the *Preface*



to a *Critique of Political Economy*, he would still remain an anti-jurisprudent who had “exposed” the philosophy of law rather than illuminated it:

In the social production of their life, men enter into definite relations that are indispensable and independent of their will, relations of production which correspond to a definite stage of development of their material productive forces. The sum total of these relations of production constitutes the economic structure of society, the real foundation, on which rises a legal and political superstructure and to which correspond definite forms of social consciousness. The mode of production of material life conditions the social, political, and intellectual life process in general. It is not the consciousness of men that determines their being, but, on the contrary, their social being that determines their consciousness. (Marx 1975d, 570)

To be sure, there are in early Marx some intimations of a different view, in which there is a “left-Kantian” notion that one should (*justly*, in effect) overthrow all social institutions (such as the extraction of “surplus value”) which fail to treat men as “ends in themselves”: “Criticism [...] ends with the doctrine that man is the highest being for man, with the categorical imperative to overthrow all circumstances in which man is humiliated, abandoned, enslaved or despised” (Marx 1975f, 57). But how this left-Kantian mixture of man as the “highest” being (*Critique of Judgment*) with the “categorical imperative” (*Groundwork of the Metaphysic of Morals*) to bring down injustice can be *congruent* with “philosophy as ideology” is not at all clear; and so it looks as if the young Marx vibrates between being a left-Kantian moralist and being the expositor or revealer of what philosophy “really” is.<sup>2</sup> (Sartre, for all his Marxian sympathies, thought that Marx’s theory of philosophy was incoherent—for the Cartesian reason that “mind” cannot be conceived as a modification of “matter”—and in effect suggested that Marxian revolutionary aims need a kind of left-Kantianism as their *Grundlegung*; Sartre 1961, *passim*. And the great Kantian socialists Vörländer and Bernstein had roughly the same view. See especially Bernstein 1959, chap. 5.)

If Marx had not lived to write *Gotha Program* in 1875, one would have to say that he has no coherent, *stable* notion of the philosophy of law. But it is now time to see whether that situation changes as one moves from the 1840s and 50s to 1875, and to *Gotha Program* itself.

Since Marx originally wrote *Critique of the Gotha Program* as a circular letter to initiated disciples, the work is unusually compressed and laconic; Marx was speaking to those who already “knew.” To an unusual degree, then, one must “unpack” the theory of “higher” *Recht* which is only hinted at in *Gotha Program*.

Marx begins by drawing a distinction between (merely) “socialist” and “fully communist” societies; and his view is that while socialism constitutes a genuine advance—since ownership of the means of production is no longer in

<sup>2</sup> On this point see Riley 1987, 525ff.

the hands of the bourgeoisie—nonetheless *Recht* in this intermediate stage is still “stigmatized by a bourgeois limitation.” In the socialist stage or phase,

the individual producer receives back from society—after the deductions have been made—exactly what he gives to it. What he has given to it is his individual quantum of labour. For example, the social working day consists of the sum of the individual hours of work; the individual labour time of the individual producer is the part of the social working day contributed by him, his share in it. He receives a certificate from society that he has furnished such and such an amount of labour (after deducting his labour for the common funds), and with this certificate he draws from the social stock of means of consumption as much as costs the same amount of labour. The same amount of labour which he has given to society in one form he receives back in another. (Marx 1975b, 545)

Even though the socialist stage really is an *advance*, Marx goes on to say, the “equal right” of socialist producers is “still constantly stigmatized by a bourgeois limitation”—inasmuch as this “equal right” in all producers is “proportional to the labour they supply,” so that the alleged equality of “equal right” “consists in the fact that measurement [of what is right] is made with an equal standard, namely labour” (ibid., 545–6). It is at this point, however, for Marx, that “equal right” reveals itself as ideological *Unrecht*:

In spite of this advance, this equal right is still constantly stigmatized by a bourgeois limitation. The right of the producers is proportional to the labour they supply; the equality consists in the fact that measurement is made with an equal standard, labour.

But one man is superior to another physically or mentally and so supplies more labour in the same time, or can labour for a longer time; and labour, to serve as a measure, must be defined by its duration or intensity, otherwise it ceases to be a standard of measurement. This equal right is an unequal right for unequal labour. It recognizes no class differences, because everyone is only a worker like everyone else; but it tacitly recognizes unequal individual endowment and thus productive capacity as natural privileges. It is, therefore, a right of inequality, in its content, like every right. Right by its very nature can consist only in the application of an equal standard; but unequal individuals (and they would not be different individuals if they were not unequal) are measurable only by an equal standard in so far as they are brought under an equal point of view, are taken from one definite side only, for instance, in the present case, are regarded only as workers and nothing more is seen in them, everything else being ignored. Further, one worker is married, another not; one has more children than another, and so on and so forth. Thus, with an equal performance of labour, and hence an equal share in the social consumption fund, one will in fact receive more than another, one will be richer than another, and so on. To avoid all these defects, right instead of being equal would have to be unequal. (Ibid.)

What Marx is tacitly saying is that no one can “deserve” (so to speak) his natural endowments (e.g., “productive capacity”)—any more than a bird can “deserve” to be able to sing—and that therefore any claim about “right” which is grounded in (undeserved, undeservable) natural abilities is indefensible. (Later John Rawls would make roughly the same claim in *A Theory of Justice*, of 1971: Since no one can naturally *deserve* anything, one needs a “substitute” theory of justice which has nothing to do with natural *endowments*; Rawls 1971, 12ff.) Marx then goes on to say, in the crucial paragraph of *Gotha Program*, that:

But these defects are inevitable in the first phase of communist society as it is when it has just emerged after prolonged birth pangs from capitalist society. Right can never be higher than the economic structure of society and its cultural development conditioned thereby.

In a higher phase of communist society, after the enslaving subordination of the individual to the division of labour, and therewith also the antithesis between mental and physical labour, has vanished; after labour has become not only a means of life but life's prime want, after the productive forces have also increased with the all-round development of the individual, and all the springs of co-operative wealth flow more abundantly—only then can the narrow horizon of bourgeois right be crossed in its entirety and society inscribe on its banners: from each according to his ability, to each according to his needs! (Marx 1975b, 545–6)

If the “narrow horizon” of bourgeois *Recht* can, one day, finally be “crossed in its entirety”—when it is ultimately realized that “equal right” is as fictitious as “deserving” unequal productive capacity—then it looks as if meeting basic “needs” (not mere expandable wants), once radical scarcity is transcended, should constitute “higher” (indeed highest) *Recht*, something which is no longer a mere epiphenomenal echo of a lower material stage. But this immediately becomes problematical, in Marx's very next paragraph:

I have dealt more at length with the “undiminished proceeds of labour,” on the one hand, and with “equal right” and “fair distribution,” on the other, in order to show what a crime it is to attempt, on the one hand, to force on our Party again, as dogmas, ideas which in a certain period had some meaning but have now become obsolete verbal rubbish, while again perverting, on the other, the realistic outlook, which it cost so much effort to instil into the Party but which has now taken root in it, by means of *ideological nonsense about right* and other trash so common among the democrats and French Socialists. (Ibid., italics added)

Is it only “democrats” and “French Socialists” whose ideas of higher *Recht* are “ideological nonsense” and perverting “obsolete verbal rubbish”? Or does meeting basic needs—post-scarcity—count as extra-ideological “justice” in a higher “economic structure of society”? In *Gotha Program* this is not entirely clear; but at least that work offers some notion of higher *Recht* in the fullness of time, even if the reader is left uncertain whether there is *finally* a no longer merely ideological truth or right.

### 14.3. Law in *Gotha Program* and in *Kapital III*, 48

It would be helpful, of course, if other late Marxian writings did something to resolve the ambiguity of *Gotha Program*—if such late writings made it decisively clear that Marx finally thought that a need-based *Recht* was no mere “epiphenomenon” of something more fundamentally real: the material *Grundlegung*. (Then only “democrats” and “the French” would continue to suffer from false consciousness!) Unfortunately, however, other late Marxian writings simply reinforce the ambiguity of *Gotha Program*—vibrating between “materialist” theories in which “ideals” (including *Recht* or justice) remain obstinately ideological, and an “idealist” (or demi-idealist) doctrine stressing human consciousness and “resolve.” Here the classic text is the brilliant and

well-known paragraph from *The Civil War in France* which insists that the proletarian members of the Paris Commune

did not expect miracles from the Commune. They have no ready-made Utopias to introduce *par décret du peuple* [by decree of the people]. They know that in order to work out their own emancipation, and along with it that higher form to which present society is irresistibly tending by its own economical agencies, they will have to pass through long struggles, through a series of historic processes, transforming circumstances and men. They have no ideals to realize, but to set free the elements of the new society with which old collapsing bourgeois society itself is pregnant. In the full consciousness of their historic mission, and with the heroic resolve to act up to it, the working class can afford to smile at the coarse invective of the gentlemen's gentlemen with the pen and inkhorn; and at the didactic patronage of well-wishing bourgeois-doctrinaires, pouring forth their ignorant platitudes and sectarian crotchets in the oracular tone of scientific infallibility. (Marx 1975a, 570)

A fascinating text! But it too vibrates between viewing (mere) “ideals”—including presumably *Recht* or higher justice—as the sectarian crotchets of “well-wishing bourgeois doctrinaires” and viewing ideals as something realized only by “full consciousness” and “heroic resolve.” In microcosm, this extraordinary paragraph from *The Civil War in France* contains the whole Marxian problem with “philosophy of law”—for within the space of fifteen lines it moves back and forth between a “materialist” theory stressing the “irresistible” operation of “economic agencies” (in which there *are* “no ideals to realize”) and a moral-political theory of a “higher form” of society brought about by “consciousness,” resolve, and a “historic mission.” (There can be no “missions” requiring conscious resolve if “irresistible” material agencies simply *cause* everything.) As so often in Marx, there is a constant vibration *within the same text* between notions of material determination and “heroic” self-determination. But while this may be effective rhetoric, it is philosophically as unsatisfactory as Sartre thought it was (Sartre 1961, *passim*).

Lamentably, the second *Postface* to *Kapital* (from the late 1860s) simply shores up this continuing vibration and ambiguity. For in the famous lines in which Marx distinguishes himself from Hegelian “idealism,” the notion that all philosophy (including philosophy of law) is epiphenomenal and ideological is simply reinforced:

My dialectic method is not only different from the Hegelian, but is its direct opposite. To Hegel, the life-process of the human brain, i.e., the process of thinking, which, under the name of “the Idea,” he even transforms into an independent subject, is the demiurgos of the real world, and the real world is only the external, phenomenal form of “the Idea.” With me, on the contrary, the ideal is nothing else than the material world reflected by the human mind, and translated into forms of thought.

The mystifying side of Hegelian dialectic I criticized nearly thirty years ago, at a time when it was still the fashion. But just as I was working at the first volume of *Das Kapital*, it was the good pleasure of the peevish, arrogant, mediocre epigoni who now talk big in cultured Germany, to treat Hegel in the same way as the brave Moses Mendelssohn in Lessing's time treated Spinoza, i.e., as a “dead dog.” I therefore openly avowed myself the pupil of that mighty thinker, and even

here and there, in the chapter on the theory of value, coquetted with the modes of expression peculiar to him. The mystification which dialectic suffers in Hegel's hands by no means prevents him from being the first to present its general form of working in a comprehensive and conscious manner. With him it is standing on its head. It must be turned right side up again, if you should discover the rational kernel within the mystical shell. (Marx 1975e, 434f.)

If “the ideal is *nothing* else than the material world reflected by the human mind, and translated into forms of thought,” then the ideals of *Recht* and justice continue to be the “echoes” of the material “base” or sub-structure which they were in *The German Ideology*. Indeed one of the things that most upsets Marx about Hegel is that the *Philosophy of Right* [*Recht*] “transfigures” mere existing German institutions (including Prussian *law*) through its insistence that the “actual” is “rational,” that reason is “the rose of the cross of the *present*” (Hegel 1942, Preface, 16ff; on this point see Kelly 1978, chaps. 5–8).

In its mystified form, dialectic became the fashion in Germany, because it seemed to transfigure and to glorify the existing stage of things. In its rational form it is a scandal and abomination to bourgeoisdom and its doctrinaire professors, because it includes in its comprehension and affirmative recognition of the existing state of things at the same time also the recognition of the negation of that state, of its inevitable breaking-up; because it regards every historically developed social form as in fluid movement, and therefore takes into account its transient nature not less than its momentary existence; because it lets nothing impose upon it, and is in its essence critical and revolutionary. (Marx 1975e, 435)

While Marx clearly admires Hegel for privileging “becoming” over “dead being,” he does not go on to say that a “truer” or better *Recht* (“to each according to his needs”) will definitely arrive in a “higher” stage of society. Even in these famous lines front the second *Postface to Kapital*, there is still vibration, vacillation, and ambiguity.

And in the end those remain; what seems to be the case is that Marx—early, middle, and late—both “has” and “cannot have” *Recht* and “justice” and “philosophy of law.” The problems are (so to speak) built into the way in which he conceives philosophy: For if one says, “all philosophical claims are ideological,” that statement at least must be *true*—otherwise there is an infinite regress in which it is not possible to say anything (cf. Sartre 1961, *passim*). The problem is logical, not political; but that does not make the problem any less acute.

And yet: One knows that *Gotha Program*, while speaking positively about “higher” *Recht*, gives (as an example of *Unrecht*) the “enslaving” subordination of the individual to the division of labor (Marx 1975b, 545–6)—and “enslaving” is hardly a morally neutral term. One knows, too, that in the remarkable “Trinity Formula” chapter of *Kapital* (1975c, vol. 3: 48, on pages 398ff.), Marx says that the *Reich der Freiheit* (realm of freedom) begins only with “the shortening of the working day”—so that human labor will not be “alienated” and unsatisfying. And one knows that as far back as *The German*

*Ideology*, three decades before *Kapital* (ibid.), the young Marx had offered a moral utopia of non-alienated work in which everyone can “develop” his all-around faculties:

The division of labour offers us the first example of how, as long as man remains in natural society, that is as long as a cleavage exists between the particular and the common interest, as long therefore as activity is not voluntarily, but naturally, divided, man's own deed becomes an alien power opposed to him, which enslaves him instead of being controlled by him. For as soon as labour is distributed, each man has a particular, exclusive sphere of activity, which is forced upon him and from which he cannot escape. He is a hunter, a fisherman a shepherd, or a critical critic, and must remain so if he does not want to lose his means of livelihood; while in communist society, where nobody has one exclusive sphere of activity but each can become accomplished in any branch he wishes, society regulates the general production and thus makes it possible for me to do one thing to-day and another to-morrow, to hunt in the morning, fish in the afternoon, rear cattle in the evening, criticize after dinner, just as I have a mind, without ever becoming hunter, fisherman, shepherd, or critic. (Marx and Engels 1963, 22; cf. 73ff.)

If, then, the notion of a “philosophy of law” remains unavoidably problematical in Marx, what is certain is that he has an overwhelming sense of *right* (and more especially of *wrong*). If he cannot straightforwardly have a *Philosophie des Rechts*, his sense or feeling of justice and injustice is more powerful than that of any nineteenth-century social theorist.

## Chapter 15

# THE LEGAL THOUGHT OF J. S. MILL

### 15.1. Introduction

Unlike Jeremy Bentham, J.S. Mill has nothing which could be called a “philosophy of law” or general jurisprudence<sup>1</sup>: Indeed his main political work, *Representative Government* (Mill 1961b), devotes no more than a few passing phrases to law. Nonetheless Mill has a *view* of law (if not a complete philosophy), and its central premise is this: That those laws only are justifiable which advance “utility in the largest sense” or “the permanent interest of mankind as a progressive being” (Mill 1989b, 14). In short, for Mill, those laws which promote self-development and individuality, and which counteract “despotism” and the “tyranny of majority opinion,” count as admirable; and, not surprisingly, most of what Mill says about law deals with “tyrannical” laws which are inimical to progress, strong individuality and self-development. Hence, though Mill could work up little enthusiasm for jurisprudence-in-general, he could forcefully attack (say) existing English marriage-laws which made husbands potential tyrants and fettered the self-development of women:

I have no desire to exaggerate, nor does the case stand in any need of exaggeration. I have described the wife’s legal position, not her actual treatment. The laws of most countries are far worse than the people who execute them, and many of them are only able to remain laws by being seldom or never carried into effect. If married life were all that it might be expected to be, looking to the laws alone, society would be a hell upon earth. Happily there are both feelings and interests which in many men exclude, and in most greatly temper, the impulses and propensities which *lead to tyranny*. I readily admit (and it is the very foundation of my hopes) that numbers of married people even under the present law (in the higher classes of England probably a great majority) live in the spirit of a just law of equality. Laws never would be improved, if there were not numerous persons whose moral sentiments are better than the existing laws. (Mill 1989c, 149–50)

In short: The rightness of laws, for Mill, must be judged in terms of their propensity to realize utility “in the broadest sense”—to realize individuality, self-development and wide-ranging liberty. In large measure, what *would* be “Mill’s philosophy of law” must be inferred from his attacks on “tyranny” and despotism. What this means, of course, is that one must examine with care Mill’s “enlarged,” extra-Benthamite notion of utility (especially in the essay *Utilitarianism*)—since Mill insists that he “regard[s] utilitarianism as the ulti-

<sup>1</sup> This is clearest in Mill’s two commentaries on Austin’s *The Province of Jurisprudence Determined*—reluctant commentaries from 1832 and 1863 in which Mill says little which is distinctive and mainly just quotes Austin. See Mill 1984, vol. 21: 94ff., 195ff.

mate appeal on all ethical questions” (Mill 1989b, 14) and since he regards the rightness or wrongness of law as part of “ethics.” And then one must also examine with care what flows from Mill’s enlarged notion of utility as “the permanent interest of mankind as a *progressive* being”—strong individuality, self-development, liberty, non-tyranny, non-despotism, non-“slavery.” For Mill’s hope, best expressed in his long essay on *The Subjection of Women* (1869, at the end of his life), is that “progressive,” liberty-based utility—no longer mere Benthamite “maximization of pleasure”<sup>2</sup>—will finally overcome laws which are venerable only in the sense that they are *old*.

The existing English legal system which entirely subordinates the weaker sex to the stronger, rests upon theory only; for there never has been trial made of any other: so that experience, in the sense in which it is vulgarly opposed to theory, cannot be pretended to have pronounced any verdict. And in the second place, the adoption of this system of inequality never was the result of deliberation, or forethought, or any social ideas, or any notion whatever of what conduced to the benefit of humanity or the good order of society. It sprang simply from the fact that from the very earliest twilight of human society, every woman (owing to the value attached to her by men, combined with her inferiority in muscular strength) was found in a state of bondage to some man. Laws and systems of polity always begin by recognising the relations they find already existing between individuals. They convert what was a mere physical fact into a legal right, give it the sanction of society, and principally aim at the substitution of public and organised means of asserting and protecting these rights, instead of the irregular and lawless conflict of physical strength. Those who had already been compelled to obedience became in this manner legally bound to it. (Mill 1989c, 197ff.)

From the case of the legal subjection of women, Mill then moves on to his most general reflections on the relation of law to utility-based *right*:

We now live—that is to say, one or two of the most advanced nations of the world now live—in a state in which the law of the strongest seems to be entirely abandoned as the regulating principle of the world’s affairs: Nobody professes it, and, as regards most of the relations between human beings, nobody is permitted to practise it. When any one succeeds in doing so, it is under cover of some pretext which gives him the semblance of having some general social interest on his side. This being the ostensible state of things, people flatter themselves that the rule of mere force is ended; that the law of the strongest cannot be the reason of existence of anything which has remained in full operation down to the present time. However any of our present institutions may have begun, it can only, they think, have been preserved to this period of advanced civilisation by a well-grounded feeling of its adaptation to human nature, and conduciveness to the general good. They do not understand the great vitality and durability of institutions which place right on the side of might; how intensely they are clung to; how the good as well as the bad propensities and sentiments of those who have power in their hands, become identified with retaining it; how slowly these bad institutions give way, one at a time, the weakest first, beginning with those which are least interwoven with the daily habits of life; and how very rarely those who have obtained legal power because they first had physical, have ever lost their hold of it until the physical power had passed over to the other side. Such shifting of the

<sup>2</sup> Bentham, *Principles of Morals and Legislation* (Bentham 1838–1843b), Chapter 1, in which Bentham famously asserts that human beings are “fastened to the throne of pain and pleasure”—psychological facts which determine equally what *is* and what *ought* to be.



physical force not having taken place in the case of women; this fact, combined with all the peculiar and characteristic features of the particular case, made it certain from the first that this branch of the system of right founded on might, though softened in its most atrocious features at an earlier period, than several of the others, would be the very last to disappear. It was inevitable that this one case of a social relation grounded on force, would survive through generations of institutions grounded on equal justice, an almost solitary exception to the general character of their laws and customs; but which, so long as it does not proclaim its own origin, and as discussion has not brought out its true character, is not felt to jar with modern civilisation, any more than domestic slavery among the Greeks jarred with their notion of themselves as a free people. (Ibid., 122ff.)

In the case of J.S. Mill, then, the truth is this: That his general notion of enlarged utility as “permanent progress” appears as early as *On Liberty* (1859), but that his particular application, of progressive utility to “law” and “justice” arrives fully only in 1869, in connection with the injustice of the legal subjection of women. Only four years before his death (1873), then, was Mill driven by particular injustices to reflect on injustice (and “tyranny”) more generally. Suitably enough for a philosopher who recommended “induction” as the correct scientific method (in the *Logic*<sup>3</sup>), Mill moves from injustices-in-particular to justice-in-general; he remains the great partisan of his own scientific methodology.

## 15.2. Mill vs. Bentham

Before one can turn to the (rightful) laws which advance Mill’s “progressive” utility (“the permanent interest of mankind”), one must see a little more clearly what he means by utilitarianism in a “large” sense—which transcends Bentham’s notion that utility means “the greatest happiness of the greatest number,” regardless of the source of that happiness (“pushpin is as good as poetry”; Mill 1910a, 28ff.). Mill begins his large essay, *Utilitarianism*, with an attempted refutation of the charge that the principle of utility is a “debased” and “low” moral theory, that it reduces men to animals insofar as it justifies the “maximization” of their more pleasures (and the minimization of their mere pains). If anyone is to blame for this mis-conceived version of utility, for Mill, it is Bentham himself; and in his early essay *Bentham* (1832) Mill strongly assaults every aspect of Bentham’s life and works.

Bentham’s knowledge of human nature is bounded. It is wholly empirical, and the empiricism of one who has had little experience. He had neither internal experience nor external; the quiet, even tenor of his life and his healthiness of mind conspired to exclude him from both. He never knew prosperity and adversity, passion nor satiety; he never had even the experiences which sickness gives; he lived from childhood to the age of eighty-five boyish health. He knew no dejection, no heaviness of heart. He never felt life a sore and a weary burden. He was a boy to the last. Self-consciousness, that daemon of the man of genius of our time, from Wordsworth

<sup>3</sup> Mill 1984, vol. 12 (“A System of Logic,” Book VI).

to Byron, from Goethe to Chateaubriand, and to which this age owes so much both of its cheerful and its mournful wisdom, never was awakened in him. How much of human nature slumbered in him he knew not, neither can we know. He had never been made alive to the unseen influences which were acting on himself nor, consequently, on his fellow creatures. Other ages and other nations were a blank to him for purposes of instruction. He measured them but by one standard: their knowledge of facts and their capability to take correct views of utility and merge all other objects in it. His own lot was cast in a generation of the leanest and barrenest men whom England had yet produced and he was an old man when a better race came in with the present century. He saw accordingly in man little but what the vulgarest eye can see, recognized no diversities of character but such as he who runs may read. Knowing so little of human feelings, he knew still less of the influences by which those feelings are formed; all the more subtle workings both of the mind upon itself and of external things upon the mind escaped him; and no one, probably, who, in a highly instructed age, ever attempted to give a rule to all human conduct set out with a more limited conception either of the agencies by which human conduct is or of those by which it should be influenced. This, then, is our idea of Bentham. (Ibid.)

To be a little clearer on the Bentham-Mill *rapprochement* (or lack of it), it is evident that Mill regards “utility as the ultimate appeal on all ethical questions,” including law and jurisprudence; in that very broad, very general sense he is indeed the descendant of Bentham (and of Hume). And while Mill might refrain from using Bentham’s actual words (“nonsense upon stilts”) in describing the history of moral-legal thought before utilitarianism, he did think that Kantianism—the most prominent modern practical philosophy—“fails almost grotesquely” to make its case. As a utilitarian, then, Mill can hardly fail to take Bentham seriously.

Nonetheless Mill did think that Bentham’s *version* of utilitarianism was crude and unsubtle, inasmuch as it could not privilege “liberty” (for example) as a “qualitatively superior higher pleasure” worth having even at the cost of some pain. For while Bentham did take account of “intensity” and “duration” of pains and pleasures in his “felicific calculus,” there is no room in Benthamism for quality (“highness” or “lowness”) of those pains and pleasures. In calculating the utility of a proposed “judicial operation” Bentham says in Chapter IV of *Principles of Morals and Legislation*, the following consideration should be taken into account:

5. Sum up all the values of all the pleasures on the one side, and those of all the pains on the other. The balance, if it be on the side of pleasure, will give the good tendency of the net upon the whole, with respect to the interests of that individual person; if on the side of pain, the bad tendency of it upon the whole.

6. Take an account of the number of persons whose interests appear to be concerned; and repeat the above process with respect to each. Sum up the numbers expressive of the degrees of good tendency, which the act has, with respect to each individual, in regard to whom the tendency of it is good upon the whole: Do this again, with respect to each, individual, in regard to whom the tendency of it is bad upon the whole. Take the balance: Which, if on the side of pleasure, will give the general good tendency of the act, with respect to the total number or community of individuals concerned; if on the side of pain, the general evil tendency, with respect to the same community. (Bentham 1838–1843b, chap. IV, par. V)

Nowhere, however, does Bentham say that the “value” of a pain or pleasure has anything to do with quality, with (supposed) “highness” or “lowness”; and therefore he cannot give decisive weight to the things that mattered to J.S. Mill: liberty, self-development, truth, Socratic virtue—in short, to utility reconceived as “the permanent interest of mankind as a progressive being.” Bentham must privilege whatever achieves a felicific “balance” in which there is a net surplus of pleasure over pain (whatever the source of that pleasure or pain may be, even “the pleasures of malevolence”). Benthamism simply cannot accommodate any notion of “qualitative superiority”; and it is on this point that Mill “reforms” Benthamism very radically indeed—beyond recognition, in fact.

It is perfectly true, Mill says in *Utilitarianism*, that only happiness based on pleasure and (avoided) pain can be the foundation of a general moral theory (which will ultimately permit assessment of the rightness of laws); but, he goes on, no-one needs to suppose that the pleasures of human beings are the same as those of animals. There are, in fact, Mill claims, “higher” and “lower” pleasures, and it is quite consistent with rightly conceived utilitarianism to insist on maximization of the higher ones:

If I am asked, what I mean by difference of quality in pleasures, or what makes one pleasure more valuable than another, merely as a pleasure, except its being greater in amount, there is but one possible answer. Of two pleasures, if there be one to which all or almost all who have experience of both give a decided preference, irrespective of any feeling of moral obligation to prefer it, that is the more desirable pleasure. If one of the two is, by those who are competently acquainted with both, placed so far above the other that they prefer it, even though knowing, it to be attended with a greater amount of discontent, and would not resign it for any quantity of the other pleasure which their nature is capable of, we are justified in ascribing to the preferred enjoyment a superiority in quality, so far outweighing quantity as to render it, in comparison, of small account. (Mill 1910b, 231ff.)

And then Mill goes on to say that

It is indisputable that the being whose capacities of enjoyment are low, has the greatest chance of having them fully satisfied; and a highly endowed being will always feel that any happiness which he can look for as the World is constituted, is imperfect. But he can learn to bear its imperfections, if they are at all bearable; and they will not make him envy the being who is indeed unconscious of the imperfections, but only because he feels not at all the good, which those imperfections qualify. It is better to be a human being dissatisfied than a pig satisfied; better to be Socrates dissatisfied than a fool satisfied. And if the fool, or the pig, are of a different opinion, it is because they only know their own side of the question. The other party to the comparison knows both sides. (Ibid.)

Utilitarianism, then, Mill insists, is not guilty of the mere maximization of any quantity of pleasure, leaving qualities aside: But he does try to avoid any notion of *intrinsic* qualities of things, completely independent of their social utility or happiness-causing propensity, by arguing that, in judging qualities, we must unavoidably accept the opinion of experts (or perhaps a majority of

them) concerning what has “higher” value. (If Mill insisted on “intrinsic” quality, *regardless* of utility and happiness, he would be no utilitarian at all—not even an “enlarged” one.)

From this verdict of the only competent judges, I apprehend there can be no appeal. On a question which is the best worth having of two pleasures, or which of two modes of existence is the most grateful to the feelings, apart from its moral attributes and from its consequences, the judgment of those who are qualified by knowledge of both, or, if they differ, that of the majority among them, must be admitted as final. And there needs be the less hesitation to accept this judgment respecting the quality of pleasures, since there is no other tribunal to be referred to even on the question of quantity. What means are there of determining which is the acutest of two pains, or the intensest of two pleasurable sensations, except the general suffrage of those who are familiar with both? Neither pains nor pleasures are homogeneous, and pain is always heterogeneous with pleasure. What is there to decide whether a particular pleasure is worth purchasing at the cost of a particular pain, except the feelings and judgment of the experienced? When, therefore, those feelings and judgment declare the pleasures derived from the higher faculties to be preferable in kind, apart from the question of intensity, to those of which the animal nature, disjoined from the higher faculties, is susceptible, they are entitled on this subject to the same regard. (Ibid.)

In this paragraph one can reasonably speak of a re-quantification of quality: For “qualitatively higher” now means, “that which would be desired or preferred by competent experts.”

And this notion of what *would* be desired leads directly into one of Mill’s most famous (and most disputed) claims: Namely that the only way to show that something is “desirable” as an end or purpose—for example a “higher” pleasure such as individual self-development unfettered by tyrannical law—is that most men *actually* desire it. This is the foundation of Mill’s basing judgments about quality on the opinion of a majority of experts—in short, on what most of them desire.

Questions about ends are, in other words, questions what things are desirable. The utilitarian doctrine is, that happiness is desirable, and the only thing desirable, as an end all other things being only desirable as means to that end. What ought to be required of this doctrine – what conditions is it requisite that the doctrine should fulfil—to make good its claim to be believed?

The only proof capable of being given that an object is visible, is that people do actually see it. The only proof that a sound is audible, is that people hear it: and so of the other sources of our experience. In like manner, I apprehend the sole evidence it is possible to produce that anything is desirable, is that people do actually desire it. If the end which the utilitarian doctrine proposes to itself were not, in theory and in practice, acknowledged to be an end, nothing could ever convince any person that it was so. No reason can be given why the general happiness is desirable, except that each person, so far as he believes it to be attainable, desires his own happiness. This, however, I being a fact, we have not only all the proof which the case admits of, but all which it is possible to require, that happiness is a good: That each person’s happiness is a good to that person, and the general happiness, therefore, a good to the aggregate of all persons. (Ibid., chap. 4, pars. 2 and 3)

Obviously there is a problem in these celebrated paragraphs: For often (in everyday moral-political-legal thought), “desirable,” means not “*able* to be de-

sired” but what ought to be desired, or what deserves to be desired (as G.E. Moore urged in *Principia Ethica*; Moore 1902, 78ff.). Mill, indeed, in equating the desirable with what is “actually” desired, may undermine the whole theory of “higher” pleasures on which his “progressive” utility turns: For if those higher things are not “actually” desired—and he grants they may not be—then he has no way of condemning those who would rather be fools or pigs than Socrates, since the only criterion of desirability is the fact of what is *actually* desired. It is only desirable to be Socrates if it is desired to be Socrates. And one cannot avert this consequence in Mill by saying that (for example) one ought to prefer virtue to swinishness, since for Mill no one pursues virtue unless he (actually) desires it, unless it will make him happy. (Virtue is no more its own aim than it is its own reward.) If, then, men do not (in fact) desire higher pleasures (among which Mill enumerates Socratic virtue, liberty, and escape from “tyrannical” laws), there is nothing that Mill can say against them; he cannot say that they have a duty to emulate what the most qualified experts desire, since there can be no duty or virtue which fails to rest on one’s own happiness. And therefore Mill’s generous *hopes* are left unsupported by any adequate and coherent moral theory (see especially Moore 1902, and Smart and Williams 1964, *passim*).

There are problems, then, in Mill’s conception of utility; and his attempt to introduce qualitative distinctions into a theory of (mere) pleasure and pain makes Mill nobler but less coherent than Bentham. Mill wishes eloquently for “higher” things (such as no-longer-tyrannical laws); but his notion of what *counts* as qualitatively higher is deeply problematical.

### 15.3. *On Liberty*

If Mill’s effort to introduce qualitatively “higher” things into utility (“the ultimate appeal on all ethical questions”) arguably only re-quantifies quality (qua “what experts desire”), so that Mill as a moral philosopher is less than wholly successful, it is still clear that in his most celebrated work, *On Liberty*, he insists on two principles which are at least relatable to “enlarged” utility. The first principle, which defines the relation of self-developing individuals to society (including law) and to other individuals, is what one might call the negative aspect of Mill’s utilitarianism, in that it indicates what ought *not* to be done to individuals—whether by law or by “tyrannical” opinion.

The object of this Essay is to assert one very simple principle, as entitled to govern absolutely the dealings of society with the individual in the way of compulsion and control, whether the means used be physical force in the form of legal penalties, or the moral coercion of public opinion. That principle is, that the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others. His own good, either physical or

moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinions of others, to do so would be wise, or even right. These are good reasons for remonstrating with him, or reasoning with him, or persuading him, or entreating him, but not for compelling him, or visiting him with any evil in case he do otherwise. To justify that, the conduct from which it is desired to deter him, must be calculated to produce evil to some one else. The only part of the conduct of any one, for which he is amenable to society, is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign. (Mill 1989b, 10)

Mill gives a further justification of this “harm” principle near the end of *On Liberty*, observing that since another person can never take such a lively interest in us as we take, in ourselves, and can never know fully what will give us (socially harmless) pleasure, it is essential to allow individuals their own way, so long as they do not actively, directly injure anyone else (*ibid.*, 12ff.). (If individuals mis-use freedom injuriously, then of course for Mill the basic principle of all justice, *neminem laedere*, comes into play in London as much as in Rome.<sup>4</sup>)

Being left alone to manage that part of one’s life which cannot (directly) adversely affect others is for Mill the only true definition of freedom: “The only freedom which deserves the name is that of pursuing our own good in our own way, so long as we do not attempt to deprive others of theirs or impede their efforts to attain it.” Mill is almost apologetic for the necessity of setting out a doctrine which, he says, “may have the air of a truism”; but the social forces of conformity and mediocrity, which he thought to be ever more ascendant, forced him, he said, to re-state a doctrine which is “anything but new” (Mill 1989b, 12ff.).

Mill begins *On Liberty*, then, with the enunciation of this general principle of the relation of individuals to society, government, and law—for neither law nor society has the right to interfere in the internal life of individuals (though he thought that government had been brought substantially under control in the nineteenth century, by becoming more “representative,” and that the greater danger in his day came from the crushing mass of unexamined social bias (*ibid.*). From this, Mill passes on to the liberty of thought and discussion, which, characteristically, he defends in terms of their social usefulness (“progress”), not in terms of intrinsic value—since, as was seen earlier, any notion of intrinsic worth is problematical for a utilitarian. “If all mankind minus one were of one opinion, mankind would be no more justified in silencing that one person than he, if he had the power, would be justified in silencing mankind.” And this is true for four reasons, which Mill conveniently summarizes exactly half-way through *On Liberty*:

<sup>4</sup> For Mill’s few remarks on Roman law and jurisprudence, see his comments on Austin (*supra*, footnote 1).

We have now recognised the necessity to the mental well-being of mankind (on which all their other well-being depends) of freedom of opinion, and freedom of the expression of opinion, on four distinct grounds; which we will now briefly recapitulate. First, if any opinion is compelled to silence, that opinion may, for aught we can certainly know, be true. To deny this is to assume our own infallibility. Secondly, though the silenced opinion be an error, it may, and very commonly does, contain a portion of truth; and since the general or prevailing opinion on any subject is rarely or never the whole truth, it is only by the collision of adverse opinions that the remainder of the truth has any chance of being supplied. Thirdly, even if the received opinion be not only true, but the whole truth; unless it is suffered to be, and actually is, vigorously and earnestly contested, it will, by most of those who receive it, be held in the manner of a prejudice, with little comprehension or feeling of its rational grounds. And not only this, but, fourthly, the meaning of the doctrine itself will be in danger of being lost, or enfeebled, and deprived of its vital effect on the character and conduct the dogma becoming a mere formal profession, inefficacious for good, but cumbering the ground, and preventing the growth of any real and heartfelt conviction, from reason or personal experience. (Ibid., 53–4)

Obviously, all of these defenses of the “liberty of thought and speech” turn on Mill’s own kind of utilitarianism: they all involve truth, the negation of prejudice, bias, and belief by rote, together with the praise of “real and heartfelt conviction.” All of these things are utile or useful only to a rational and progressive society (such as Mill hoped for), and might be harmful or fatal in other systems—as Mill stresses in *Representative Government* (Mill 1961b, chap. 4).

It is the last two defenses which are of particular interest, since few will perhaps deny that the dawning of a great truth (or even half-truth) are to be welcomed. But Mill had also to defend the liberty of views which might be false (and hence, some might say, dangerous or painful). Mill’s principle of progressive and truthful utility could not accept the holding of even a complete truth in the manner of a prejudice; and the main example which he uses to show that even truth itself must be attacked and defended was “the truth of Christianity” (about whose perfect verity Mill was skeptical). Taking that very truth whose denial might be most offensive and painful, Mill urged that

All Christians believe that the blessed are the poor and humble, and those who are ill-used by the world: that it is easier for a camel to pass through the eye of a needle than for a rich man to enter the kingdom of heaven; that they should judge not, lest they be judged; that they should swear not at all; that they should love their neighbour as themselves; that if one take their cloak, they should give him their coat also; that they should take no thought for the morrow; that if they would be perfect, they should sell all that they have and give it to the poor. They are not insincere when they say that they believe these things. They do believe them, as people believe what they have always heard lauded and never discussed. But in the sense of that living belief which regulates conduct, they believe these doctrines just up to the point to which it is usual to act upon them. The doctrines in their integrity are serviceable to pelt adversaries with; and it is understood that they are to be put forward (when possible) as the reasons for whatever people do that they think laudable. But any one who reminded them that the maxims require an infinity of things which they never even think of doing, would gain nothing but to be classed among those very unpopular characters who affect to be better than other people. The doctrines have no hold on ordinary believers - are not a power in their minds. They have an habitual respect for the sound of them, but no feeling which spreads from the words to the things

signified, and forces the mind to take them in, and make them conform to the formula. Whenever conduct is concerned, they look round for Mr. A and B to direct them how far to go in obeying Christ. (Mill 1989b, 43)

Now the interesting point here is surely that bias and mere unreflecting gullibility are often the most advantageous props of society (and indeed of law) that can be imagined: In fact, examination of beliefs may lead to extreme instability and rapid change. Nothing could show more clearly that Mill took the ordinary utilitarian idea of usefulness, in a static or conservative sense, and turned it into an agency for reform, improvement, and self-developing individuality. And this is why he could justify the unfettered propagation of error: Its clashes with the truth would provoke a lively and conscious attachment to that truth, without which “the permanent interest of mankind as a progressive being” could not flourish (*ibid.* 12ff.).

It is not necessary to go over, in detail, every reason that Mill gives for tolerating, and indeed celebrating, intellectual diversity. It is true that, when intellectual diversity passes over into actual actions, which may physically affect other people, Mill draws his lines rather more closely: “No one,” he says, “pretends that actions should be as free as opinions” (*ibid.*, 40ff.). It is only when one passes from (say) a general questioning of the utility of private property—as in Mill’s own “Chapters on Socialism” (Mill 1989a, 227ff.)—to inciting a mob in front of a corn dealer’s house to set fire to it, that limits must be drawn. Mill was aware of the difficulty of distinguishing between “advocacy” and “instigation,” but his general principle was clear: One should try to change the public mind by argumentation (concerning “progressive” utility); the public should then, (through “representative government”) effect valuable change in an orderly way. If one tries to circumvent the process of changing public opinion (and then finally law), and goes directly to incitement to physical attack, then society is in danger and the individual may be (legally) constrained (Mill 1989b, 38ff.).

But it is clear that it is not the possible danger of individuals to society with which Mill is concerned; that problem will, through law, take care of itself. The real threat is that of society (including its legal agencies), as an all engulfing, mass mediocrity threatening to swallow up all deviation, all signs of genius or eccentricity. Mill was much affected by Tocqueville’s theory of the “tyranny of the majority,” and devoted his main efforts to a defense against this tyranny:

Like other tyrannies, the tyranny of the majority was at first, and is still vulgarly, held in dread, chiefly as operating through the acts of the public authorities. But reflecting persons perceived that when society is itself the tyrant—society collectively, over the separate individuals who compose it—its means of tyrannising are not restricted to the acts which it may do by the hands of its political functionaries. Society can and does execute its own mandates: And if it issues wrong mandates instead of right, or any mandates at all in things with which it ought not to meddle, it practises a social tyranny more formidable than many kinds of political oppression,



since, though not usually upheld by such extreme penalties, leaves fewer means of escape, penetrating much more deeply into the details of life, and enslaving the soul itself. Protection, therefore, against the tyranny of the magistrate is not enough: There needs protection also against the tyranny of the prevailing opinion and feeling; against the tendency of society to impose, by other means than civil penalties, its own ideas and practices as rules of conduct on those who dissent from them; to fetter the development, and, if possible, prevent the formation, of any individuality not in harmony with its ways, and compel all characters to fashion themselves upon the model of its own. (Ibid., 8)

It is precisely because individuals, the agents of all development and progress, are under such dangerous attack that one must forbear to correct those deficiencies in individuals which affect society only indirectly (such as alcoholism). That these deficiencies affect society obliquely Mill does not deny; but he affirms that the effort to correct them will involve a fatal concentration of legal and political power. Therefore only “clear and present dangers” are to be legally suppressed (ibid., 38ff.).

Mass mediocrity, and even fear and hatred of “gifted individuals,” leads not only to a grinding and depressing conformity in social life, but, for Mill, also to a mediocre government. Mill was a kind of democrat; government should be an exact (representative) transcript of society, so that no one’s interests will be violated because they are not understood. But:

No government by a democracy or a numerous aristocracy, either in its political acts or in the opinions, qualities, and tone of mind which it fosters, ever did or could rise above mediocrity [...]. Many have let themselves be guided (which in their best times they always have done) by the counsels and influence of a more highly gifted and instructed One or Few. The initiation of all wise or noble things, comes and must come from individuals; generally at first from some one individual. The honour and glory of the average man is that he is capable of following that initiative; that he can respond internally to wise and noble things, and be led to them with his eyes open. I am not countenancing the sort of ‘hero-worship’ which applauds the strong man of genius for forcibly seizing on the government of the world and making it do his bidding in spite of itself. All he can claim is, freedom to point out the way. The power of compelling others into it is not only inconsistent with the freedom and development of all the rest, but corrupting to the strong man himself. It does seem, however, dial when the opinions of masses of merely average men are everywhere become or becoming the dominant power, the counterpoise and corrective to that tendency would be the more and more pronounced individuality of those who stand on the higher eminences of thought. It is in these circumstances most especially that exceptional individuals, instead of being deterred, should be encouraged in acting differentially from the mass. In other times there was no advantage in their doing so, unless they acted not only differently, but better. In this age, the mere example of nonconformity, the mere refusal to bend the knee to custom, is itself a service. Precisely because the tyranny of opinion is such as to make eccentricity a reproach, it is desirable, in order to break through that tyranny, that people should be eccentric. (Ibid., 66–7)

Mill concludes *On Liberty* with a spirited attack on those who try to universalize their biases (and legally impose them); in particular he assaults, those who wish (legally) to inflict their religious convictions on the whole public:

It remains to be proved that society or any of its officers holds a commission from on high to avenge any supposed offence to Omnipotence, which is not also a wrong to our fellow creatures. The notion that it is one man's duty that another should be religious was the foundation of all the religious persecutions ever perpetrated, and if admitted, would fully justify them. Though the feeling which breaks out in the repeated attempts to stop railway travelling on Sunday, in the resistance to the opening of Museums, and the like, has not the cruelty of the old persecutors, the state of mind indicated by it is fundamentally the same. It is a determination not to tolerate others in doing what is permitted by their religion, because it is not permitted by the persecutor's religion. It is a belief that God not only abominates the act of the misbeliever, but will not hold us guiltless if we leave him unmolested. (Ibid., 90–1)

#### 15.4. Mill on “Justice”: A Virtue “*per se*”?

Given Mill's fundamental insistence that “I regard utility as the ultimate appeal on all ethical questions,” one would not expect him to define or defend *justice* (however “high” a virtue it may be) independently of utility (or “*per se*”). And in Chapter 5 of *Utilitarianism*, this expectation is (finally) fulfilled.

To be sure, Mill begins Chapter 5 by acknowledging that “one of the strongest obstacles to the reception of the doctrine that Utility or Happiness is the criterion of right and wrong has been drawn from the idea of justice.” The belief in “the majority of thinkers” that there is an extra utilitarian “inherent quality in things,” an “existence in nature as something absolute, generically distinct from every variety of the expedient” (Mill 1910b, 238ff.)

To judge whether there really *can* be a notion of justice as a non-utilitarian “thing intrinsically peculiar and distinct,” Mill urges, one must begin by canvassing commonly-made claims about justice. In highly abridged and concentrated form, Mill says that

In the first place, it is mostly considered unjust to deprive anyone of his personal liberty, his property, or any other thing which belongs to him by law. Here, therefore, is one instance of the application of the terms just and unjust in a perfectly definite sense, namely, that is just to respect, unjust to violate, the *legal rights* of anyone.[...]

Secondly [...] we may say that a second case of injustice consists in taking or withholding from any person that to which he has a *moral right*.

Thirdly it is universally considered just that each person should obtain that (whether good or evil) which he *deserves*; and unjust that he should obtain a good, or be made to undergo an evil, which he does not deserve. This is, perhaps, the clearest and most emphatic form in which the idea of justice is conceived by the general mind. As it involves the notion of desert, the question arises, what constitutes desert? [...]

Fourthly, it is confessedly unjust to *break faith* with any one: to violate an engagement, either express or implied, or disappoint expectations raised by our own conduct, at least if we have raised those expectations knowingly and voluntarily [...].

Fifthly, it is, by universal admission, inconsistent with justice to be *partial*; to show favour or preference to one person over another, in matters to which favour and preference do not properly apply [...].

Nearly allied to the idea of impartiality is that of *equality*; which often enters as a component part both into the conception of justice and into the practice of it, and, in the eyes of many persons, constitutes its essence. (Ibid.)

The problem, for Mill, is that all these views (taken singly) are “extremely plausible”: but how does one mediate between or rank-order “plausible” views which are *incommensurable* (since “desert,” for example, may not be consistent with “equality”)?

Among so many diverse applications of the term Justice, which yet is not regarded as ambiguous, it is a matter of some difficulty to seize the mental link which holds them together, and on which the moral sentiment adhering to the term essentially depends. (Ibid.)

And this “mental link” is only further “embarrassed” when one looks into the *etymology* of “justice,” and finds (for example) that Old Testament divine legal rigorism is incongruent with Graeco-Roman law as something humanly made. And the language of “philosophic jurists,” for Mill, sorting out so-called “perfect” and “imperfect” duties, really only amounts to a distinction “between justice and the other obligations of morality” (such as “charity or beneficence”).

Having unfolded a wide variety of “plausible” but inconsistent and incommensurable notions of justice, Mill suddenly (and some what unexpectedly) says:

We have seen that the two essential ingredients in the sentiment of justice are, the desire to punish a person who has done harm, and the knowledge or belief that there is some definite individual or individuals to whom harm has been done. (Ibid.)

In fact the “embarrassing” range of “extremely plausible” theories of justice which Mill has lengthily enumerated are neither “imaginary” nor (readily or obviously) *reducible* to the avoiding and punishing of harm (a Benthamite rendering of *neminem laedere*). But for Mill it is crucial to be able to say this: For the “harm principle” (from *On Liberty*) is, for him, already “in place” and justified; and if justice really is reducible to a harm-less British version of *neminem laedere*, then Mill has shown that there is no “intrinsically peculiar” or “*per se*” justice that is *independent* of utility (as the “ultimate appeal on all ethical questions”).

What Mill really wants to say, perhaps, is not so much that “justice” is *reducible* (without remainder) to non-harm, but that only utility (or “social utility”) can order or rank-order an “embarrassing” range of “extremely plausible” and long-advocated (but contestable) claims. “Social utility” would then be the over-arching “ultimate” principle which *orders* conflicting notions of (and claims about) justice (even if it doesn’t obviously “contain” all those notions):

How many, again, and how irreconcilable, are the standards of justice to which reference is made [...]. Each, from his own point of view, is unanswerable; and any choice between them, on grounds of justice, must be perfectly arbitrary. Social utility alone can decide the preference. [...] From these confusions there is no other mode of extrication than the utilitarian. (Ibid.)

But if, for Mill, there is no “inherent” or “*per se*” justice independent of “social utility,” it is still the case that, just as “liberty” and “Socratic virtue” are *higher* pleasures (better worth having at the cost of some pain), so too the “highest” part of utility is precisely justice itself:

While I dispute the pretensions of any theory which sets up an imaginary standard of justice not grounded on utility, I account the justice which is grounded on utility to be the chief part, and incomparably the most sacred and binding part, of all morality. Justice is a name for certain classes of moral rules, which concern the essentials of human well-being more nearly, and are therefore of more absolute obligation, than any other rules for the guidance of life; and the notion which we have found to be of the essence of the idea of justice, that of a right residing in an individual, implies and testifies to this more binding obligation. (Ibid.)

But this is true because of (not surprisingly) the centrality of the already-established “harm principle”:

The moral rules which forbid mankind to hurt one another (in which we must never forget to include wrongful interference with each other’s freedom) are more vital to human well-being than any maxims, however important, which only point out the best mode of managing some department of human affairs. They have also the peculiarity, that they are the main element in determining the whole of the social feelings of mankind. It is their observance which alone preserves peace among human beings. (Ibid.)

Here the notion of qualitatively-superior “higher” things (from *On Liberty*) gives *primacy* to justice:

It appears from what has been said, that justice is a name for certain moral requirements, which, regarded collectively, stand higher in the scale of social utility, and are therefore of more paramount obligation, than any others [...].

Justice remains the appropriate name for certain social utilities which are vastly more important, and therefore more absolute and imperative, than any others are as a class (though not more so than others may be in particular cases); and which, therefore, ought to be, as well as naturally are, guarded by a sentiment not only different in degree, but also in kind; distinguished from the milder feeling which attaches to the mere idea of promoting human pleasure or convenience, at once by the more definite nature of its commands and by the sterner character of its sanctions. (Ibid.)

An extraordinary paragraph!—not least because of Mill’s placing “the mere idea of promoting human pleasure” on a level with “mere” *convenience*. Here justice is “higher” than “mere” pleasure, as in *On Liberty* Socratic virtue and self-development had been “higher” than “a pig satisfied.” The Benthamite primacy of pleasure (even “the pleasure(s) of malevolence”) is rejected in favour of the qualitatively superior, the higher good. To be sure, “highness” remains a problem, since Mill in *Utilitarianism* Chapter 4 had insisted that “high” = “qualitatively superior” = “expertly preferred” = “desirable” = “is actually desired.” But at least in Chapter 5 Mill avoids this disastrous equation, and treats social utility as “higher” *mainly* because it alone can mediate be-

tween (and rank-order) competing, incommensurable, and “extremely plausible” notions of justice which are (taken singly) “unanswerable.” Chapter 5 is therefore much more persuasive than Chapter 4.

### 15.5. Conclusion

Now that an enlarged notion of utility as the “permanent” interest of mankind as “a progressive being” is reasonably clear—even if one can doubt that his notion of qualitatively “higher” things is philosophically successful—one can return briefly to some of his characteristic utterances about justice and law in *The Subjection of Women* (in which injustices provoked him into his most nearly- jurisprudential reflections):

Laws and systems of polity always begin by recognising the relations they find already existing between individuals. They convert what was a mere physical fact into a legal right give it the sanction of society, and principally aim at the substitution of public and organized means of asserting and protecting these rights, instead of the irregular and lawless conflict of physical strength. Those who had already been compelled to obedience became in this manner legally bound to it. Slavery, from being a mere affair of force between the master and the slave, became regularised and a matter of compact among the masters, who, binding themselves to one another for common protection, guaranteed by their collective strength the private possessions of each, including his slaves. In early times, the great majority of the male sex were slaves, as well as the whole of the female. And many ages elapsed, some of them ages of high cultivation, before any thinker was bold enough to question the rightfulness, and the absolute social necessity, either of the one slavery or of the other. By degrees such thinkers did arise: And (the general progress of society assisting) the slavery of the male sex has, in all countries of Christian Europe at least (though, in one of them only within the last few years) been at length abolished, and that of the female sex has been gradually changed into a milder form of dependence. But this dependence, as it exists at present, is not an original institution, taking a fresh start from considerations of justice and social expediency—it is the primitive state of slavery lasting on, through successive mitigations and modifications occasioned by the same causes which have softened the general manners, and brought all human relations more under the control of justice and the influence of humanity. (Mill 1989c, 123)

Plainly, for J.S. Mill, enlightened and just reform of law goes hand-in-hand with the advent of “progressive” and truth-loving “higher” utility: When individual self-development is finally understood to be the agency of progress, then laws which fetter individuals through mere bias will be increasingly transcended. The generosity and nobility of Mill’s aims, including his legal ones, are never in doubt for a moment; the only thing doubtful is whether Mill is in a position to offer a philosophically persuasive account of what counts as “higher.” It may be that there is a large gap between Mill’s generous view of what ought to be, and his success in making “ought” (what is “higher”) intelligible; he may be more persuasive as a reformer than as a philosopher. But his view *is* generous, and it aims at a progressive notion of the function of law.

## Chapter 16

# NIETZSCHE AS A PHILOSOPHER OF LAW

### 16.1. Introduction

The notion of “philosophy of law” is deeply problematical in the thought of Nietzsche, since all philosophy (generally) is conceived by him as an *ex post facto* rationalization of a deeper *psychological* truth: “Gradually it has become clear to me,” Nietzsche says in *Beyond Good and Evil*, “what every great philosophy so far has been,” namely a “personal confession” and “involuntary memoir” in which “desires of the heart” have been “filtered and made abstract,” and then “defended with reasons sought after the fact” (Nietzsche 1954c, sec. 5). To be sure, the phrase “so far” may be thought of by Nietzsche as a kind of escape-clause which exempts his philosophy from the general truth that philosophy is after-the-fact “rationalization”; and it is certainly the case that Nietzsche was not absolutely first to view philosophy as the rationalized surface of deeper reality: Pascal, after all, had famously said that “*le coeur a ses raisons, que la raison ne connoît point*” (“the heart has its reasons, which reason knows not of”) (Pascal 1914b, 354), and Marx had more recently insisted that when (material) reality is correctly depicted, philosophy “loses its medium of existence” and is revealed to be a mere “epiphenomenal” ideology (Marx and Engels 1963, 14–5). And it is true that Nietzsche does not always or consistently go as far as Freud in the “psychologizing” of practical concepts: When Freud says, in a bitterly amusing phrase, that “justice means that we deny ourselves many things, in order that we may be able to deny them to others as well” (Freud 1959, 53), he does not go on elsewhere to speak of “real” or true justice which is *more* than resentment rationalized—whereas by contrast Nietzsche does say, “equal to the equal, unequal to the unequal: That would be the true slogan of justice” (Nietzsche 1954e, 532). What exactly Nietzsche means by “true” justice as the defeat of (Christian) egalitarianism, and as the triumph of a (basically Greek) aristocratic aestheticism in which the “pathos of distance” between great men and “herd animals” is accepted and recognized (*ibid.*, 499ff.), will be treated in the rest of this chapter. For Nietzsche does have a notion that egalitarian mediocrity should never be able to beat down creative “will to power” in Goethe or Raphael, that justice *means* acknowledging serious adult creative genius (*ibid.*, especially 540–1). This notion of justice as “creative willpower acknowledged” is most brilliantly defended by Nietzsche in *Twilight of the Idols*, which views the egalitarian French Revolution as a levelling nightmare and Rousseau as an “abortion,” and which insists that finite adult creativity must not be “squandered” on politics or law (*ibid.*, 543). Nietzsche, then, offers an anti-politics and an anti-

law, as well as a deeply paradoxical “philosophy of philosophy”—but he does have a theory of justice which is a striking inversion of the Christian egalitarianism which he thought had wrecked the ancient Greek acknowledgement of aesthetic power (ibid.; see Nietzsche 2000 and 2003, *passim*). If, for Nietzsche, we can get beyond good and *evil* (as conceived mainly in Christian thought, “the metaphysics of the hangman”; see Nietzsche 1954e, 499–500), we can hope to recover the Greek distinction between good and bad: good and bad poetry, good and bad painting, good and bad music (*Nietzsche contra Wagner*: Nietzsche 1954d, 673–5). First, however, dominant Christian egalitarianism (and its “underhanded offshoot,” democracy) must be exposed for what it really is: “the revolt of everything that crawls against everything that has height” (ibid.).

### 16.2. Law as Christian Egalitarianism “Rationalized”

Though Nietzsche’s radical view of philosophy as “desires of the heart” defended with “reasons” sought *ex post facto* separates him from much of Western philosophy, from the pre-Socratics to Rawls (though not from Pascal, Marx or Freud), his notion that Christianity and especially Christian egalitarianism (“the equality of souls in the sight of God”) is *the* calamity which makes respect for the “pathos of distance” not just wrong but impossible has a history—a weaker history than in Nietzsche, but a history nonetheless. Machiavelli, for example, 350 years before Nietzsche wrote, had objected that Christianity tended to make men weak and timid and guilt-ridden through its insistence on humility and self-abnegation, and that Christianity’s division of human experience into “this world” and “the other world” had made men neglect the only thing that was assuredly real, namely this world and the “greatness” that might be achieved in it if bold men could bring themselves to act “against faith” and “against charity” (Machiavelli 1950b, chap. 15). (Hence Nietzsche’s amusing assertion that “my cure from all Platonism” is to be found in Thucydides and in Machiavelli’s *Il Principe*—a work “most closely related to myself by its unconditional will not to deceive oneself” by seeing “reason” manifest in “morality”; Nietzsche 1954e, 534ff.). But a kind of (weaker) anti-Christianity is to be found in the Rousseau whom Nietzsche so deeply detested—the Rousseau who could say (in *Lettres écrites de la montagne*, 1764, chap. 3) that Christian otherworldliness brought about “good men” who were “bad citizens” (quite unlike the “Spartan mother” in *Émile*); and it is found also in the J. S. Mill who could say that hypocritical Victorians “look round to Mr. A and Mr. B to see how far to go in obeying Christ” (Mill 1989b, 43). Nietzsche, however, made more of anti-Christianity than any other Western philosopher, and even insisted that some modern social doctrines which do not seem to be obviously Christian, such as socialism, really are covert or “underhanded” Christianity (Nietzsche 1954e, 530ff.).

The essential idea in Nietzsche as a social theorist is that modern society is held together, not by morality traditionally understood, but by guilt; in fact, Nietzsche reverses the usual order of morality and guilt, and makes the former dependent on the latter. For Nietzsche the modern social world is made up of timid and weak-willed, uncreative men who cannot endure the possibility that anyone is superior to them: superiority is something they hate, and more particularly resent (*ibid.*, *passim*). They feel resentment towards all those who might be or become great, who might create (out of themselves) beautiful or superior things; and out of this plebeian resentment of natural aristocracy they draw or spin several “doctrines”: equality, humility, self-effacement. All of these merely negative “virtues”—for Nietzsche really plebeian vices—they impose as if they were objective moral standards (“categorical imperatives”) on an entire society, in order to make sure that no one will rise above their own banal, trivial, tedious level (*ibid.*). Those who do assert themselves, who try to develop their own sense of selfhood, of creativity, of strong individuality, are made to feel guilty for doing so; and most men are not strong enough to stand up to general social hatred and resentment of superior merit. They succumb; they relent; they even internalize the “herd-animal morality” of Christian societies, so that ultimately they lose even their critical awareness of *what* is good and bad. But in losing their awareness of what is good and bad, they become aware through social force—of what is good and “evil”: That is, they no longer know what is great in music, in philosophy, in self-development, but they do know what the “herd-animal” hates and fears and resents. And what that animal hates and fears and resents is what he calls “evil” (*ibid.*). But there is, for Nietzsche, no “evil” as conceived by Augustine or Aquinas or Kant: The distinction between good and bad—fundamentally an aesthetic distinction—is what matters; the idea of evil is a trick which the mediocre and the fearful use to enslave the potentially powerful by guilt (as Callicles had violently argued in Plato’s *Gorgias*, 416a ff.). In a spirit of pure resentment, pure revenge, the herd-animal equates justice [*Recht*] with equality, since equality is the only “principle” which can embrace the herd-animal; equality involves precisely the abolition of all distinction, all discernment, all judgment.

Today, [...] when only the herd animal is honored and dispenses honors in Europe, and when “equality of rights” could all too easily be converted into an equality in violating rights—by that I mean, into a common war on all that is rare, strange, or privileged, on the higher man, the higher soul, the higher duty, the higher responsibility, and on the wealth of creative power and mastery—today the concept of “greatness” entails being noble, wanting to be by one-self, being capable of being different, standing alone, and having to live independently; and the philosopher will betray something of his own ideal when he posits: “He shall be the greatest who can be the loneliest, the most hidden, the most deviating, the human being beyond good and evil, the master of his virtues, he that is overrich in will. Precisely this should be called *greatness*; to be capable of being as manifold as whole, as wide as full.” And to ask this once more: today—is greatness *possible*? (Nietzsche 1954c, 446)



For Nietzsche there have been, historically, a number of social systems which rest on resentment, revenge, mediocrity and self-abnegation (rationalized into “justice” and “virtue”); but of these, in his view, Christianity is incomparably the worst. Most fundamentally, it draws a distinction—entirely fanciful—between “this world” and a better, “higher” world—and then uses this pernicious distinction to revile and slander *this* life, which is the only real one:

Third proposition. To invent fables about a world “other” than this one has no meaning at all, unless an instinct of slander, detraction and suspicion against life has gained the upper hand in us: In that case, we avenge ourselves against life with a phantasmagoria of “another,” a “better” life. Fourth proposition. Any distinction between a “true” and an “apparent” world—whether in the Christian manner or in the manner of Kant (in the end, an under-handed Christian)—is only a suggestion of decadence, a symptom of the decline of life. (Nietzsche 1954e, 499ff.)

And then Nietzsche goes on to describe the worst “invented fable,” namely the transcendental other-worldliness which begins with Plato and finally expands into “Christianity”:

How the “true world” finally became a fable:

The History of an Error

1. The true world—attainable for the sage, the pious, the virtuous man; he lives in it, he is it. (The oldest form of the idea, relatively sensible, simple, and persuasive. A circumlocution for the sentence, “I, Plato, am the truth.”)
2. The true world—unattainable for now, but promised for the sage, the pious, the virtuous man (“for the sinner who repents”). (Progress of the idea: It becomes more subtle, insidious, incomprehensible—it becomes female, it becomes Christian.)
3. The true world—unattainable, indemonstrable, unpromisable; but the very thought of it—a consolation, an obligation, an imperative. (At bottom, the old sun, but seen through mist, and skepticism. The idea has become elusive, pale, Nordic, Königsbergian.)
4. The true world—unattainable? At any rate, unattained. And being unattained, also unknown. Consequently, not consoling, redeeming, or obligating: How could something unknown obligate us? (Gray morning. The first yawn of reason. The cockcrow of positivism.)
5. The “true” world—an idea which is no longer good for anything, not even obligating—an idea which has become useless and superfluous—consequently, a refuted idea: Let us abolish it! (Bright day; breakfast; return of bon sens and cheerfulness; Plato’s embarrassed blush; pandemonium of all free spirits.)
6. The true world—we have abolished. What world has remained? The apparent one perhaps? But no! With the true world we have also abolished the apparent one. (Noon; moment of the briefest shadow; end of the longest error; high point of humanity; INCIPIT ZARATHUSTRA). (Ibid.)

The ironic lightness of “How the ‘True World’ Finally Became a Fable” shows Nietzsche at his deft best, as a brilliant satirist. Sometimes, however, his sheer hatred of any Christian-Platonic “beyond” broke out into a more extreme, even ferocious, form—above all in his very late essay *The Antichrist*:

When one places life's center of gravity not in life but in the "beyond"—in nothingness—one deprives life of its center of gravity altogether. The great lie of personal immortality destroys all reason, everything natural in the instincts—whatever in the instincts is beneficent and life-promoting or guarantees a future now arouses mistrust. To live so that there is no longer any sense in living, that now becomes the "sense" of life. Why communal sense, why any further gratitude for descent and ancestors, why cooperate, trust, promote, and envisage any common welfare? Just as many "temptations," just as many distractions from the "right path"—"one thing is needful." (Nietzsche 1954a, 623ff.)

And then the argument of *The Antichrist* takes an even more angry and indignant tone:

That everyone as an "immortal soul" has equal rank with everyone else, that in the totality of living beings the "salvation" of every single individual may claim eternal significance, that little prigs and three-quarter-madmen may have the conceit that the laws of nature are constantly broken for their sakes—such an intensification of every kind of selfishness into the infinite, into the impertinent, cannot be branded with too much contempt. And yet Christianity owes its triumph to this miserable flattery of personal vanity: It was precisely all the failures, all the rebellious-minded, all the less favored, the whole scum and refuse of humanity who were thus won over to it. The "salvation of the soul"—in plain language: "The world revolves around me." (Ibid.)

And last of all, *The Antichrist* insists that the whole of modern politics and law is the underhanded offshoot of plebian "selfishness" and "vanity":

The poison of the doctrine of "equal rights for all"—it was Christianity that spread it most fundamentally. Out of the most secret nooks of bad instincts, Christianity has waged war unto death against all sense of respect and feeling of distance between, man and man, that is to say, against the presupposition of every elevation, of every growth of culture; out of the *ressentiment* of the masses it forged its chief weapon against us, against all that is noble, gay, high-minded on earth, against our happiness on earth. "Immortality" conceded to every Peter and Paul has so far been the greatest, the most malignant, attempt to assassinate noble humanity.

And let us not underestimate the calamity which crept out of Christianity into politics. Today nobody has the courage any longer for privileges, for masters' rights, for a sense of respect for oneself and one's peers—for a pathos of distance. Our politics is sick from this lack of courage. (Ibid.)

The distinction between "two worlds," however, is not the only perversion which Nietzsche finds in Christian/Platonic doctrine. Equally objectionable, in his view, is the doctrine of the freedom of the will, which (according to Nietzsche) was concocted or fabricated solely that men might be responsible for their acts—that is, *guilty*.

The error of free will. Today we no longer have any pity for the concept of "free will": We know only too well what it really is—the foulest of all theologians' artifices, aimed at making mankind "responsible" in their sense, that is, dependent upon them. Here I simply supply the psychology of all "making responsible."

Wherever responsibilities are sought, it is usually the instinct, of wanting to judge and punish which is at work. Becoming has been deprived of its innocence when any being-such-and-such is traced back to will, to purposes, to acts of responsibility: The doctrine of the

will has been invented essentially for the purpose of punishment, that is, because one wanted to impute guilt. The entire old psychology, the psychology of will, was conditioned by the fact that its originators, the priests at the head of ancient communities, wanted to create for themselves the right to punish—or wanted to create this right for God. Men were considered “free” so that they might be judged and punished—so that they might become guilty: consequently, every act had to be considered as willed, and the origin of every act had to be considered as lying within the consciousness (and this the most fundamental counterfeit in psychology was made the principle of psychology itself). Today, as we have entered into the reverse movement and we immoralists are trying with all our strength to take the concept of punishment out of the world again, and to cleanse psychology, history, nature, and social institutions and sanctions of them; there is in our eyes no more radical opposition than that of the theologians, who continue with the concept of a “moral world-order” to infect the innocence of becoming by means of “punishment” and “guilt.” Christianity is the metaphysics of the hangman. (Nietzsche 1954e, 499ff.)

All of this leads, naturally enough, to Nietzsche’s radical rejection of morality—and not just particular moral doctrines (such as “Christian Platonism”), but of any morality which tries to define categorically what human purpose is or ought to be: “Man is not the effect of some special purpose, of a will, an end; nor is he the object of an attempt to attain an ‘ideal of humanity’ [...] We have invented the concept of ‘end’ [*Zweck*]: in reality there is no end” (ibid.). (Lest anyone should think that Nietzsche is advocating “doing whatever one wants,” it should hastily be added that it is precisely self-control which would make “morality” unnecessary: Goethe or Heine or Raphael would not squander precious, finite creative energy on the mere oppression of the ungifted, the untalented. See ibid., 508–9.)

Of all received moralities, Christianity is for Nietzsche the most objectionable, because it directly denies the value of all true values: strength, creative willpower, radical independence, self-assertion. A “noble” civilization, in Nietzsche’s view, will value these true values; hence the need for a “transvaluation of all values”—and most especially of Christian values.

Strong ages, noble cultures, consider pity, “neighbor-love,” and the lack of self and self-assurance something contemptible. Ages must be measured by their positive strength—and then that lavishly squandering and fatal age of the Renaissance appears as the last great age; and we moderns, with our anxious self-solicitude and neighbor-love, with our virtues of work, modesty, legality, and scientism—accumulating, economic, machinelike—appear as a weak age. Our virtues are conditional on, are provoked by, our weaknesses. “Equality,” as a certain factual increase in similarity, which merely finds expression in the theory of “equal rights,” is an essential feature of decline. The cleavage between man and man, status and status, the plurality of types, the will to be oneself, to stand out—what I call the pathos of distance; that is characteristic of every strong age. The strength to withstand tension, the width of the tensions between extremes, becomes ever smaller today; finally, the extremes themselves become blurred to the point of similarity. (Ibid., 534ff.)

Nietzsche then goes on to draw very pointed political-legal conclusions from the notion that “equal rights” is a mere legal reflection of a more fundamental psychological reality, namely *weakness*:

All our political theories and constitutions—and the “German Reich” is by no means an exception—are consequences, necessary consequences, of decline; the unconscious effect of decadence has assumed mastery even over the ideals of some of the sciences. My objection against the whole of sociology in England and France remains that it knows from experience only the forms of social decay, and with perfect innocence accepts its own instincts of decay as the norm of sociological value-judgments. The decline of life, the decrease in the power to organize, that is, to separate, tear open clefts, subordinate and super-ordinate—all this has been formulated as the ideal in contemporary sociology. Our socialists are decadents, but Mr. Herbert Spencer is a decadent too: He considers the triumph of altruism desirable. (Ibid.)

Socialism—which Nietzsche abusively called “anarchism,” for no very good reason—was simply (for him) a secularized, modernized, scientized version of the Christian hatred of greatness, originality, and achievement; it was, in effect, the equality of all souls before God, *minus* God.

Christian and anarchist. When the anarchist, as the mouthpiece of the declining strata of society, demands with a fine indignation what is “right,” “justice,” and “equal rights,” he is merely under the pressure of his own uncultured state, which cannot comprehend the real reason for his suffering—what it is that he is poor in life. A causal instinct asserts itself in him: it must be somebody’s fault that he is in a bad way.

Also, the “fine indignation” itself soothes him; it is a pleasure for all wretched devils to scold: It gives a slight but intoxicating sense of power. Even plaintiveness and complaining can give life a charm for the sake of which one endures it: there is a fine dose of revenge in every complaint; one charges one’s own bad situation, and under certain circumstances even one’s own badness, to those who are different, as if that were an injustice, a forbidden privilege. “If I am canaille, you ought to be too”—on such logic are revolutions made. [...]

The Christian and the anarchist are both decadents. When the Christian condemns, slanders, and besmirches “the world”; his instinct is the same as that which prompts the socialist worker to condemn, slander, and besmirch society. The “last judgment” is the sweet comfort of revenge—the revolution, which the socialist worker also awaits, but conceived as a little farther off. The “beyond”—why a beyond, if not as a means for besmirching this world? (Ibid.)

Justice, if there is such a thing, cannot rest on equality, which is only plebian resentment rationalized (sometimes in the “underhanded” Kantian form of equal respect for all persons as “objective ends”); justice must rest on a simple acceptance and recognition [*Anerkennung*] of natural endowments and talents—it must accept the “pathos of distance.”

The doctrine of equality! There is no more poisonous poison anywhere: For it seems to be preached by justice itself, whereas it really is the termination of justice. “Equal to be equal, unequal to be unequal”—that would be the true slogan of justice; and also its corollary: “Never make equal what is unequal.” That this doctrine of equality was surrounded by such gruesome and bloody events, that has given this “modern idea” par excellence a kind of glory and fiery aura so that the Revolution as a spectacle has seduced even the noblest spirits. In the end, that is no reason for respecting it any more. I see only one man who experienced it as it must be experienced, with nausea—Goethe. (Ibid., 552–3)

And then Nietzsche goes on to mount a ferocious polemic against the French Revolution as a phenomenon which used *égalité* to destroy *liberté* and misconceive *fraternité*: above all in the thought of Jean-Jacques Rousseau.

But Rousseau—to what did he really want to return? Rousseau, this first modern man, idealist and rabble in one person—one who needed moral “dignity” to be able to stand his own sight, sick with unbridled vanity and unbridled self-contempt. This miscarriage, couched on the threshold of modern times, also wanted a “return to nature”; to ask this once more, to what did Rousseau want to return? I still hate Rousseau in the French Revolution: It is the world-historical expression of this duality of idealist and rabble. The bloody farce which became an aspect of the Revolution, its “immorality,” are of little concern to me: What I hate is its Rousseauian morality—the so-called “truths” of the Revolution through which it still works and attracts everything shallow and mediocre. (Ibid.)

All of these judgments of Christianity (and of its “underhanded” political-legal offshoots such as legal “equal rights” and “democracy”), are perhaps harsh enough; but in *The Antichrist*, which he wrote shortly before becoming permanently insane, Nietzsche rose to a height of vituperation, of incandescent outrage, unequalled even by the more extreme parts of *Twilight of the Idols*:

With this I am at the end and I pronounce my judgment I condemn Christianity. I raise against the Christian church the most terrible of all accusations that any accuser ever uttered. It is to me the highest of all conceivable corruptions. It has had the will to the last corruption that is even possible. The Christian church has left nothing untouched by its corruption; it has turned every value into an un-value, every truth into a lie, every integrity into a vileness of the soul. Let anyone dare to speak to me of its “humanitarian” blessings! To abolish any distress ran counter to its deepest advantages: it lived, on distress, it created distress to eternalize itself.

The worm of sin, for example: With this distress the church first enriched mankind. The “equality of souls before God,” this falsehood, this pretext for the rancor of all “the base-minded, this explosive of a concept which eventually became revolution, modern idea, and the principle of decline of the whole order of society—is Christian dynamite. “Humanitarian” blessings of Christianity! To breed out of *humanitas* a self-contradiction, an art of self-violation, a will to lie at any price, a repugnance, a contempt for all good and honest instinct! Those are some of the blessings of Christianity!

Parasitism as the only practice of the church; with its ideal of anemia, of “holiness,” draining all blood, all love, all hope for life; the beyond as the will to negate every reality; the cross as the mark of recognition for the most subterranean conspiracy that ever existed—against health, beauty, whatever has turned out well, courage, spirit, graciousness of the soul, against life itself.

This eternal indictment of Christianity I will write on all walls, wherever there are walls—I have letters to make even the blind see.

I call Christianity the one great curse, the one great innermost corruption, the one great instinct of revenge, for which no means is poisonous, stealthy, subterranean, small enough—I call it the one immortal blemish of mankind.

And time is reckoned from the *dies nefastus* with which this, calamity began—after the first day of Christianity! Why not rather after its last day? After today? Revaluation of all values. (Nietzsche 1954a, 655–6)

Nietzsche’s general view is, perhaps, more lightly and ironically summed up in one of the “maxims” which he drew up by the dozen, being deeply suspicious of all philosophical “systems” (“the will to a system is a lack of integrity”): “When a worm is stepped on, it doubles up. That is clever; in that way it lessens the likelihood of being stepped on again—or, in the language of morality, *humility*” (Nietzsche 1954b, 64ff.).

What, then, can one make of Nietzsche as a “political-legal” thinker, in the face of such overwhelming opposition to (and contempt for) all modern mass phenomena? One can say at least these things: politics and law, for Nietzsche, are not of fundamental importance; they exist to serve the small and wearisome needs of cramped and stultified men who want to succeed in one thing only—namely being certain that no one succeeds in anything at all (universal failure as “equal justice for all”). As a result, the political-legal order is not the great ornament of civilization which many thinkers thought it to be (Aristotle and Kant, *inter alia*, in very different ways) (see especially Kant 1952, pt. II, secs. 81–5; and Aristotle, *Politics*, I, 1240a ff.) In fact, in Nietzsche’s view, great cultural ages (shaped by adult creativity) occur only when men’s finite psychic energies are not syphoned off into mediocre political-legal adventurism:

In the end, no one can spend more than he has: that is true of the individual, it is true of a people. If one spends oneself for power, for power politics, for economics, world trade, parliamentarianism, and military interests—if one spends in this direction the quantum of understanding, seriousness, will, and self-overcoming which one represent, then it will be lacking for the other direction.

Culture and the state—one should not deceive oneself about this—are antagonists: “Kultur-Staat” is merely a modern idea. One lives off the other, one thrives at the expense of the other. All great ages of culture are ages of political decline: what is great culturally has always been unpolitical, even anti-political. Goethe’s heart opened at the phenomenon of Napoleon—it closed at the “Wars of Liberation.” At the same moment when Germany comes up as a great power, France gains a new importance as a cultural power. Even today much new seriousness, much new passion of the spirit, have migrated to Paris; the question of pessimism, for example, the question of Wagner, and almost all psychological and artistic questions are there weighed incomparably more delicately and thoroughly than in Germany—the Germans are altogether incapable of this kind of seriousness. In the history of European culture the rise of the “Reich” means one thing above all: a displacement of the center of gravity. It is already known everywhere: In what matters most—and that always remains culture—the Germans are no longer worthy of consideration. One asks: Can you point to even a single spirit who counts from a European point of view, as your Goethe, your Hegel, your Heinrich Heine, your Schopenhauer counted? That there is no longer a single German philosopher—about that there is no end of astonishment. (Nietzsche 1954e, 552–3)

What value, then, if any, has a legal-political system for Nietzsche? Some legal-political systems can have a (limited, secondary) value, but most modern ones do not. Rome was great (*selon* Nietzsche) because she valued great men; but these great men valued themselves too much to squander their energies on the mere oppression of the many. Great men, in Nietzsche’s view, can afford to be magnanimous because they have no need to hold anyone else in their thrall; one can trust them with everything because they have everything—within themselves. Their mastery of adversity, their creation of the beautiful and the valuable out of nothing (the only *real* creation *ex nihilo*), their happy knowledge of the difference between good and bad (uncorrupted by the false distinction between good and evil)—these will be enough for

them. Nietzsche was extremely doubtful that the kind of society which recognized greatness without submitting to tyranny could be revived in modernity; but at least (he thought) he could show modern Christian-egalitarian Europeans how far they had gone wrong. Thus he thought of himself principally as a great psychologist, liberating men from long-standing errors; and in the remarkable "Preface" to *Twilight of the Idols*, Nietzsche says that the whole of his work can be seen as

a recreation, a spot of sunshine, a leap sideways into the idleness of a psychologist. Perhaps a new war, too? And are new idols sounded out? This little essay is a great declaration of war; and regarding the sounding out of idols, this time they are not just idols of the age, but eternal idols, which are here touched with a hammer as with a tuning fork: There are altogether no older, no more convinced, no more puffed-up idols—and none more hollow. That does not prevent them from being those in which people have the most faith; nor does one ever say "idol," especially not in the most distinguished instance. (Ibid., 465ff.)

Nietzsche, then, is not so much a philosopher as a *psychologist* of law: Prevailing notions of "justice" and "equal rights" are merely plebian resentment and fear rationalized into (so-called) *iurisprudentia*. Modern law, like all Christian-egalitarian social phenomena, is simply "the revolt of everything that crawls" mis-conceived as an "objective end." And this is why Nietzsche's attack on law is the most brilliantly *radical* in the history of legal thought.

## Chapter 17

### NEO-KANTIAN EPILOGUE: RAWLS AND HABERMAS

#### 17.1. The Legal Thought of John Rawls

John Rawls (1921–2002) is of course celebrated as the author of the most famous work on “justice” produced in the twentieth century (*A Theory of Justice*, 1971). But he also wrote about “the rule of law,” in a (mainly neglected) subsection of his *Justice* book. The reason for this neglect is not far to seek: For while Rawls’ theory of justice is the most famous expansion of a (basically) Kantian view of *Recht* since Kant’s own *Metaphysik der Sitten* (1797), what Rawls says (by contrast) about the “rule of law” is sound and solid and orthodox but neither very original nor very striking. His theory of justice ranks him with the great political thinkers from Plato to Marx; but his writings on law are more reasonable and reliable than extraordinary.

Rawls’ theory of justice is descended from a branch or part of Kantianism: Namely the part in which Kant urges that just laws must be such that “mature, rational beings” could in principle consent to them (under the “Idea” of the social contract). While this demi-Rousseauian, contractarian side of Kant is perfectly real and authentic, it has little (at least obviously) to do with Kant’s celebrated *reine praktische Teleologie* (“pure practical teleology”), according to which persons count as “objective ends in themselves” who should be respected as members of the Kingdom of Ends, never used merely as “means” to the “relative,” arbitrary ends of others. (In this “teleological” vein Kant frequently views law or “public legal justice” as the partial realization of moral ends—such as non-murder—from merely legal “incentives” or motives.) Rawls, while perfectly knowledgeable about Kant’s “moral teleology,” had doubts about retaining (intact) Kant’s whole system of “transcendental idealism” and *reine praktische Teleologie*; hence Rawls’ famous insistence (in *The Basic Structure as Subject*: Rawls 1977) that in order to retain the “force” of a Kantian idea of justice, we must “detach” that justice from its “background” in transcendental idealism and give it a “procedural” (contractarian) interpretation<sup>1</sup>—the notion of what mature, rational beings *would* agree to if their consent were asked. (And this, for Rawls, makes Kant congruent with a “reasonable empiricism,” rather than a Platonic-Leibnizian rationalist metaphysician.<sup>2</sup>) What matters for Rawls is that Kant be viewed as a “deepened Rousseau”—as a more adequate

<sup>1</sup> Rawls 1977, 38ff. The best critic of Rawls’ efforts to “detach” Kant is Onora O’Neill. See O’Neill 1988, 1989, 1991, 1992, 1996, 1997, 2000, and 2001.

<sup>2</sup> See Rawls 1989, as well as his lectures on Leibniz in Rawls 2000.



successor to the author of *Du contrat social* (see Rawls 1980, 515ff., especially 554ff.)

Whatever one makes of Rawls' highly controversial "detaching" of Kantian justice from its philosophical "background," what is certain is that Rawls does indeed follow the contractarian *side* of Kant in insisting that justice is that set of principles that would be chosen by free and equal rational beings in an "original position" (draped in a "veil of ignorance" which banishes corrupting particular knowledge of one's race, gender, nation, and position in history) (Rawls 1971, 11–4). And Rawls insists, of course, that rational beings (so situated) would choose, as the heart of justice, (a) the "greatest equal liberty" (as the pre-condition for realizing all subjective ends), and (b) equality in distributive justice unless some deviation from equality would be universally advantageous and (especially) most advantageous to the most disadvantaged (the so-called "difference principle") (ibid., 65ff. and then 542ff., for "the priority of liberty"<sup>3</sup>). What seems clear is that while Rawls' demi-Kantian theory of justice (as something rationally chosen) is striking and famous, his reflections on the "rule of law" (as will soon be seen) are much more conventional, if also unexceptionable. The wise course, then, will be to discuss (briefly) Rawls' well-known "theory of justice," and afterwards to focus on his much less familiar thoughts on law.

## 17.2. Contractarianism, Rousseau, and Kant

Near the beginning of *A Theory of Justice*, Rawls makes it clear that he is building on an inherited Rousseauian-Kantian foundation, according to which principles of justice are the object of rational choice:

My aim is to present a conception of justice which generalizes and carries to a higher level of abstraction the familiar theory of the social contract as found, say, in Locke, Rousseau, and Kant. In order to do this we are not to think of the original contract as one to enter a particular society or to set up a particular form of government. Rather, the guiding idea is that the principles of justice for the basic structure of society are the object of the original agreement. They are the principles that free and rational persons concerned to further their own interests would accept in an initial position of equality as defining the fundamental terms of their association. These principles are to regulate all further agreements; they specify the kinds of social cooperation that can be entered into, and the forms of government that can be established. This way of regarding the principles of justice I shall call justice as fairness. (Rawls 1971, 11)

And he goes on to insist that, if rational choice of principles of justice is to be possible, those who are choosing must be (imaginatively) deprived of corrupting particular knowledge (knowledge of age, gender, class, nation) which keeps rational beings from acknowledging general principles that could be embraced by all other equal selves:

<sup>3</sup> Like J. S. Mill and Isaiah Berlin, Rawls wants to "privilege" liberty. For Rawls on J. S. Mill see Rawls 2007.

Among the essential features of this situation is that no one knows his place in society, his class position or social status, nor does any one know his fortune in the distribution of natural assets and abilities, his intelligence, strength, and the like. I shall even assume that the parties do not know their conceptions of the good or their special psychological propensities. The principles of justice are chosen behind a veil of ignorance. This ensures that no one is advantaged or disadvantaged in the choice of principles by the outcome of natural chance or the contingency of social circumstances. Since all are similarly situated and no one is able to design principles to favor his particular condition, the principles of justice are the result of a fair agreement or bargain. For given the circumstances of the original position, the symmetry of everyone's relations to each other, this initial situation is fair between individuals as moral persons, that is, as rational beings with, their own ends and capable, I shall assume, of a sense of justice. The original position is, one might say, the appropriate initial status quo, and thus the fundamental agreements reached in it are fair. This explains the propriety of the name "justice as fairness": It conveys the idea that the principles of justice are agreed to in an initial situation that is fair. (Ibid.,12–3)

If, for Rawls, principles of justice can be rationally chosen behind a "veil of ignorance" which brackets out the "particular" in favor of the "general" — here Rousseau is at least as weighty as Kant<sup>4</sup> — then a society ruled (for all future time) by chosen, general justice-principles will come as close as possible to being a "voluntary" scheme: something important in a contractarian view, which understands just government as the artificial product of the "voluntary agreement" of free and equal adult moral agents (as in Locke's insistence that "voluntary agreement gives political power to governors," or in Rousseau's claim that "civil association is the most voluntary act in the world").<sup>5</sup>

No society can, of course, be a scheme of cooperation which men enter voluntarily in a literal sense; each person finds himself placed at birth in some particular position in some particular society, and the nature of this position materially affects his life prospects. Yet a society satisfying the principles of justice as fairness comes as close as a society can to being a voluntary scheme, for it meets the principles which free and equal persons would assent to under circumstances that are fair. In this sense its members are autonomous and the obligations they recognize self-imposed. (Rawls 1971, 13)

Having set up a Lockean-Rousseauian-Kantian contractarian background, Rawls now goes on to indicate which principles of justice would be chosen by free and equal voluntary agents:

I shall now state in a provisional form the two principles of justice that I believe would be chosen in the original position:

First: each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others.

Second: social and economic inequalities are to be arranged so that they are both (a) reasonably expected to be to everyone's advantage, and (b) attached to positions and offices open to all. (Ibid., 65–6)

<sup>4</sup> For Rousseau's constant subordination of the merely *particulière* to the civic and *générale*, see Riley 1986, chap. 5.

<sup>5</sup> On these points see Riley 1982, chapters 3 and 4, and Riley 2006.

And, much later in *A Theory of justice*, Rawls finally reveals why the “greatest equal liberty” enjoys so-called lexical *priority* in his theory, why “beyond some point” it becomes irrational to trade away liberty for greater material benefits:

Now the basis for the priority of liberty is roughly as follows: As the conditions of civilization improve, the marginal significance for our good of further economic and social, advantages diminishes relative to the interests of liberty, which become stronger as the conditions for the exercise of the equal freedoms are more fully realized. Beyond some point it becomes and then remains irrational from the standpoint of the original position to acknowledge a lesser liberty for the sake of greater material means and amenities of office. Let us note why this should be so. First of all, as the general level of well-being rises (as indicated by the index of primary goods the less favored can expect) only the less urgent wants remain to be satisfied by further advances, at least insofar as men's wants not largely created by institutions and social forms are concerned. At the same time the obstacles to the exercise of the equal liberties decline and a growing insistence upon the right to pursue our spiritual and cultural interests asserts itself. Increasingly it becomes more important to secure the free internal life of the various communities of interests in which persons and groups seek to achieve, in modes of social union consistent with equal liberty, the ends and excellences to which they are drawn. In addition men come to aspire to some control over the laws and rules that regulate their association, either by directly taking part themselves in its affairs or indirectly through representatives with whom they are affiliated by ties of culture and social situation.

To be sure, it is not the case that when the priority of liberty holds, all material wants are satisfied. Rather these desires are not so compelling as to make it rational for the persons in the original position to agree to satisfy them by accepting a less than equal freedom. (Ibid., 542–3)

### 17.3. The Rule of Law in Rawls

With his general theory of justice in place, and with the “priority of liberty” established, Rawls now goes on to discuss “the rule of law” as something which defends the primacy of extensive, equal freedom. But, as will be seen, what Rawls says about the rule of law is comparatively conventional, and largely derived from H.L.A. Hart<sup>6</sup>—even though the rule of law defends that which has *absolute* priority in his thought (namely liberty). What Rawls says about the rule of law, indeed, might be found (more or less) in figures as radically different as Hobbes, Bentham, and Hart—an indication that what Rawls says—will be more “acceptable” (and widely accepted) than striking or freshly innovative.

I now wish to consider rights of the person as these are protected by the principle of the rule of law. As before my intention is not only to relate these notions to the principles of justice but to elucidate the sense of the priority of liberty. I have already noted (§10) that the conception of formal justice, the regular and impartial administration of public rules, becomes the rule of law when applied to the legal system. One kind of unjust action is the failure of judges and others in authority to apply the appropriate rule or to interpret it correctly. It is more illuminating in this connection to think not of gross violations exemplified by bribery and corruption, or the abuse of the legal system to punish political enemies, but rather of the subtle distortions of

<sup>6</sup> See Rawls' acknowledgement of Hart in Rawls 1971, 235ff.

prejudice and bias as these effectively discriminate against certain groups in the judicial process. The regular and impartial, and in this sense fair, administration of law we may call “justice as regularity.” This is a more suggestive phrase than “formal justice.”

Now the rule of law is obviously closely related to liberty. We can see this by considering the notion of a legal system and its intimate connection with the precepts definitive of justice as regularity. A legal system is a coercive order of public rules addressed to rational persons for the purpose of regulating their conduct and providing the framework for social cooperation. When these rules are just they establish a basis for legitimate expectations. They constitute grounds upon which persons can rely on one another and rightly object when their expectations are not fulfilled. If the bases of these claims are unsure, so are the boundaries of men’s liberties. (Rawls 1971, 235ff.)

Even though Rawls has insisted that “the rule of law is obviously closely related to liberty,” and that if the rule of law is corrupted or “unsure” then “so are the boundaries of men’s liberties,” and even though he has given “lexical *priority* to liberty (the most extensive equal liberty) as the first, over-riding principle of justice (“the first virtue of social institutions”), what Rawls actually goes on to say about the attributes or characteristics of “the rule of law” is conventional and familiar (though not of course unimportant). Rawls begins his account of the rule of law with a precept that might be found not just in Bentham or Hart, but even in Aristotle or St. Thomas:

Let us begin with the precept that ought implies can. This precept identifies several obvious features of legal systems. First of all, the actions which the rules of law require and forbid should be of a kind which men can reasonably be expected to do and to avoid. A system of rules addressed to rational persons to organize their conduct concerns itself with what they can and cannot do. It must not impose a duty to do what cannot be done. Secondly, the notion that ought implies can conveys the idea that those who enact laws and give orders do so in good faith. Legislators and judges, and other officials of the system, must believe that the laws can be obeyed; and they are to assume that any orders given can be carried out. Moreover, not only must the authorities act in good faith, but their good faith must be recognized by those subject to their enactments. Laws and commands are accepted as laws and commands only if it is generally believed that they can be obeyed and executed. If this is in question, the actions of authorities presumably have some other purpose than to organize conduct. Finally, this precept expresses the requirement that a legal system should recognize impossibility of performance as a defense, or at least as a mitigating circumstance. In enforcing rules a legal system cannot regard the inability to perform as irrelevant. It would be an intolerable burden on liberty if the liability to penalties was not normally limited to actions within our power to do or not to do. (Ibid., 236–7)

Here, as is evident, Rawls is discussing what might be called “the general idea of a (or indeed any) legal system,” rather than something specifically *Rawlsian*; almost everything he says might be found in Books III–V of the *Nicomachean Ethics* (1106b ff.), or in Questions 90–97 of the *Summa Theologica*. (Thus, while Rawls is the confessed heir of Locke, Rousseau and [Rousseauianized] Kant in his general theory of justice, his account of the nature of *law* has a wider, longer range of intellectual debts stretching back to antiquity and to medieval thought.)

Rawls next goes on to insist (quite conventionally) that the “rule of law” requires that like cases be treated alike:

The rule of law also implies the precept that similar cases be treated similarly. Men could not regulate their actions by means of rules if this precept were not followed. To be sure, this notion does, not take us very far. For we must suppose that the criteria of similarity are given by the legal rules themselves and the principles, used to interpret them. Nevertheless, the precept that like decisions be given in like cases significantly limits the discretion of judges and others in authority. The precept forces them to justify the distinctions that they make between persons by reference to the relevant legal rules and principles. In any particular case, if the rules are at all complicated and call for interpretation, it may be easy to justify an arbitrary decision. But as the number of cases increases, plausible justifications for biased judgments become more difficult to construct. The requirement of consistency holds of course for the interpretation of all rules and for justifications at all levels. Eventually reasoned arguments for discriminatory judgments become harder to formulate and the attempt to do so less persuasive. This precept holds also in cases of equity, that is, when an exception is to be made when the established rule works an unexpected hardship. But with this proviso: Since there is no clear line separating these exceptional cases, there comes a point, as in matters of interpretation, at which nearly any difference will make a difference. In these instances, the principle of authoritative decision applies, and the weight of precedent or of the announced verdict suffices. (Rawls 1971, 238–9)

The next aspect of “the rule of law” which Rawls treats, “no offense without a law,” makes it clear that his intellectual debts stretch back to Roman *jurisprudentia* and to received English common law:

The precept that there is no offense without a law (*Nullum crimen sine lege*), and the requirements it implies, also follow from the idea of a legal system. This precept demands that laws be known and expressly promulgated, that their meaning be clearly defined, that statutes be general both in statement and intent and not be used as a way of harming particular individuals who may be expressly named (bills of attainder), that at least the more severe offenses be strictly construed, and that penal laws should not be retroactive to the disadvantage of those to whom they apply. These requirements are implicit in the notion of regulating behavior by public rules. For if, say, statutes are not clear in what they enjoin and forbid, the citizen does not know how he is to behave. Moreover, while there may be occasional bills of attainder and retroactive enactments, these cannot be pervasive or characteristic features of the system, else it must have another purpose. A tyrant might change laws without notice, and punish (if that is the right word) his subjects accordingly, because he takes pleasure in seeing how long it takes them to figure out what the new rules are from observing the penalties he inflicts. But these rules would not be a legal system, since they would not serve to organize social behavior by providing a basis for legitimate expectations. (Ibid., 239)

In connection with this aspect of the rule of law, *Nullum crimen sine lege*, Rawls (more than is usual with him) brings out the importance of liberty, the highest principle of Rawlsian justice:

Now the connection of the rule of law with liberty is clear enough. Liberty, as I have said, is a complex of rights and duties defined by institutions. The various liberties specify things that we may choose to do, if we wish, and in regard to which, when the nature of the liberty makes it appropriate, others have a duty not to interfere. But if the precept of no crime without a law is violated, say by statutes being vague and imprecise, what we are at liberty to do is likewise

vague and imprecise. The boundaries of our liberty are uncertain. And to the extent that this is so, liberty is restricted by a reasonable fear of its exercise. The same sort of consequences follow if similar cases are not treated similarly, if the judicial process lacks its essential integrity, if the law does not recognize impossibility of performance as a defense, and so on. (Ibid.)

While Rawls now goes on to discuss further aspects of “the rule of law” (such as “no punishment without a crime”) (ibid., 240ff.), what he says on this point is (again) long-familiar from jurisprudential theory from Aristotle to H.L.A. Hart<sup>7</sup>. Eventually, indeed, it becomes clear that Rawls wants to be sound and solid and traditional when the rule of law is at issue: If he wants brilliantly to enlarge and expand the Lockean-Rousseau-Kantian inheritance in his famous *Theory of Justice*, by contrast he just keeps unaltered “inheritance” in his theory of law. While the rule of law shores up liberty, and the greatest equal liberty comes first, Rawls is content to echo his jurisprudential ancestors in legal theory and seems to have no wish to transform law in the way that he famously transformed Rousseau and Kant in *Justice*. Thus, there is in Rawls, jurisprudential traditionalism in aid of radically innovative “justice.”

#### 17.4. Jürgen Habermas

Jürgen Habermas and John Rawls are comparable as philosophers of law because they both (in some sense) “descend” from Kant—and more precisely from “left-Kantianism.” Rawls’ demi-Kantianism sets aside or minimizes “transcendental idealism”<sup>8</sup> and moral “teleology” (the notion of persons as “objective ends”) and magnifies Kant’s claim (in the *Rechtslehre* and in *Theory and Practice*) that “just” laws are those which could in principle be consented to by “mature, rational beings”; hence for Rawls Kant is the “high point” of an “Ideal” contractarian tradition, a “deepened Rousseau” who thinks that justice is “constructed” by a contractarian “procedure” (Rawls 1971, chap. 40) (not just “given” by a *Faktum der Verkunft* or objective *Zwecke*).

While Habermas would certainly not *reject* the notion of the “consent” of mature, rational beings—his concern with “unimpaired” democratic communication permits no such rejection—Habermas’ notion of law descends not so much from the *Rechtslehre* and from *Theory and Practice* as from Kant’s *Critique of Judgment*, and more exactly from the Kantian argument in “Aesthetic Judgment,” 38–40, that “universal communicability” of shared truth increases the worth of that truth “to an almost infinite degree.”<sup>9</sup> It is not uncommon, in post-War neo-Kantianism, to say that the valuable part of Kant lies in unim-

<sup>7</sup> See ibid., 235ff., where Rawls’ jurisprudential traditionalism is quite clear.

<sup>8</sup> Rawls 1977, 58ff. For Rawls’ “constructivist” reading of Kant, see Rawls 2000, 238ff.

<sup>9</sup> Kant 1952, Part I, “Aesthetic Judgment,” secs. 38–40. For a critique of all efforts to derive Kant’s so-called “unwritten” legal-political theory from his idea of aesthetic judgment, see Riley 1992.

paired, “transparent” communicability; Hannah Arendt (1982, 53ff.), indeed, stresses this fully as much as Habermas. Thus Habermas himself insist not just on “consent,” but on a transparent “discourse” undistorted by prevailing power relations, so that law is a kind of “rational consensus.”

It was only with the publication of *Between Facts and Norms* (*Faktizität und Geltung*) in 1992 that Habermas finally made this notion of law as the outcome of rational consensus, free discourse, and unimpaired “intersubjectivity,” fully clear (Habermas 1996, *passim*). (Indeed in *Facts and Norms* Habermas insists that the “principle of morality” and the “principle of law” emerge “equiprimordially” [*gleichbursprünglich*] from the “principle of discourse”; *ibid.*, 138). And Habermas urges in *Facts and Norms* that *legitimate* laws are those that are arrived at and backed by “impartial reason” (democratic discourse), that “despotic” laws are those that are produced and backed only by partisan interests—what Rousseau would have called seductive *volontés particulières*.

The argument developed in *Between Facts and Norms* essentially aims to demonstrate that there is a conceptual or internal relation, and not simply a historically contingent association, between the rule of law and democracy [...] [T]he *democratic process* bears the entire burden of legitimation. It must simultaneously secure the private and public autonomy of legal subjects. This is because individual private rights cannot even be adequately formulated, let alone politically implemented, if those affected have not first engaged in public discussions to clarify which features are relevant in treating typical cases as alike or different, and then mobilized communicative power for the consideration of their newly interpreted needs. The proceduralist understanding of law thus privileges the communicative presuppositions and procedural conditions of democratic opinion—and will-formation as the sole source of legitimation. (*Ibid.*, 100–6; see especially 449–50)

(Habermas’ claim that there is a “conceptual” relation, not merely an historically “contingent association,” between “the rule of law and democracy” is of course a radical and disputable one: Indeed almost every important philosopher of law between Plato and Hegel, including Aristotle, Cicero, Augustine, Aquinas, Hobbes, and Kant, would reject it; and even Locke and Rousseau would accept it only with many qualifications.)

Laws, for Habermas, then, *must* be conceived as the outcome of a “democratic process of deliberation” (a phrase that Rawls could also accept) which interprets and applies rational principles—so that “consensus” achieved by an impartial, unimpaired discursive “procedure” yields the legitimacy of a law. As Habermas himself argues in *Between Facts and Norms*, a legal order

guarantees each legal person to claim to a fair procedure that in turn guarantees not certainty of outcome but a discursive clarification of the pertinent facts and legal questions [...] in which affected parties can be confident that only relevant reasons will be decisive, and not arbitrary ones[...] If we view existing law as an ideally coherent system of norms, then this *procedure-dependent certainty of law* can satisfy the expectations of a legal community intent on its integrity and oriented towards principles, such that each is guaranteed the rights to which he or she is entitled. (*Ibid.*, 220)

And this Habermasian characterization of legal “discourse” (rational intersubjectivity unimpaired by arbitrariness) is of course a version of discourse-in-general which Habermas had sketched out as early as *Knowledge and Human Interests* (1971): “Only in an emancipated society, whose members’ autonomy and responsibility have been realized, would communication [as in Kant’s *Judgment*] have developed into the non-authoritarian and universally practiced dialogue [discourse] from which our true idea [...] of consensus is always implicitly derived” (Habermas 1971, 268).

(Not that Habermas thinks that “law as an ideally coherent system of norms” is perfectly attainable, given “ideological” distortions and unequal power which impede the legal ideal: “We will never [fully] attain to this ideal of a coherent system of all valid norms,” and therefore existing, historically contingent law can only “represent” [*vorstellen*] that ideal, more or less: Habermas 1996, 163–4. The most that one can reasonably hope is that “a sufficient measure of legal certainty” will be “intersubjectively shared by all citizens and express a self-understanding of the legal community as a whole”; *ibid.*, 223.)

Of course, for Habermas, a “true” consensus about law, discursively arrived at in a “non-authoritarian” way that respects “autonomy and responsibility” (Kantian virtues!), needs some sort of enforcement mechanism, some way of seeing to it that *pacta sunt servanda*:

If precisely those [legal] norms are valid that deserve the rationally motivated agreement of all under the condition that actual compliance with the norm is *universal*, then no one can reasonably be expected to abide by valid norms insofar as this condition is not fulfilled. Each must be able to expect [*erwarten*] that everyone will observe valid norms. Valid norms represent reasonable expectations only if they can be actually enforced against deviant behavior. (*Ibid.*, 116)

(Habermas, then, for all his stress on “autonomy” and transparent democratic “discourse,” does not neglect the Hobbesian worry that “first performers” of rightful actions only “betray” themselves to the appetites of others unless *everyone* obeys, “universally” (Hobbes 1957, chap. 18). And even Kant had made roughly the same “Hobbesian” point in *Toward Eternal Peace*; Kant 1974b, 91ff.)

To be sure, one can still wonder—as does Habermas’ friend and colleague Karl-Otto Apel (2002, 17ff.)—whether the justness of law is sufficiently guaranteed by the unimpairedness of “communication” and discourse, by the absence of the “arbitrary” and “authoritarian”; but then Habermas, as an anti-metaphysical semi-Kantian, cannot appeal to the Kingdom of Ends or to a *respublica noumenon*. (He has, as it were, “cut away” the “transcendental” part of Kant that would *make* “discourse” be just. But this “cutting away” is characteristic of much, perhaps most, post-War “Kantianism”—it is a problem in Rawls and in Arendt, and even in Sartre,<sup>10</sup> as much in Habermas.)

<sup>10</sup> Especially in Sartre’s *Existentialism is a Humanism* (1954), which keeps Kantian “universalism” and “will,” but discards “reason-ordained objective ends [...] which we ought to have.”



Perhaps the most intelligently appreciative estimation of Habermas' "discourse-ethical" jurisprudence has been offered by Frank Michelman, in a helpful essay entitled, *The problem of Constitutional Interpretive Disagreement: Can "Discourse of Application" Help?* (Michelman 2002). For Habermas, Michelman urges, a "legal ordering" is not legitimate unless all of those subject to it

may with good reason regard themselves as authors of at least the regime's most basic, framing constitutional principles of individual liberty, equality and civic association, and procedural regularity. Given that the regime *is* one of positive legal ordering, there is only one way in which this may be possible. Those subject to the regime must, at all times, *be able to see already in force* a set of legally established, institutional arrangements that they, as participants in rational discourses, could find apt to the end of ensuring (insofar as institutional arrangements can ensure it) that the essential constitution is at all times subject to democratic-discursive checks for discursive-ethical validity. In other words, the essential legal constitution must be such as to ensure its own exposure to democratic-discursive checks, and these must be, recursively, checks for the property of constituting a set of legal arrangements for the democratic-discursive making and checking of legal arrangements, starting with itself. Such a guarantee must extend beyond laws governing formal political processes. It must extend beyond the standard liberal guarantees of basic private and political liberties. It must cover, as well, the so-called private law that basically structures daily life in civil society. (Michelman 2002, 132)

But the last word should of course be given to Habermas himself, in *Between Facts and Norms*:

[T]he claim to [legal] legitimacy requires decisions that are not only consistent with [...] the existing legal system. They are also supposed to be rationally grounded in the matter at issue so that all participants can accept them as rational decisions. Judges decide actual cases within the horizon of a present future, and their opinions claim validity in the light of rules and principles that are here and now accepted as legitimate. To this extent, the justifications must be emancipated from the contingencies of their historical genesis. (Habermas 1996, 126ff.)

How far law *can* be "emancipated" from historical contingencies and from the "ideological" distortions that impede intersubjective "transparency"—simply through the traditional "discourse" of autonomous agents, but without any "metaphysical" appeal to the Kingdom of Ends—remains of course *the* great worry in assessing Habermas' version of demi-Kantian jurisprudence. Whether Habermas (or Rawls or Arendt or Sartre) has "saved" enough of Kant is still the question:<sup>11</sup> For a great deal of post-1945 ethics and jurisprudence has wanted to keep Kantian practical conclusions (such as "equal respect for all persons") while "detaching" Kantian *Recht* from its "background in transcendental idealism."<sup>12</sup> But whether ethics and law can be "de-

<sup>11</sup> "Saved" is Habermas' own term; but his version of that salvation may inspire as much doubt as confidence: "The Kantian heritage [...] is saved, in pragmatist translation, by Peirce [...] [and] Rorty is most Kantian" (!) See Habermas 2002, 228.

<sup>12</sup> For "detaching" Kantian practical conclusions from their "background in transcendental idealism," see Rawls 1977 (as in footnote 1, *supra*).

tached”—like a fresco removed from a crumbling wall—is seriously questionable; a painted surface can be given a new “support,” but ethical-juridical conclusions follow from a “first philosophy” which is not replaceable. Whether “discourse” and “communicability” alone can generate “legitimate” law remains a serious Habermasian problem, and (more generally) a serious problem for all post-war “left Kantians” who want Kantianism without Kant.

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